No. 23-975

In the Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE COALITION, ET AL.,
Petitioners,
v.
EAGLE COUNTY, ET AL.,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the D.C. Circuit

BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether environmental impacts that are beyond the scope of an agency's jurisdiction and expertise can be among the reasonably foreseeable effects of a major federal action that must be studied under the National Environmental Policy Act.

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who specialize in administrative and environmental law, including the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, and who have previously published on, or have interest in, maintaining the legality and effectiveness of administrative agency action as originally envisioned in the U.S. Constitution, the Administrative Procedure Act, and NEPA. Amici have no personal stake in the outcome of this case.

SUMMARY OF THE ARGUMENT

In *Public Citizen*, this Court rightly held that an environmental impact statement (EIS) is not required under NEPA when the agency "has no ability to prevent" those effects "due to its limited statutory authority." *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 770 (2004). The Court likened this limiting principle to the principle of proximate causation in torts. But the question of what constitutes a "reasonably foreseeable" environmental impact under NEPA cannot be considered in legal isolation, for NEPA must be applied consistently with other sources of law that bear on the question. Those include the Administrative Procedure Act's "arbitrary and capricious" standard, 5 U.S.C. § 706, and the Constitution's separation of

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[1] Pursuant to this Court's Rule 37.6, counsel for amici curiae states that no counsel for a 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 person or entity other than amici curiae or its counsel has made a monetary contribution to the preparation or submission of this brief.

powers—all aspects of the case that the D.C. Circuit glossed over.

Both the APA and the Constitution create independent limits of their own on those matters which agencies may delve into as well as those which courts may require them to delve into, and NEPA must be interpreted consistently with those limits. The question of what is a "reasonably foreseeable" effect of an agency's action under NEPA cannot be separated from the question of what deference the agency is due on matters that lie within its *jurisdiction* and *expertise*, nor from the related question of how far beyond its jurisdiction and expertise the agency can stray before its actions and determinations not only deserve no deference but must be set aside as arbitrary and capricious.

Hence what this Court said just a few years ago in *West Virginia v. EPA* should have been enough to close the door on decisions like the one below: "'When the agency has no comparative expertise' in making certain policy judgments, we have said, 'Congress presumably would not' task it with doing so." 597 U.S. 697, 729 (2022) (quoting *Kisor* v. *Wilkie*, 588 U. S. 558, 578 (2019)).

These issues are also inseparable from the Constitution's separation of powers, which require both intelligible principles for agencies exercising delegated rulemaking authority and that the delegations of rulemaking authority be unambiguous. Requiring an agency such as the Surface Transportation Board (STB) to study climate impacts in connection with the authorization of a short railway line violates all these requirements.

This Court has placed clear boundaries on "the scope of the agency's inquiries" under NEPA to ensure that they fall within "manageable" limits to accomplish "NEPA's goal of insuring a fully informed and well-considered decision." *Metropolitan Edison Company* v. *People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (citing *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 435 U.S. 519, 558 (1978) (internal citations and punctuation omitted). Agencies must only consider environmental impacts that bear a "reasonably close causal relationship" to the action that the agency is taking, which the Court, analogizing to the "familiar doctrine of proximate cause," has defined as only those impacts that the agency was legally responsible for. *Metropolitan Edison,* 462 U.S. at 774.

In this case, the D.C. Circuit Court of Appeals vacated a Surface Transportation Board (STB) approval of a short segment of railroad in Utah because the court concluded that the agency should have further analyzed impacts that might occur far downstream and upstream as a result of authorizing the railway segment, including increased oil production in Utah, accidents on distant rail lines, increased oil refining on the Gulf Coast, further oil consumption around the world, and all of the ultimately resulting carbon emissions.

This Court has repeatedly admonished the lower courts to stop reading the NEPA so expansively. *See* James W. Coleman, *Pipelines & Power-lines: Building the Energy Transport Future*, 80 Ohio St. L.J. 263, 299 & n.167 (2019). Had the court below followed this Court's admonition to consider the

"familiar doctrine of proximate cause," 541 U.S. at 767, the case would have been easy: the STB's approval of a rail line entirely within Utah would have been largely confined to impacts within Utah, not hypothetical future impacts due to the independent actions of other actors around the world.

Yet the lower courts continue reading this Court's opinions narrowly and applying their own increasingly baroque standards to require consideration of more and more hypothetical impacts, causing more and more delay to important national infrastructure projects. *See,* e.g., *Sierra Club* v. *FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (distinguishing *Public Citizen*). To ensure lower court compliance with this Court's decisions, the Court should clearly state that agencies need only consider impacts, whether direct or indirect, if the agency is legally responsible for that impact because it lies within the scope of the agency's jurisdiction and expertise.

That the scope of agency authority is the right place for the "manageable line" between effects the agency must study and those it need not study is reinforced by the APA's deferential "arbitrary and capricious" standard, which is similarly predicated on the scope of agency authority—in particular its statutory jurisdiction and expertise. In *State Farm*, this Court confirmed that to survive "arbitrary and capricious review," agencies must take a hard look at all relevant facts. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). But "relevant facts" does not mean *all facts*, otherwise the agency may have "relied on factors

which Congress has not intended the agency to consider." *Id.*

Moreover, while CEQ's Regulations Implementing the Procedural Provisions of NEPA, 40 C.F.R. §§ 1500 *et seq.*, (CEQ Regulations) have long been considered authoritative, NEPA in fact grants CEQ no rulemaking authority. Hence the CEQ Regulations may "regulate" agencies for purposes of presidential administration, but they cannot bind agencies as a matter of law and can have no impact on independent agencies like the Federal Energy Regulatory Commission (FERC). Especially after this Court's decision in *Loper Bright Enterprises.* v. *Raimondo*, 144 S. Ct. 2244 (2024), the CEQ Regulations are at most entitled to deference under *Skidmore* v. *Swift*, 323 U.S. 134 (1944).

By expanding NEPA well beyond its statutory bounds in disregard of *Public Citizen*, the decision below systematically trampled on both the APA's deference scheme and the Constitution's separation of powers, and should be reversed.

ARGUMENT

All agree that under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.,* agencies need study only those downstream and upstream impacts that are reasonably foreseeable. But as interpreted by the D.C. Circuit and courts that follow it, that standard has become largely indeterminate. That has introduced several grave errors into administrative law which this Court now has a chance to correct.

First, requiring agencies to study impacts beyond their jurisdiction and expertise makes it nearly

impossible in routine cases for agencies to predict where courts will draw the line between those impacts that they must study and those they need not, thereby upsetting the division of regulatory labor ordained by Congress. Second, this expansive reading of NEPA contradicts the APA's sensible scheme of deference under "arbitrary and capricious" review, while imposing expansive environmental review requirements with respect to matters entirely outside the agency' jurisdiction and expertise and as to which the agency should expect little deference. Third, the D.C. Circuit approach engenders major separation-of-powers problems, including a lack of intelligible principles to guide agencies in climate-based rulemaking and the fact that CEQ has no rulemaking authority under NEPA, and therefore its Regulations for Implementing the Procedural Provisions of NEPA, 40 C.F.R. §§ 1500 *et seq.*, (the CEQ Regulations), cannot be not judicially enforceable.

I. NEPA Does Not Require Agencies to Study Impacts that Are Beyond the Scope of their Jurisdiction and Expertise.

A. What Impacts Are "Reasonably Foreseeable" Depends on the Scope of Agency Authority.

As originally enacted, NEPA required agencies to include in any proposal for "major Federal actions significantly affecting the quality of the human environment" an environmental impact statement (EIS) on "the environmental impact of the proposed action." It was obvious virtually from the start that there had to be some limiting principle on the downstream and upstream impacts that had to be

studied, otherwise NEPA would become unmanageable for agencies. But in the D.C. Circuit and courts that follow it, "reasonably foreseeable" has been transformed into an almost infinitely elastic standard. As the decision below demonstrates, the only "manageable line" between effects the agency must study under NEPA and those which it need not study is one based upon the scope of the agency's statutory authority.

The original 1978 CEQ Regulations acknowledged that there must be a limiting principle on the impacts that must be studied under NEPA. It defined "Effects" to include both "(a) Direct effects, which are caused by the action and occur at the same time and place," and "(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, *but are still reasonably foreseeable*." 43 Fed. Reg. 55978, 56004 (November 29, 1978) (emphasis added). In 2023, the Fiscal Responsibility Act codified the reasonably foreseeable standard. 42 U.S.C. § 4332(C).

This Court first explored what standard should govern the effects that an agency must study under NEPA in *Metropolitan Edison Company* v. *People Against Nuclear Energy*. 460 U.S. 766 (1983). The Nuclear Regulatory Commission (NRC) had authorized one of the reactors at Three Mile Island to restart operations. Pursuant to its general safety procedures (*see*, *Balt. Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87 (1983)), the NRC determined that the action would have no significant environmental impacts. Challengers argued that the NRC had failed to consider the psychological harm to residents in the vicinity, as well as their relatives elsewhere, that

might be caused by the reactor restart as a cognizable environmental effect within NEPA.

The Court held that the psychological effects of the reactor restart were not within the scope of NEPA analysis and adopted a causation test to determine NEPA's applicability:

> Our understanding of the congressional concerns that led to the enactment of NEPA suggests that the terms "environmental effect" and "environmental impact" in § 102 be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. This requirement is like the familiar doctrine of proximate cause from tort law.

462 U.S. at 774. Thus, to be relevant for NEPA analysis, an impact has to be proximately caused by a change in the physical environment entailed in the proposed agency action. The Court held that the NRC did not have to take into account the psychological impacts of the decision to reopen a reactor. "In the context of both tort law and NEPA, courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Id.* at 774 n.7. The requirement of proximity cannot be satisfied given the vast array of actions that intervene between an agency action and remote psychological or climate impacts. *See* Richard A. Epstein, Torts, §10.9 Directness and Foresight (1999). The range of consequences that the D.C. Circuit wishes to add into the analysis are orders of magnitude greater than those rejected in

Metropolitan Edison, such that any "indirect effects" included in the 1978 CEQ Regulation are subject to the cautionary limitations of *Metropolitan Edison.*

Hence the CEQ Regulation risks drawing agencies onto treacherous waters when it provides that "[i]ndirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.1(i)(2). Such effects are still subject to other limitations, of which the proximate cause of *Metropolitan Edison* is only one. There is also the limitation inherent in APA § 706, which cautions agencies not to stray far beyond the scope of their authority and expertise. There is the fact that beyond the scope of the agency's expertise, Congress has almost certainly supplied no intelligible principle. *See J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928) (holding that precise mechanisms for setting tariff adjustments prescribed in statute constituted intelligible principles to guide the agency in its exercise of delegated rulemaking authority). And there is the question, which courts have too long ignored, of exactly what legal effect should be given to the CEQ Regulation: While a president has inherent executive authority to add to the agency procedures that are required by law, the president has no power to *create* law. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 587 (1952). Any command from the president to federal agencies which claims to have the force of law must therefore rest on a delegation of rulemaking authority from Congress,

In re Surface Mining Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980).

The high deference due to agencies under APA § 706 with respect to issues "which rest[] within the expertise of [the agency], and upon which a reviewing court must be most hesitant to intrude," *See Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 53 (1983), has as its corollary that determinations outside the agency's sphere of competence are due little deference beyond the respect of *Skidmore*. Properly understood, *State Farm* implies that agencies cannot stray too far beyond those issues Congress has entrusted to them before their very lack of expertise renders their actions inherently "arbitrary and capricious" under § 706. And that matters here, because "'[w]hen the agency has no comparative expertise' in making certain policy judgments […] Congress presumably would not task it with doing so." *West Virginia* v. *EPA*, 597 U.S. at 729 (quoting *Kisor* v. *Wilkie*, 588 U. S. 558, 578 (2019) (internal quotations omitted).

The issue of what acts fall within agency authority came to the fore with *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004). In that case, the President had decided to lift a moratorium on Mexican motor carrier certification following the preparation of new motor carrier safety regulations required by law. In crafting the proposed safety regulations, the Federal Motor Carrier Safety Administration (FMCSA) determined that it need not consider the environmental impact of the increased presence of Mexican trucks within the United States. The Court upheld FMCSA's

determination because FMCSA had no discretion to prevent the entry of Mexican trucks, where the legal authority lay with the President, not FMCSA.

The "relevant question," this Court said, was whether the environmental impact of an increased volume of Mexican trucks in the U.S. was an "effect" of FMCSA's issuance of safety regulations for those trucks. 541 U.S. at 764. The Court held that it was not. "[A] 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. . . . NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause." *Id.* This Court again noted a strong analogy to proximate causation in torts law: "[C]ourts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." "Inherent in NEPA . . . is a 'rule of reason' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." 541 U.S. at 767.

Public Citizen was an unusual case in that the statute triggering NEPA was non-discretionary. As a result, some courts have had a difficult time applying it to the more usual case, in which the agency has substantial discretion over the decision. But *Public Citizen* merely added to the foundation established in *Metropolitan Edison*, the linchpin of which was the need for a "manageable line" between the effects an agency is responsible for and those it is not, given its limited statutory authority. For even where the agency has discretion over the

decision, and therefore can theoretically stop the impact from happening, no agency has *unlimited* statutory authority. The question remains whether that impact is a "factor which Congress [] intended [the agency] to consider," 463 U.S. at 43, and whether considering it would advance "NEPA's goal of insuring a fully informed and well-considered decision," *See Metropolitan Edison*, 460 U.S. at 776 (internal citations and punctuation omitted). Hence the crucial first question in all of these cases is: What is the scope of the agency's authority?

Part of what has led to the circuit split observed by the petitioners and others is a difference of opinion over whether NEPA requires agencies to study impacts beyond their narrow jurisdiction and expertise and therefore requires agencies to consider those remote impacts in their decision making. Answering that question emphatically in the affirmative, the D.C. Circuit approach ignores multiple important guardrails inherent in NEPA, the APA, and the Constitution's separation of powers.

Emblematic of this unsound approach is the D.C. Circuit's decision in *Sierra Club* v. *FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (Sabal Trail), where the court vacated FERC's Certificate of Public Convenience and Necessity for the Sabal Trail pipeline project under the Natural Gas Act, 15 U.S.C.S. § 717f(e) (NGA). The court concluded that the agency had authority under the NGA to consider climate change, which it failed to do, in the court's view, by not estimating carbon emissions from power plants.

Sabal Trail wrongly reads Public Citizen as turning "not on the question 'What activities does

[the agency] regulate,'" but on the agency's unchecked power to block a project that "would be too harmful to the environment." 867 F.3d at 1373. On this view, agencies must consider even those distant environmental effects that are another agency's responsibility: "[T]he existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis." *Id.* at 1375.

Center for Biological Diversity, Manasota-88, Inc. v. *United States Army Corps of Engineers*, 941 F.3d 1288 (11th Cir. 2019) stands for the opposite position. When the Corps of Engineers was permitting wetland discharges required for the expansion of a phosphate mine in Florida, the Corps' NEPA review addressed the direct and indirect effects of those discharges. But the Corps did not study the effects of downstream activities, such as refining the phosphate ore into fertilizer or storing phosphogypsum. Relying on *Public Citizen*, the Eleventh Circuit upheld the Corps' decision not to delve into such downstream issues, noting that "[t]he Corps has no jurisdiction to regulate or authorize any of that." 941 F.3d at 1294. It went on to note that "EPA and the [Florida Department of Environmental Protection]—not the Corps—directly regulate fertilizer plants and phosphogypsum." *Id.* at 1295. "[I]t was sensible," the court explained, "for the Corps to draw the line at the reaches of its own jurisdiction, leaving the effects of phosphogypsum to phosphogypsum's regulators" and "respecting the jurisdictional boundaries set by Congress and inherent in state-federal cooperation." *Id.* at 1295–96. Any other reading of *Public Citizen* would turn the Corps into a "de facto environmental-policy czar"

that could deny a permit based on "its dislike of the applicant's business or downstream effects not sufficiently caused by" the activity the Corps was permitting. *Id.* at 1296, 1299. The Eleventh Circuit's holding was a sharp rebuke of the D.C. Circuit's decision in *Sabal Trail* on a remarkably analogous set of facts, also involving the jurisdictional boundary between a federal agency and Florida regulators.

The Eleventh Circuit is not alone in disagreeing with the D.C. Circuit. *See Kentuckians for the Commonwealth* v. *United States Army Corps of Eng'rs*, 746 F.3d 698 (6th Cir. 2014); Ohio Valley Coalition v. Aracoma Coal Co., 556 F.3d 177 (4th Cir. 2009); and *N.J. Dep't of Envtl. Prot.* v. *United States NRC*, 561 F.3d 132 (3rd Cir. 2009).

Simply put, the D.C. Circuit approach makes *Metropolitan Edison*'s "manageable line" unmanageable. As interpreted by the D.C. Circuit and kindred courts, NEPA's requirements have mushroomed into a fuzzy and indeterminate mass, violating the basic principles of any legal system, such as publicity, clarity, and constancy. *See* Lon L. Fuller, Morality of Law (New Haven: Yale University Press, rev. ed. 1969). Accordingly, the case-by-case approach does not work. *See* Richard A. Epstein, Simple Rules for a Complex World (1995). By severely restricting the availability of private financing for infrastructure, and necessitating massive public subsidies, that uncertainty also violates NEPA's explicit policy of encouraging man's productive harmony with his environment. 42 U.S.C. § 4331(a).

B. Climate Impacts Are Beyond the Limited Scope of STB's Authority.

The STB has broad discretion to consider the public interest in granting the authorization at issue here, but that discretion is not unlimited, and it does not include the consideration of climate impacts or climate policy.

The Interstate Commerce Commission Termination Act of 1995 (the Interstate Commerce Act), 49 U.S.C. 10101 *et seq.*, provides the STB with authority to license the construction and operation of new railroad lines in the interstate rail system. *See Alaska Survival* v. *Surface Transp. Bd.*, 705 F.3d 1073, 1078 (9th Cir. 2013). The STB's authorization of a new line takes one of two forms. First, if an applicant submits a full application to build a new railroad line, the STB must grant the authorization "unless the STB finds that such activities are inconsistent with the public convenience and necessity." 49 U.S.C. § 10901I. Second, as in this case, an applicant may request STB authorization through an "exemption" process under 49 U.S.C. § 10502.

The STB may grant that exemption when it finds that (1) a full proceeding under § 10901 "is not necessary to carry out" the rail transportation policy in § 10101 of the Interstate Commerce Act, and (2) either that (a) the transaction is limited in scope, or (b) the application of § 10901 "is not needed to protect shippers from the abuse of market power." 49 U.S.C. § 10502. Market power was no issue here. In an exemption proceeding, the STB considers the transportation merits of a project by looking to the exemption criteria in § 10502, which in turn

requires the STB to analyze the rail transportation policy factors identified in Section 10101. and of the exemption criterion in Section 10502, only one of a long list of 15 factors was materially implicated: "(8) to operate transportation facilities and equipment without detriment to the public health and safety." 49 U.S.C. § 10101 (8).

The ICC's authorizing statute, like the STB's, enabled it to approve a rail-line merger if the project "will be in the public interest." *New York Cent. Sec. Corp.* v. *United States*, 287 U.S. 12, 20 n.1 (1932) (quoting Interstate Commerce Act, § 5(2)). This Court held that the "public interest" did not include every conceivable public benefit, but was limited by context to require a "direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred." *Id.* at 25. The STB appropriately concerns itself with the adequacy of freight rail service, and, consistent with NEPA, the incidental environmental effects of that service. Congress determines whether and how environmental effects are regulated, and it has not tasked STB with weighing the merits and demerits of the oil and gas industry.

The authority to grant a certificate of public convenience and necessity carries broad discretion, but that discretion is not unlimited. In the analogous context of the Natural Gas Act (NGA), the Supreme Court has held that the NGA's nearly identical language on public convenience and

necessity requires FERC to evaluate "all factors bearing on the public interest." *Atl. Ref. Co.* v. *Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959). The Court has cautioned, however, that this requirement is not unlimited in scope and cannot be read in a vacuum. The term "public interest" in the NGA is not "a broad license to promote the general public welfare"—instead, it "take[s] meaning from the purposes of the regulatory legislation." *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976) (NAACP), which in the case of the NGA is "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *Id.* at 669-70; accord *Myersville Citizens for a Rural Cmty.* v. *FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (quoting *NAACP*, 425 U.S. at 669-70).

The Supreme Court has also recognized that the Commission has authority to consider "other subsidiary purposes," such as "conservation, environmental, and antitrust questions." *NAACP*, 425 U.S. at 670 & n.6 (citations omitted). But all subsidiary purposes are, necessarily, subordinate to the statute's primary purpose, and the inquiry must respect the guardrails provided by other sources of law.

If the term "public convenience" were as "vague and indefinite" as the D.C. Circuit suggests, it may even violate the nondelegation doctrine. *Nat'l Broad. Co.* v. *United States*, 319 U.S. 190, 226 (1943). Under the D.C. Circuit's reading, STB can address any foreseeable harm that it chooses. If that is true, then Congress has failed to give an "intelligible principle" to guide the STB in its determination under the statute. *Whitman* v. *Am.*

Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)).

To avoid any nondelegation problem, "public convenience" must be read through the lens of the statutory scheme Congress entrusted the STB with implementing. Cf. *New York Cent. Sec. Corp.*, 287 U.S. at 25 (interpreting the statute while ruling on a nondelegation challenge). Viewed contextually, it becomes clear that the environmental effects of oil production or oil refining do not bear a "direct relation to the adequacy of transportation service" that the STB is tasked with promoting.

Finally, both NEPA and the statutory scheme that Congress entrusted the STB with implementing must be read consistently with other applicable law, including the APA and the Constitution's separation of powers, all of which constrain the agency's authorization process in ways that the D.C. Circuit failed to take into account.

II. The D.C. Circuit Gave STB Little Deference within the Scope of Its Authority, While Imposing Vast New Procedural Requirements On It Outside the Scope of Its Authority

The D.C. Circuit focus on remote environmental impacts totally outside STB's jurisdiction and expertise led it to lose sight of the deference analysis required by § 706 of the APA. Both *State Farm* and *Baltimore Gas* tolerate agency discretion only on matters within the scope of an agency's jurisdiction and expertise, but demand deference to agencies within that scope. The D.C. Circuit trampled on

both sides of this sensible scheme, finding fault with the agency's entirely appropriate refusal to study impacts well beyond the scope of its jurisdiction and expertise, while giving no deference to STB determinations within that scope. It thereby lost sight of this Court's observation in *West Virginia* v. *EPA*: "'When the agency has no comparative expertise' in making certain policy judgments, we have said, 'Congress presumably would not' task it with doing so." West Virginia v. EPA, 597 U.S. 697, 729 (2022) (quoting *Kisor* v. *Wilkie*, 588 U. S. 558, 578 (2019). *See* also Gonzales v. Oregon, 546 U.S. 243, 266-67 (2006).

A. The D.C. Circuit Failed to Defer to STB Where Deference Was Due.

The D.C. Circuit agreed with petitioners that STB had failed to take a "hard look" at the increased risk of rail accidents downline given the increased rail traffic resulting from the proposed railway. The STB used national data to assess the risk of derailment for the proposed railway, explaining that "insufficient data" existed to assess whether the specific commodity to be transported (waxy crude oil) entailed any particular risks. 82 F.4th at 1182. The D.C. Circuit pointed to the CEQ Regulation's requirement that agencies explain why needed information is unavailable and what actions the agency took to address that unavailability. *See* 40 C.F.R. § 1502.22 (2019). (As explained in Part III of this brief, this is another "requirement" of the CEQ Regulation that is not judicially enforceable). The court concluded that the agency had not taken these steps, and that in view of "significant opposing viewpoints" concerning its analysis of rail accidents,

it had failed to comply with NEPA, and therefore also with the APA. The court found the STB's derailment-risk assessment arbitrary and capricious without even suggesting that the STB had erred in its assessment! Though assessing the risk of derailment is at the very core of the agency's authority and technical expertise, the court gave no hint of deference.

The court also found arbitrary and capricious the STB's assessment of low wildfire risk. The court explained, "A significant increase in the frequency of [sic] which existing ignition sources travel this route equally poses an increased risk of fire." 82 F.4th at 1184. But the court provides no authority to support this assertion, and common sense suggests that the agency was correct to assess a marginal increase in a "very low risk" as still amounting to a very low risk. The D.C. Circuit provided no reason why the STB might be wrong in that assessment, other than its own disagreement with the assessment. And to paraphrase *Loper Bright*, courts have no special competence in risk assessment. Agencies do. *See* 144 S. Ct. at 2251.

The court then held that the STB's analysis of impacts on downline water resources was faulty because it did not specifically mention the Colorado River adjacent to the downline Union Pacific line that would be carrying increased rail traffic. In its EIS, STB included a detailed section on potential impacts to water resources, which the STB said applied equally well to water resources elsewhere. The D.C. Circuit found that expert assessment wanting, too.

The D.C. Circuit even vacated the STB's decision to grant an exemption for the railway application under 49 U.S.C. § 10502, even though it could point to no way in which the exemption failed to comply with statutory requirements, other than tagging along with the STB's other supposed deficiencies.

The D.C. Circuit's opinion is characterized from start to finish by an almost astonishing lack of respect or deference for STB with respect to those matters that fall within the agency's jurisdiction and expertise. What makes the court's lack of deference particularly remarkable is its expansive view of the things STB should have given a "hard look" to entirely outside its jurisdiction and expertise. One is left to wonder: If the court gives virtually no deference to the agency with respect to the agency's core competencies, what deference could the agency expect from the same court with respect to pure speculation about upstream oil development or downstream greenhouse gas emissions, both of which lie outside the agency's jurisdiction and expertise, and with respect to which the agency did not have access to meaningful information and no means of developing meaningful information itself?

The question is no mere curiosity. Suppose STB had spent dozens of pages ruminating on the problems of global climate change, and on that basis had denied the authorization for the railway. Would it not then have been guilty of "rely[ing] on factors which Congress ha[d] not intended it to consider" and thereby fail the first test of "hard look" review? *See State Farm*, 463 U.S. at 43. It is when agencies

are outside their jurisdiction and expertise that "hard look" review must be the most exacting.

Given the D.C. Circuit's casual disregard for STB's authority and expertise on matters as to which the APA demands deference, this case may be an opportune time for this Court to ask whether its embrace of "hard look" review in *State Farm* did not unintentionally open the door to courts' systematically ignoring the deference that is clearly implied in the APA's "arbitrary and capricious" standard. In *Loper Bright*, this Court finally signaled a return to the simple and sensible scheme of the APA, but deference on pure questions of law was not the only part of that tapestry that has frayed.

This Court's concerns about judicial usurpation of agency expertise, which were so misplaced in *Chevron*, would have been fully justified in *State Farm*. Ministerial fact-finding in the implementation of a statutory scheme is a core executive function. The court's inquiry should be chiefly directed to whether the agency has properly exercised that function, either as part of delegation of rulemaking authority, or as an exercise of inherent executive authority. On these mixed questions of law and fact, the agency should ordinarily receive ample running room as Justice William Rehnquist pointed out in his short *State Farm* dissent. 463 U.S. 57-59.

Alas, in practice, *State Farm*'s "hard look" review has created a fog of litigation risk around every agency action that no amount of diligence can reliably cut through it. Any court can think of some point that even the most diligent agency neglected

to mention in a rulemaking or EIS hundreds of pages long. The courts can then quite arbitrarily and capriciously vacate a vitally necessary agency action, without any regard to the public interest, because the agency arguably failed to fulfill some requirement that it had no way of knowing about before it got to court. This is the reality facing agencies engaged in NEPA compliance today. They often have no idea what the law requires, spend exorbitant amounts of taxpayer resources trying to anticipate every possible angle of attack without a thought to NEPA's purpose of informed decisionmaking, and then publish their EISs with as much confidence as the man betting on red at the roulette table, and with only slightly more success. When the law becomes so indeterminate that compliance is almost impossible, there is a problem. This problem was not created by NEPA, a simple and modest good-governance statute, but by the fearsome procedural nettle that activist courts have turned it into over the years.

State Farm has been cited countless times since 1983, usually by federal courts second-guessing agency actions they don't like. However, the earlier 1983 case of *Baltimore Gas*, 462 U.S. 87 (1983), took a far better approach to the "arbitrary and capricious" standard by upholding the Nuclear Regulatory Commission's (NRC) "generic" procedure for nuclear plant approval, emphasizing Congress's and agencies' respective roles in resolving fundamental policy questions. The alternative is to insist on hundreds of ad hoc decisions that follow no rhyme or reason, which slows down these reviews while leading to indeterminate results that pointlessly prolong empirical reviews. No business

takes such a mindless and wasteful approach. Government agencies should not either.

Courts have lost sight of the deeper logic of *Vermont Yankee*—that courts should not micro-manage executive administration. To paraphrase *Loper Bright*, courts have no comparative advantage when it comes to the management of administrative processes. Agencies do. 144 S. Ct. at 2251. The D.C. Circuit violated that admonition when it substituted its preferences on things within STB's prerogative for those of the agency.

Applied without rigorous consistency, *State Farm's* "hard look" doctrine often amounts to a double standard. The *grant* of any infrastructure permit can be vacated under "hard look" review, to great acclaim from environmentalists. But an agency's *refusal* to grant a permit, or its imposition of vast paperwork burdens, is routinely accorded sweeping deference that often strikes down the sensible agency-wide procedures upheld in *Baltimore Gas*, helping to make American infrastructure the costliest, most time-consuming and riskiest to build in the industrial world.

B. Impacts Outside the Agency's Authority May be Noted in an EIS but Studying Them in Detail Cannot Be Required.

Federal courts generally pay lip service to the idea that agencies need only study impacts that are "reasonably foreseeable." But without guardrails, that standard is still too malleable, as shown by the decision below. The concrete limiting principle that should guide reasonable foreseeability is right there

in the APA: The admonition against agency actions that are "arbitrary, capricious, or abuse of discretion" counsels for agencies to stick to their jurisdiction and expertise. Environmental impacts that occur outside the agency's jurisdiction and expertise of NEPA may be noted in a variety of ways, such as general statements. But they are not within the reasonably foreseeable impacts that NEPA requires careful study of, because NEPA must be implemented consisted with the APA, and under the APA agency action that stray too far from the scope of agency authority risks being set aside as arbitrary and capricious.

That any given environmental impact is not a particular agency's problem does not mean that it is not the federal government's problem. The purpose of NEPA is still served when environmental impacts within the jurisdiction of other agencies, or of Congress, are noted for their attention. But there is no point in an agency such as STB spending time on climate policy; climate policy is no part of its statutory mandate or expertise, and nothing that it says on the subject should be due any deference under the APA—on the contrary, anything it says on the subject should be viewed with great skepticism. The president surely has authority to make STB part of a national policy effort on climate, but such a national effort would not be judicially enforceable against agencies without congressional action, and there was none here.

III. CEQ Has No Rulemaking Authority under NEPA and Cannot Create Judicially Enforceable Obligations.

The inclusion of "cumulative impacts" in the definition of "effects", 40 C.F.R. § 1508, and the directive to examine "reasonable alternatives not within the jurisdiction of the lead agency", 40 C.F.R. §1502.14, are just two familiar examples among many of the requirements that CEQ invented out of thin air. As a component of the White House, there is no doubt that CEQ has authority to promulgate rules of administration to guide agencies in their implementation of NEPA's procedural requirements. But there is no basis for those rules' being judicially enforceable, and the D.C. Circuit's enforcement of them was another source of reversible error.

Federal courts' enforcement of NEPA since publication of the 1978 CEQ Regulation has lost sight of the fact that NEPA grants CEQ no legislative rulemaking authority. The procedural requirements that the CEQ Regulation adds to NEPA are binding upon executive agencies in the same manner as any other presidential directive. But judicial enforcement of those requirements has no basis in law, and violates both the basic principle of *Youngstown Steel*, that presidents cannot make law, and that of *Vermont Yankee*, that courts cannot add procedural requirements to those provided in a procedural statute.

In *Public Citizen*, this Court said, that CEQ was "established by NEPA with authority to issue regulations interpreting it." 541 U.S. at 757. This is certainly true in the sense that CEQ's interpretations of NEPA deserve *Skidmore* respect,

a conviction reinforced by this Court's recent decision in *Loper Bright*. But the inclusion of things like "cumulative impacts" of other agency actions and socioeconomic effects of the agency action within the definition of "environmental impact" could not follow from any reasonable interpretation of that statutory term; they are surplusage, which could only be judicially enforceable if promulgated pursuant to delegated rulemaking authority. And neither NEPA nor any other statute grants CEQ rulemaking authority in the traditional sense.

Federal courts may be forgiven for assuming that CEQ does have such authority, however, given the wording of the 1978 CEQ Regulation, which through a clever sleight-of-hand glossed over the lack of statutory basis. Section 1500.3 of the 1978 CEQ Regulation contains the following recitation of authorities:

> These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). […] It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement. . . .

The reference to E.O. 11991 is on firm ground; the rest of the quoted passage statement is nothing but smoke and mirrors. There is not a word about CEQ's having authority to issue regulations, nor

even an intimation to that effect, in any of the statutes mentioned in § 1500.3. The (Carter-era) E.O. 11991 is in fact the *sole* authority for the (Carter-era) CEQ Regulation, which in fact was promulgated wholly pursuant to the President's vested authority under Article II of the U.S. Constitution.

It may have been dressed up as a regulation and adopted through notice-and-comment rulemaking; it may walk and talk like a regulation; and it may have fooled lots of people into thinking that it is a regulation in the legislative sense. But in truth, the CEQ Regulation of NEPA is nothing more than an executive order. When the Eighth Circuit refused to enforce a similar presidential directive, it said, "*Youngstown Sheet & Tube Co.* v. *Sawyer* completely refutes the claim that the President may act as a lawmaker in the absence of a delegation of authority or mandate from Congress." *Indep. Meat Packers Asso.* v. *Butz*, 526 F.2d 228, 236 (8th Cir. 1975) (citations omitted).

"Generally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders." *Facchiano Const. Co.,* v. *United States Dept. of Labor*, 987 F.2d 206, 210 (3d Cir. 1993), cert. denied, 510 U.S. 822 (1993); *See* also *Haitian Refugee Ctr., Inc.* v. *Baker*, 953 F.2d 1498, 1510-11 (11th Cir.), cert. denied, 502 U.S. 1122 (1992); *Michigan* v. *Thomas*, 805 F.2d 176, 187 (6th Cir. 1986). Only when executive orders have "specific foundation in Congressional action" are they "judicially enforceable in private civil suits." *See In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980).

Unless based in delegated rulemaking authority, presidential directives such as executive orders have never been considered enforceable de jure and draw the entirety of their compelling force from the President's power to remove agency heads, which does not extend to independent agencies like FERC. Section of Administrative Law and Regulatory Practice, American Bar Association, *A Guide to Judicial and Political Review of Federal Agencies* § 6.024 (John F. Duffy & Michael Herz eds., 2005).

Multiple courts of appeals have held that executive orders without specific foundation in congressional action are not judicially enforceable in private civil suits. *See Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451, 456-57 (1965), cert. denied, 382 U.S. 978, (1966) (holding E.O. 10988 not judicially enforceable); *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (holding E.O. 11821 and OMB Circular No. A-107 not judicially enforceable).

Congress knows how to delegate rulemaking authority. For example, Section 111 of the Clean Air Act specifically delegates to EPA the authority to promulgate New Source Performance Standards with the force of law: ". . . the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category." 42 U.S.C. § 7411(b)(1)(A). *See* Note, Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act, 55 Geo. Wash. L. Rev. 659, 661-62 (1987). There is no similar language in NEPA.

Judicial enforcement of the CEQ Regulation is a glaring exception to the general practice of federal

courts, which only enforce executive orders that are authorized by a statute. *See, e.g., City of Albuquerque* v. *U.S. Dep't of the Interior*, 379 F.3d 901, 905-06, 913-14 (10th Cir. 2004) (considering a claim that agency violated executive order in choosing office space); *City of Carmel-By-The-Sea* v. *U.S. Dep't of Transportation*, 123 F.3d 1142 (9th Cir. 1997); *Sierra Club* v. *Peterson*, 705 F.2d 1475 (9th Cir. 1983); *Legal Aid Soc'y of Alameda County* v. *Brennan*, 608 F.2d 1319 (9th Cir. 1979); *Chambers* v. *United States*, 451 F.2d 1045, 1050 (Ct. Cl. 1971) (awarding backpay for the government's violation of an executive order regarding nondiscriminatory employment practices); *Wildlands CPR, Inc.* v. *U.S. Forest Service,* 872 F. Supp. 2d 1064 (D. Mont. 2012) (finding that EOs governing use of off-road vehicles on public lands had force and effect of law and were intended to create a private right of action).

In *Independent Meat Packers Association* v. *Butz*, 526 F.2d 228 (8th Cir. 1975), meatpackers challenged an agency action partly on the basis that its inflation impact statement was deficient and failed to comply with the requirements of Executive Order No. 11821, "Inflation Impact Statements," 39 Fed. Reg. 41501 (November 29, 1974). The 8th Circuit Court of Appeals disagreed:

> [I]n our view, Executive Order No. 11821 was intended primarily as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action. Even if appellees could show that the Order has the force and effect of law, they would still have to demonstrate that it was intended to create a private right of action.

> To infer a private right of action here creates a serious risk that a series of protracted lawsuits brought by persons with little at stake would paralyze the rulemaking functions of federal administrative agencies.

526 F.2d at 234-236. Unfortunately, that describes eminently well the modern state of NEPA.

Hundreds of federal permits have been vacated by courts because of agencies' failure to comply with supposed NEPA requirements that are not in the statute and that were invented by CEQ out of thin air. And not only does NEPA contain no hint of delegated rulemaking authority for CEQ, it doesn't even hint at a private right of action for enforcing the statute! The D.C. Circuit's decision in *Calvert Cliff's Coordinating Committee* v. *Atomic Energy Commission*, 449 F.2d 1190 (D.C. Cir. 1971), has stood the test of time, but was arguably contradicted by this Court's holding in *Cort* v. *Ash*, which held that these actions should be inferred only when the plaintiff is "one of a class for whose *especial* benefit the statute was enacted." 422 U.S. 66, 78 (1975) (emphasis in the original). That test cannot be met when thousands of individuals and organizations have standing. *Calvert Cliffs*, much like the decision below, wholly distorts the statute, whose procedures were intended to find middle positions on hard questions. Allowing a private right action to enforce NEPA lets extreme opponents prolong litigation and undermine cooperative solutions. Such rulings have helped transform the CEQ regulation into fertile ground for endless litigation where there was arguably no right of action at all.

CONCLUSION

We urge this Court to reverse the decision below.

Respectfully submitted,

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