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 THE CENTER FOR ENVIRONMENTAL ACCOUNTABILITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

PAUL E. SALAMANCA
Counsel of Record
279 Cassidy Avenue
Lexington, KY 40502
(859) 338-7287
psalaman20@gmail.com

Counsel for Amicus Curiae

116984

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE*

The Center for Environmental Accountability (CEA) is a non-profit organization whose mission is to promote transparency, excellence, and accountability in environmental policy and fidelity to the rule of law.[1] Its commitment to a clean environment includes commitment to a healthy *human* environment, such that people from all walks of life can thrive. To date, it has submitted sixteen distinct sets of comments to agencies at the federal and state level in ten different areas of environmental law and policy.[2] With particular reference to this case, it submitted comments on the Council on Environmental Quality's most recent proposed rules in respect of the National Environmental Policy Act of 1969 (NEPA).[3] CEA respectfully submits that its broad familiarity with environmental law and policy, together with its specific insights on NEPA, enable it to be of considerable help to the Court.

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1. In accordance with this Court's Rule 37.6, counsel for *amicus curiae* states that no counsel for a party wrote this brief in whole or in part, and that no party or counsel for a party made a monetary contribution intended to pay for the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for *amicus curiae* provided timely notice of intent to file this brief.

2. *See* https://environmentalaccountability.org/publications/ (last visited Aug. 29, 2024).

3. *See* 88 Fed. Reg. 49,924 (July 31, 2023), Docket No. CEQ-2023-0003 (Sept. 29, 2023), https://environmentalaccountability.org/wp-content/uploads/2024/05/CEA-NEPA-PHASE-2-COMMENTS-FINAL.pdf (last visited Aug. 29, 2024).

SUMMARY OF THE ARGUMENT

Under the D.C. Circuit's test for NEPA, a federal agency is obliged to assess effects completely outside its organic jurisdiction, and often completely *inside* the organic jurisdiction of another federal agency, or perhaps even an agency of another sovereign, provided only that the effect is "reasonably foreseeable." *See* Pet. App.37a. This approach is irreconcilable with Congress' goal in enacting the statute, which was simply to enable agencies to take environmental concerns into account when making particularized decisions within their area of jurisdiction. This approach is also irreconcilable with this Court's decision in *Department of Transportation v. Public Citizen*, where it held that, "where 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." 541 U.S. 752, 770 (2004) (emphasis added). Finally, this approach is irreconcilable with NEPA as recently amended by Congress in the Fiscal Responsibility Act of 2023 (FRA). In the FRA, Congress took important steps to reiterate that an agency's duties under NEPA are limited, and, more precisely, limited to the "reasonably foreseeable environmental effects of the proposed *agency* action." Pub. L. No. 118-5, 137 Stat. 10, 38 (codified at 42 U.S.C. § 4332(2)(C)(i)) (emphasis added). This confirms the correctness of *Public Citizen*. Consistent with its mission to promote accountability in environmental law, CEA respectfully asks this Court to reiterate the correct doctrinal position that it took in *Public Citizen*, in the hope that further reiteration will not be necessary.

ARGUMENT

I. An agency's duties under NEPA are limited to matters within its organic jurisdiction.

This Court's decision in *Department of Transportation v. Public Citizen* took a long step toward restoring manageability to NEPA. 541 U.S. 752 (2004). It did so by recognizing that agencies have distinct jurisdictions, and that NEPA does not require them to assess effects arising from activities outside those jurisdictions. In a manner of speaking, the Court validated the elemental principle that good fences make good neighbors. "[W]here an agency has no ability to prevent a certain effect due to its *limited statutory authority over the relevant actions*," it held, "the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770 (emphasis added). In other words, if an agency lacks power under its organic statute to actually *regulate* an effect, "that is, to prescribe the rule by which [that effect] is to be governed," it also lacks a duty under NEPA to *evaluate* that effect. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824). A right-sized NEPA, as delineated in *Public Citizen*, takes heed of how Congress has allocated responsibility among different sovereigns and agencies, and allows each to deploy its expertise efficiently, thus promoting the best principles of sound government.

Given the spareness of its text, consideration of NEPA's underlying purposes is in order. From its inception, NEPA has displayed an unusual mix of grandeur and modesty. Its rhetoric is soaring, as befits legislation from the dawn of the environmental era. It spoke then, and continues to speak, of "achiev[ing] a balance between population and

resource use which will permit high standards of living and a wide sharing of life's amenities." 42 U.S.C. § 4331(b)(5). As an operational matter, however, it is quite modest, even minimalist. Its only directive, as of 1970, was that federal agencies "include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment . . . a detailed statement" as to "the environmental impact of the proposed action." Pub. L. No. 91-190, §102(2)(C)(i), 83 Stat. 852, 853 (Jan. 1, 1970). Today, even more modestly, its only directive is that federal agencies include "a detailed statement" as to "reasonably foreseeable environmental effects of the proposed *agency* action." 42 U.S.C. § 4332(2)(C)(i) (emphasis added).

This operational modesty is easy to explain. As the Senate Report that preceded NEPA noted, many agencies in the late 1960s thought that their organic statutes forbade consideration of environmental issues. *See* Sen. Rep. No. 91-296 at 9 (Jul. 9, 1969). In other words, they believed in good faith that they had to ignore environmental concerns. As an early sponsor of NEPA noted, "[i]n some areas of Federal activity, existing legislation does not provide clear authority to assure consideration of environmental factors which conflict with other Federal objectives." 115 Cong. Rec. 40419 (Dec. 20, 1969) (statement of Senator Henry M. "Scoop" Jackson). Daniel A. Dreyfus, one of Senator Jackson's staffers at the time, later wrote that, before NEPA, "[f]ederal officials had no authority or responsibility to incur additional costs in their activities to prevent even the most blatant environmental insult." NEPA: The Original Intent of the Law, 109 J. Prof. Issues in Eng'g Educ. & Prac. 249, 251 (1983).

NEPA addressed this concern by inserting a procedural "beat" into the process, during which agencies were able, but not compelled, to alter their decisions after taking environmental concerns into account. However, it does not purport to create a substantive test for agency decision making. After Congress enacted NEPA, an agency could, if it wanted to, reject, modify, or approve a project that caused more environmental harm than it achieved economic good. Likewise, it could, if it wanted to, adopt the more environmentally friendly of two alternatives, even if that alternative was the less attractive of the two as a matter of economics.

As this Court knows, from having decided not only *Public Citizen* but also a litany of cases in which the lower courts have engaged in overreach, this is all NEPA does. By providing a beat for environmental assessment, NEPA "ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). As this Court noted in *Robertson v. Methow Valley Citizens Council*, "NEPA itself does not mandate particular results, but simply prescribes the necessary process." 490 U.S. 332, 350 (1989). In other words, it is solely about *the acting agency* and how it exercises *its jurisdiction* under *its organic statute*. It is nothing more. Least of all is it a mandate for federal agencies to look over the shoulder of other federal agencies, as well as state agencies, simply because an effect in those other agencies' jurisdictions can be framed as a "reasonably foreseeable" consequence of an activity in its own jurisdiction. As the Eleventh Circuit properly recognized, that "unbounded view" would reconstitute many agencies as "de facto environmental-policy czar[s]."

Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs, 941 F.3d 1288, 1299 (2019). Congress could never have intended such a thing.

This Court underscored the relationship between an agency's jurisdiction and its duties under NEPA in *Public Citizen*. That case involved the President's decision to lift a ban on the operation of Mexican trucks in the United States. *See* 541 U.S. 752, 759-60 (2004). Before these trucks could enter the country, the Federal Motor Carrier Safety Administration (FMCSA) had to issue new rules to govern their safe operation. *See id.* at 760. Importantly, however, that was the extent of FMCSA's authority. As this Court observed, FMCSA had "no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety." *Id.* at 759.

Consistent with its narrow jurisdiction, FMCSA limited its NEPA analysis to probable effects from the enforcement of the rules themselves, that is, effects "likely to arise from the increase in the number of roadside inspections of Mexican trucks and buses due to the proposed regulations." *Id.* at 761. These included "a slight increase in emissions," presumably because of vehicles idling during inspection, "noise from the trucks," presumably for the same reason, and "possible danger to passing motorists," presumably from the risk that inspections would take place in breakdown lanes adjacent to moving traffic. *Id.* at 761-62. Mindful of the fence that Congress placed around its jurisdiction, FMCSA did not assess "any environmental impact that might be caused by the increased presence of Mexican trucks within the United States." *Id.* at 761. This was the President's lookout, not FMCSA's.

The line FMCSA drew was subsequently attacked on the ground that, if the agency issued no regulations at all, no trucks could enter the United States. Therefore, the environmental groups that brought the case argued, FMCSA's decision to issue rules would "cause" the trucks to enter the country. This Court flatly rejected this argument, embracing the idea that an agency need not study matters outside its jurisdiction to satisfy NEPA. The attack on FMCSA's determination, the Court wrote, reflected "a particularly unyielding variation of 'but for' causation, where an agency's action is considered a cause of an environmental effect *even when the agency has no authority to prevent the effect*." *Id.* at 767 (emphasis added). In reiterating the principle that good fences make good neighbors, this Court took a large step toward restoring a sense of proportion to NEPA.

When called upon to do so, most of the courts of appeals have followed *Public Citizen*. According to the Third Circuit, for example, the "line between those causal changes that may make an actor responsible for an effect and those that do not. . . . appears to approximate the limits of an agency's *area of control*." *N.J. Dep't of Envtl. Prot. v. U.S. Nuclear Regulatory Comm'n*, 561 F.3d 132, 139 (3d Cir. 2009) (internal citation and quotation marks omitted) (emphasis added). With this in mind, that court correctly held that the Nuclear Regulatory Commission (NRC), when asked to relicense a nuclear power plant, had no duty under NEPA to evaluate the environmental impact of a hypothetical terrorist attack on that plant. *See id.* at 144. In reaching this conclusion, the court emphasized the limits of the NRC's authority. "In the instant case," it wrote, "the NRC controls whether equipment within a facility is suitable for continued operation or could

withstand an accident, but it has no authority over the airspace above its facilities, which is largely controlled by Congress and the Federal Aviation Administration. . . . " *Id.* at 139.

The Sixth Circuit has similarly recognized that "agencies may reasonably limit their NEPA review to only those effects proximately caused by the actions over which they have *regulatory responsibility*." *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 710 (6th Cir. 2014) (emphasis added). In that case, the Corps had been asked to permit the discharge of dredged or fill material into the jurisdictional waters of the United States in connection with certain surface mining operations. The issue in the case was whether the Corps could limit its review under NEPA to the effects of that discharge, leaving the effects of "surface mining in general" to the political and administrative actors under whose jurisdiction that issue falls. In keeping with *Public Citizen*, the court said yes, emphasizing that "[t]he Corps reasonably limited its scope of review to the effects proximately caused by the specific activities that were authorized by the permit." *Id.* at 706. The Seventh Circuit reached a similar conclusion in *Protect Our Parks, Inc. v. Buttigieg*, where it concluded an agency subject to NEPA is "on the hook only for the decisions that it has the authority to make." 39 F.4th 389, 400 (7th Cir. 2022).

The Eleventh Circuit as well has taken *Public Citizen* seriously. Obliquely at issue in *Center for Biological Diversity v. U.S. Army Corps of Engineers* was a series of steps in the making of fertilizer. *See* 941 F.3d 1288, 1293-94 (2019). The first was the mining of phosphate ore, which yielded dredged and fill material as a byproduct. The second was benefication of the ore to remove sand and clay.

The third was the making of phosphoric acid from the ore, which yielded phosphogypsum as a byproduct. Notably, the phosphogypsum had to be "left to 'weather'" in enormous "open-air 'stacks'" because it contains uranium and other materials seen as hazardous. *Id.* at 1294.

The facts leading up to the case began when a private entity, Mosaic, sought to expand its mining operations for phosphate ore in Florida. To do so, it needed a permit from the Corps to discharge additional dredged and fill material into the jurisdictional waters of the United States. In deciding to grant the permit, the Corps confined its NEPA review to the effects of the discharges themselves. Thus, it assessed how the discharges "might affect the water quality of [surrounding] wetlands." *Id.* at 1293. It also considered "how that discharge might through stormwater runoff be carried to and affect the quality of distant waters." *Id.* It declined, however, to assess the environmental effects of storing phosphogypsum or allowing it to "weather," on the ground that the storage of phosphogypsum was outside its jurisdiction. *See id.* at 1294.

The issue in the case was whether NEPA compelled it to take those effects into account. *See id.* at 1292. The court said no, emphasizing the distinction between the Corps' jurisdiction and the jurisdiction of other sovereigns and agencies. "[I]t was sensible," the court wrote, "for the Corps to draw the line at *the reaches of its own jurisdiction*, leaving the effects of phosphogypsum to phosphogypsum's regulators." *Id.* at 1295 (emphasis added). The court went on to note that "[t]he Corps' line respects the jurisdictional boundaries set by Congress and inherent in state-federal cooperation." *Id.* at 1295-96.

As the foregoing survey attests, most of the courts of appeals have taken *Public Citizen* seriously when asked to do so. But two courts have not. Instead, the approach the D.C. Circuit took in the decision below, which began with *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357 (D.C. Cir. 2017), and which the Ninth Circuit has appeared to follow, *see Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 736-40 (2020), all but repudiates *Public Citizen*. Whereas *Public Citizen* eschewed "a particularly unyielding variation of 'but for' causation," 541 U.S. at 767, the decisions below and in *Sabal Trail* seem to embrace such an approach, under which the mere fact that agency could by its action forestall an effect makes it a proximate cause of that effect, without regard to the limits of its jurisdiction.

Petitioners in the instant case want to build a short railway, less than a hundred miles long, to connect a remote basin in northeastern Utah and northwestern Colorado with a main line. At present, the only way to move freight into or out of this basin is by truck over two-lane roads. *See* Pet.App.6a-7a. Before they can build their railway, however, they need permission from the Surface Transportation Board (STB). And, before the STB can let them build their railway, it must comply with NEPA.

At the time the STB received petitioners' application, NEPA required federal agencies to prepare, with respect to any "major Federal action[ ] significantly affecting the quality of the human environment," a "detailed statement" as to the "environmental impact of the proposed action." The STB did so, noting (as befits its area of expertise) that:

> construction and operation *of the Railway* could have "major impacts" on water resources, air

> quality, special status species like the greater sage-grouse, land use and recreation, local economies, cultural resources, and the Ute Indian tribe, as well as "minor impacts" on vehicle safety and delay, rail operations safety, big game, fish and wildlife, vegetation, and geology in the Uinta Basin.

Pet.App.11a (quoting Final Exemption Order, 2021 WL 5960905, at *7-13) (emphasis added).

But petitioners and the STB soon ran headlong into the D.C. Circuit's oversized notion of what NEPA requires. According to that court, an agency conducting analysis under NEPA must take into account *any* reasonably foreseeable effect of a proposed action, even if that effect would take place far from, or long after, the activity over which the agency has jurisdiction, even if that effect falls completely outside the agency's area of expertise, and even if that effect falls squarely within the jurisdiction and expertise of another agency or a state. *See* Pet.App.37a. Applying this oversized test, the D.C. Circuit concluded that the STB's evaluation of petitioners' railway was deficient because it did not adequately take into account the impact of new wells that might be drilled in the basin as a consequence of the railway's existence, *see id.* at 34a, because it did not adequately assess the increased risk of accidents on main lines downline from the railway, *see id.* at 40a, and because it did not adequately take into account greenhouse gas emissions from the refining of oil or gas welled in the basin, *see id.* at 34a-35a.[4]

4. CEA recognizes that the D.C. Circuit found fault with aspects of the STB's decision beyond those noted in the text.

It did not matter to the D.C. Circuit that the STB lacks authority to authorize, or forbid, the drilling of wells in the basin. Nor did it matter that the Federal Railroad Administration, not the STB, regulates rail safety. Nor did it matter that the STB does not regulate oil and gas refineries. The only thing that mattered to the D.C. Circuit was the fact that the STB, by denying petitioners' application, could—in a literal, but-for sense—prevent these contingencies from occurring. *See* Pet.App.37a ("[G]iven that the Board has authority to deny an exemption to a railway project on the ground that the railway's anticipated environmental and other costs outweigh its expected benefits, the Board's argument that it need not consider effects it cannot prevent is simply inapplicable."). This approach cannot be squared with *Public Citizen*.

Respondents may argue that the STB in fact *did* have "jurisdiction" over the upstream and downstream effects of the proposed railway because it has authority to grant or deny exemptions in the "public convenience and necessity." *See* Pet.App.37a. This kind of language, of course, appears in the organic statutes of many agencies. *See*, *e.g.*, *Sabal Trail*, 867 F.3d at 1373 ("Congress broadly

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Importantly, however, that court applied the *Allied-Signal* test to determine whether to vacate the STB's decision on remand. Under this test, the court asks, among other things, about "'the likelihood that "deficiencies" in an order can be redressed on remand.'" *See* Pet.App.69a-70a (quoting *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993))). Thus, the perceived *extent* of the STB's deficiency was material to the decision by the court below. Correcting that misperception would materially enhance the likelihood that the STB's decision would avoid vacatur on remand from this Court.

instructed [FERC] to consider 'the public convenience and necessity' when evaluating applications to construct and operate interstate pipelines."). If the D.C. Circuit's oversized notion of NEPA is correct, agencies would routinely be expected to engage in analysis outside their area of expertise, and often squarely within the expertise and jurisdiction of another agency. This cannot be. No rational legislature would require multiple agencies to undertake precisely the same calculus. That would be wasteful, dangerous, and even absurd. It would also defy sound principles of administrative law. As this Court recently observed in *Loper Bright Enterprises v. Raimondo*, courts are prudent to take into account "the 'interpretations and opinions' of the relevant agency, '*made in pursuance of official duty*' and '*based upon . . . specialized experience*.'" 144 S. Ct. 2244, 2259 (2024) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)). This emphasis on "official duty" and "specialized experience" reflects the elemental principle that agencies have no business assessing effects outside their specialty or, worse, squarely within the specialty of another agency, or another sovereign. As the Eleventh Circuit has correctly observed, tying an agency's duties under NEPA to a broad "public-interest" analysis would make each agency a "de facto environmental-policy czar." *Ctr. for Biological Diversity*, 941 F.3d at 1299.

Sabal Trail, on which *Eagle County* relies, is just as palpable a departure from *Public Citizen* as the decision below. At issue in *Sabal Trail* was an order by the Federal Energy Regulatory Commission (FERC) allowing the construction and operation of three pipelines to carry natural gas from Alabama to power plants in Florida, passing through Georgia along the way. *See* 867 F.3d at 1363. Sierra Club argued that FERC's analysis of

the pipelines' effects on the environment was deficient because it had "failed to adequately consider the project's contribution to greenhouse-gas emissions." *Id.* at 1365. It had in mind the power plants at the downstream end of the pipelines and the carbon dioxide those plants would emit when they burned the natural gas that moved through those pipelines. Relying on this Court's decision in *Public Citizen*, FERC reasonably and correctly argued that it had no duty to assess those emissions because it did not regulate power plants. *See id.* at 1372. Although the *Sabal Trail* court "recognize[d] that the power plants in question will be subject to state and federal air permitting processes" of other agencies, it nevertheless rejected FERC's argument. "[T]he existence of permit requirements overseen by another federal agency or state permitting authority," it wrote, "cannot substitute for a proper NEPA analysis." *Id.* at 1375. As the Eleventh Circuit aptly noted in declining to follow its sister circuit, the D.C. Circuit in *Sabal Trail* "fail[ed] to take seriously the rule of reason announced in *Public Citizen*." *Ctr. for Biological Diversity*, 941 F.3d at 1300.

Sabal Trail and the cases that follow in its wake are not mere one-off errors. Instead, they reflect a dangerous line of caselaw neglecting this Court's teachings and misapprehending Congress' intent in enacting NEPA. Congress' goal in enacting the statute was not to stymie the development of necessary infrastructure, nor was it to blur lines between the delineated jurisdiction it had carefully delegated to the several agencies. As noted above, it was simply, and only, to enable federal agencies to take environmental concerns into account as they made their particularized decisions with respect to actions under their own, limited jurisdiction, such as the decision by the STB in this case to authorize an eighty-odd-mile

railway.[5] This case gives this Court an opportunity to confirm the correct construction of NEPA it set forth in *Public Citizen*.[6]

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5. Federal Respondents miss the point of *Public Citizen* in tying NEPA to a "context-specific inquiry." Brief for the Federal Respondents Supporting Petitioners at 31 (Federal Brief). This Court made clear in that case that agencies have no duty under NEPA to assess effects outside the jurisdiction that Congress gave them. See 541 U.S. at 770. And, far from eliminating the uncertainty to which *Sabal Trail* and the decision below give rise, their test would simply perpetuate that uncertainty. Nor does NEPA's requirement that agencies "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved" support their test. Federal Brief at 32 (quoting 42 U.S.C. §4332(2)(C)). This argument assumes that an "involved" impact can be outside an agency's organic jurisdiction, but *Public Citizen* teaches the opposite. All this provision means, consistent with *Public Citizen*, is that an agency, when assessing an effect that is within its organic jurisdiction and also within the jurisdiction or expertise of another agency, must consult with that agency.

6. This case does not present the issue of whether the rules that CEQ issues with respect to NEPA should have any controlling weight in litigation. On the other hand, the court below did rely on those rules heavily. Moreover, it is quite possible that CEQ's purported requirement that agencies delineate between "direct" and "indirect" effects exerts a hydraulic pressure on agencies to assess effects arising from activities outside their jurisdiction. *See* Pet.App.26a-27a (noting those distinctions). In any case, a strong argument can be made that CEQ's rules have no controlling weight. As Judge Randolph recently noted, "[n]o statute grants CEQ the authority to issue binding regulations." *Food & Water Watch v. U.S. Dep't of Agriculture*, 1 F.4th 1112, 1119 (D.C. Cir. 2021) (Randolph, J., concurring). In addition, although this Court has accorded "substantial deference" to CEQ's regulations, *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979), it is far from clear whether that deference is consistent with this Court's recent decision in *Loper Bright*.

II. No rational legislature would embrace the D.C. Circuit's construction of NEPA.

According to *Sabal Trail* and the decision below, reasonable foreseeability alone is sufficient to make an agency responsible for evaluating an effect under NEPA. This is true even if the effect is completely outside its regulatory authority and even if the effect is squarely *within* the regulatory authority of another agency, or even another sovereign. NEPA as deployed by *Sabal Trail* and the decision below thus makes every project—and especially every long, skinny infrastructure project—subject to multiple, and perhaps numberless, vetogates. Congress could not possibly have intended this. To be sure, the authors and ratifiers of our Constitution contemplated a system of separated powers that would check one another. *See*, *e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015). But to say the one is to exclude the other. Although the founders constituted the House, Senate, and President to serve as checks on one another, they did not make *every individual citizen* a check on public policy, for that would have precluded public policy. And if Congress wanted every significant project proposed by a federal officer to be subject to countless vetoes by private parties, surely it would have said so. As noted above, however, its goals in enacting NEPA were far more modest. Congress simply wanted to let agencies take environmental concerns into account as they made particularized decisions within the four corners of their jurisdiction.

Sabal Trail and the decision below take what Congress intended to be a modest, sensible statute and make of it a recipe for a failed state. After all, a nation that cannot reopen a harbor, rebuild a bridge, run a transmission line

from a windfarm to a city, move natural gas from where it is plentiful and cheap to where it is scarce and expensive, or build a high-speed rail line without the forbearance of virtually every actor in our political system (or a side deal to persuade the actor to stand down) is asking for trouble. The simple truth is that uncertainty drives away capital. "The suppliers of capital to private and public sector organizations expect to earn returns on their capital investments commensurate with the risks they are assuming." Stephen A. Berkowitz, "Project Selection Under Uncertainty," in Dennis E. Logue, Handbook of Modern Finance 26-6 (1984). In other words, capital is input for infrastructure as much as cement or steel. And it is not free. People with capital want an adequate return on their investment. And they will accept risk only if they are properly compensated for doing so. Otherwise, they will take their capital and invest it in something less risky. NEPA as interpreted below complicates this process, not only by introducing an enormous element of risk into many projects, but by rendering that risk hard if not impossible to quantify.

For many, of course, this stymieing effect is a feature, not a bug. As one person wrote, "[e]nvironmentalists have won many . . . infrastructure battles, and they've added delay and cost to projects." Bill McKibben, Joe Biden's Cancellation of the Keystone Pipeline Is a Landmark in the Climate Fight, The New Yorker, Jan. 20, 2021, https://www.newyorker.com/news/daily-comment/joe-bidens-cancellation-of-the-keystone-pipeline-is-a-landmark-in-the-climate-fight (last visited Aug. 29, 2024). Similarly, a writer for Sierra Club reported a few years ago that "our movement has . . . shown that we'll fight every new fossil fuel project that's proposed—and that we'll often win."

Jamie Henn, Here's How We Defeated the Keystone XL Pipeline, Sierra, Jan. 31, 2021, https://www.sierraclub.org/sierra/here-s-how-we-defeated-keystone-xl-pipeline (last visited Aug. 29, 2024). This does not bode well for our nation's ability to adapt. "The closer to unanimity is the rule required for decision," wrote the economists James M. Buchanon and Gordon Tullock, "the greater is the power of the individual bargainer and the greater the likelihood that at least some individuals will try to 'exploit' their bargaining position to the maximum extent possible." The Calculus of Consent, in 3 The Collected Works of James M. Buchanan 60 (1990). These two economists went on to observe, with equal bluntness, that "[v]oluntary contractual agreements sufficient to remove the externality completely may be as costly as the organization of collective action under the unanimity rule." *Id.*

Empowering a project's most ardent opponents to flyspeck an agency's attempt to satisfy NEPA is nothing Congress could ever have intended, and something this Court should seek to preclude. After all, where NEPA is concerned, we are dealing with "a judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975); *see also Public Citizen*, 541 U.S. at 767 (quoting *Marsh*, 490 U.S. at 373 (associating NEPA with a "'rule of reason'")). Given the substantial role that the judiciary has played in letting NEPA metastasize, it is proper for this Court to ask itself if a rational legislature would ordain the kind of process that *Sabal Trail* and the opinion below contemplate. The clear answer is no.

To be clear, strategic deployment of NEPA to delay, frustrate, and preclude important improvements to

infrastructure is not limited to fossil fuels. In *Protect Our Parks, Inc. v. Buttigieg*, it was deployed against a proposed presidential library. *See* 39 F.4th 389, 392-93 (7th Cir. 2022). It has also been deployed against New York City's proposed congestion pricing plan. *See* Complaint at 6, *Mulgrew v. U.S. Dep't of Transportation* (now S.D.N.Y. Nos. 24-cv-1644, 24-cv-367, and 23-cv-10365), https://files.uft.org/congestion-pricing-lawsuit.pdf (last visited Aug. 29, 2024). And it has been deployed many times against transmission lines, which can serve wind and solar farms as easily as fossil-fuel-fired plants. *See* Eric Boehm, It Took 15 Years for the Feds To Approve a 700-Mile Electric Line, Apr. 14, 2023, https://reason.com/2023/04/17/it-took-15-years-for-the-feds-to-approve-a-700-mile-electric-line/ (last visited Aug. 29, 2024). Reassociating NEPA with a rule of reason would go far to restoring our nation's ability to thrive across many areas of policy and many economic sectors.

Limiting the mission creep that *Sabal Trail* and the decision below require would also have side benefits. First, it would save lower courts from the often difficult decision of whether, upon finding a violation of NEPA, it should vacate the administrative decision and remand for further proceedings, or remand without vacatur. *See generally Allied-Signal v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). The smaller the universe of possible violations, the smaller the universe of difficult vacatur decisions on remand.

Limiting *Sabal Trail*'s mission creep would also relieve federal appellate courts, and this Court, from some of the strains of writ practice. As this Court knows, if a court finds a violation of NEPA, it may also be asked to halt work in progress, or perhaps halt the operation

of infrastructure already in service. If the court merely halts work in progress, the proponent and the agency may not seek relief from judgment, depending on such variables as weather and financing. But if it stops the operation of infrastructure already in service, especially a key component, writ practice may well ensue. *See*, *e.g.*, Dakota Access, LLC's Emergency Motion for Stay Pending Appeal, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 20-5197 (D.C. Cir. Jul. 10, 2020) (seeking emergency relief to keep open a pipeline that carried 570,000 barrels of oil per day). This puts an acute burden on both the courts and the parties. To be sure, writ practice is an important part of our legal system, independent of the operative scope of NEPA. But reducing that scope in accordance with a rule of reason would be conducive to judicial economy.

III. The Fiscal Responsibility Act of 2023 confirms that Congress intends to limit an agency's duties under NEPA to matters within its organic jurisdiction.

As noted above, the operative provision of NEPA as of 1970 was quite modest. Congress simply wanted to "ensure[ ] that [agencies] will not act on incomplete information, only to regret [their] decision[s] after [they are] too late to correct." *Marsh*, 490 U.S. at 371. Over the years, however, NEPA as deployed became an ever-increasing impediment to sensible growth and development. In the FRA last year, Congress responded by underscoring the limited nature of an agency's duties under the statute.

NEPA as originally enacted required federal agencies to "include in every recommendation or report

on proposals for . . . major Federal actions significantly affecting the quality of the human environment . . . a detailed statement" as to "the environmental impact of the proposed action." Pub. L. No. 91-190, §102(2)(C)(i), 83 Stat. 852, 853 (Jan. 1, 1970). Today, it requires federal agencies to include "a detailed statement" as to "*reasonably foreseeable environmental effects* of the proposed *agency* action." 42 U.S.C. § 4332(2)(C)(i) (emphasis added).

The FRA thus effected three changes in NEPA's operative language. First, it substituted "effects" for "impact." Second, it inserted the words "reasonably foreseeable" before "environmental effects." And third, it inserted the word "agency" between the words "proposed" and "action." Pub. L. No. 118-5, 137 Stat. at 10, 38.

These changes are significant. "Impact" and "effects" may be interchangeable in colloquial speech, but there is no gainsaying that Congress intended the adjectival phrase "reasonably foreseeable" to restrict the universe of "effects" (or "impact[s]") that an agency is obliged to consider under NEPA. This is underscored by the remarks on the floor of the House by Representative Bruce Westerman, Chairman of the House Committee on Natural Resources, three days before the FRA became law. As he explained, "[t]he intent of using the term 'reasonably foreseeable' in subsection (a) of section 321 [of the FRA], which amends section 102 of the National Environmental Policy Act, is to narrow the scope of NEPA's requirements." 169 Cong. Rec. H2704 (May 31, 2023). Importantly, this Court has recognized that, when Congress acts, it necessarily acts with a purpose. *See Stone v. INS*, 514 U.S. 386, 397 (1998). The only function that the phrase "reasonably foreseeable" could serve

would be to limit the scope of the word ("effects") that it modifies. Even more significantly, Congress in the FRA inserted the word "agency" between the words "proposed" and "project," thus underscoring this Court's point in *Public Citizen*, that an agency performing its work under NEPA is only expected to evaluate the effects of *its* action taken under *its* jurisdiction, not those of agencies and entities that it does not control.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to reverse the decision below.

Respectfully submitted,

Paul E. Salamanca
Counsel of Record
279 Cassidy Avenue
Lexington, KY 40502
(859) 338-7287
psalaman20@gmail.com

Counsel for Amicus Curiae