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 U.S. SENATORS JOHN BARRASSO, SHELLEY MOORE CAPITO, TED CRUZ, MIKE LEE, MITCH MCCONNELL, AND MITT ROMNEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae are United States Senators John Barrasso (WY), Ranking Member of the Committee on Energy and Natural Resources; Shelley Moore Capito (WV), Ranking Member of the Committee on Environment and Public Works; Ted Cruz (TX), Ranking Member of the Committee on Commerce, Science, and Transportation; Mike Lee (UT); Mitch McConnell (KY), Minority Leader; and Mitt Romney (UT).

As United States Senators, *amici* have a strong interest in the proper interpretation of our nation's energy and environmental laws. *Amici* include the Minority Leader, the Ranking Members of the Senate committees of jurisdiction that oversee these laws and the many agencies that implement them, including the Surface Transportation Board, and the Senators from the State of Utah, where the project at issue in the decision below is located.

The D.C. Circuit's reading, if affirmed, will continue the troubling trend of placing more and more court-created impediments on the development of critical energy infrastructure across the nation. *Amici* have a strong interest in ensuring that the D.C. Circuit's overly expansive reading of the law at issue is overturned.

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

SUMMARY OF THE ARGUMENT

When Congress legislates, it assumes the same common-sense approach to causation that animates both daily life and the law. While the metaphysics of causation may puzzle philosophers, more tangible concepts like reasonable foreseeability and proximate causation are ubiquitous.

Congress wrote the National Environmental Policy Act ("NEPA") with practical reality, settled principles of legal causation, and prudent procedure in mind. Despite its broad title, the statute is merely procedural in nature. It imposes a general rule that, before taking "major Federal actions" that "significantly" affect the environment, federal agencies must prepare an analysis of the proposal's "reasonably foreseeable environmental effects" as well as potential alternatives. 42 U.S.C. § 4332(C). NEPA doesn't require an analysis of every possible "butterfly effect" of a proposed action—it simply requires an agency to think before it acts within the scope of its authority.

As a common-sense statute imposing only procedural precautions, "inherent in NEPA" is a "rule of reason." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004). Thus, agencies "need not consider" environmental effects that they have "no ability to prevent" "due to [their] limited statutory authority." *Id.* at 770. In such cases, agencies are not the "legally relevant 'cause' of the effect." *Id.* Congress did not use a procedural statute to turn all agencies into "environmental-policy czar[s]." *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1299 (11th Cir. 2019).

This statutory framework would not be apparent, however, from looking at many lower court decisions. The latest lower-court effort to rewrite NEPA is at issue in this case: the D.C. Circuit's doctrine requiring agencies to study "upstream" and "downstream" environmental effects even when outside their delegated authority.

The decision below transforms NEPA's think-before-you-act framework into a roving environmentalist mandate. It requires the Surface Transportation Board ("STB"), which regulates railroad transportation, to study the "downstream" environmental effects of refining oil along the Gulf of Mexico before approving a rail line in Utah. *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1179 (D.C. Cir. 2023). It also requires the STB to consider the "upstream" effects of new oil wells that would rely on the rail line to transport the crude they produce. *Id.* at 1180. And the STB must "estimate the emissions *or other environmental impacts* it expects" from these upstream and downstream developments, even though the Court does not define the relevant impacts. *Id.* at 1179 (emphasis added). The D.C. Circuit requires these reviews even though the effects in question are so far from the STB's "wheelhouse," *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023), that it defies "common sense" to think that Congress wanted the STB to judge rail lines on such bases, *West Virginia v. EPA*, 597 U.S. 697, 722 (2022) (quotation omitted).

Taken together, the D.C. Circuit turns NEPA review into a limitless academic exercise, disconnected from an agency's statutory authority and actual expertise. In so doing, it multiplies the ways a future

court might second guess an agency's decisions in ways unknowable *ex ante*, establishing a judicial veto for every energy infrastructure project. Now, any company seeking to build a project that triggers NEPA review must bear the costs of this additional, unmeasurable uncertainty. Even worse, the decision below depends on reading the STB's authority to approve rail lines as a limitless delegation to advance the "public convenience" however the STB sees fit. That conclusion matters beyond NEPA compliance; it also encourages regulatory overreach and threatens the separation of powers.

Because NEPA does not grant agencies a roving commission to go in search of environmental issues to solve outside their jurisdiction, this Court should reverse the decision below.

ARGUMENT

I. Congress has not sanctioned the broad reach of judicial review under NEPA.

Congress passed NEPA "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions." *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97–98 (1983). This narrow procedure was meant to promote "a fully informed and well-considered decision." *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

Some lower courts, however, have transformed NEPA into an impenetrable labyrinth for any project requiring federal approval. Those brave enough to enter may find themselves sent back to the beginning as the courts liberally grant remands, injunctions, and even vacaturs. The resulting uncertainty frustrates

the development of projects of all types—both critical and mundane—imposing untold economic consequences on the United States.

A. NEPA compliance is reviewable only because of post-enactment changes to the legal backdrop.

Congress did not include in NEPA a cause of action allowing for judicial review of the NEPA process. Nevertheless, the courts soon applied the law in surprising ways, creating a "flood of new litigation" that Congress did not sanction. *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971). Numerous plaintiffs, whether they be anti-development organizations, a project's competitors, or citizen activists, would almost always have the doors of the federal courthouse open to litigate NEPA. This judicial review has become so burdensome and unpredictable that it constitutes a judicial veto. The legal backdrop against which Congress enacted NEPA was almost immediately transformed by the courts in ways that multiplied the burdens the statute imposes.

Congress could not have anticipated that section 702 of the Administrative Procedure Act ("APA") would be read to confer a right of action to enforce NEPA on any person offended by infrastructure development, even if they are at best obliquely affected by the project. *See* 5 U.S.C. § 702. NEPA was enacted before this Court's decision in *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), which was later read (and perhaps misread) as holding that section 702 of the APA confers a

staggeringly broad right of action on anyone "arguably within the zone of interests," *id.* at 153, protected by the underlying statute—a standard that has no meaningful limit. *See generally* Caleb Nelson, *"Standing" and Remedial Rights in Administrative Law*, 105 Va. L. Rev. 703 (2019). This reading of the APA was "a marked departure from prior understandings of remedial rights in administrative law," and one that Congress did not authorize in 1946 nor could have predicted in 1969. *Id.* at 708.

Nor could Congress have predicted that courts would read the "case" or "controversy" requirement in Article III to protect personal interests that were never protected at common law. *Sierra Club v. Morton*, which first explained that environmental groups could have associational standing to sue based on asserted injuries to their members' "[a]esthetic and environmental well-being," had not yet been decided by this Court. 405 U.S. 727, 734 (1972). Nor had this Court decided that the constitutional requirement of redressability could be "relaxed" to allow NEPA litigation to proceed under different constitutional standing rules. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011) (quotation omitted). It was this novel concept of aesthetic, environmental injury—and the watering down of redressability—that generally provided "the basis for standing in NEPA cases." David R. Mandelker et al., *NEPA Law & Litigation* § 4:11 (2d ed., 2024); *see United States v. Students Challenging Regul. Agency Procs.*, 412 U.S. 669, 683–89 (1973) (finding NEPA standing under *Morton*). No other area of law gets such generous treatment. *See TransUnion LLC v. Ramirez*, 594 U.S. 413,

459 (2021) (Thomas, J., dissenting) ("Had the class members claimed an aesthetic interest in viewing an accurate report, would this case have come out differently?").

B. Judicial review of NEPA compliance is atextually strict in many lower courts.

Unsurprisingly, given its absence from the text, the question of judicial review of NEPA compliance "was barely discussed in the legislative history." Mandelker, *supra*, § 2:5; Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 Cal. L. Rev. 929, 956 (1993) (noting the "lack of discussion of judicial review"). NEPA creates no cause of action, so courts have relied instead on *Data Processing*'s progeny and its atextual reading of the APA.

Worse, lower courts have treated NEPA cases unlike any other APA case. Some courts apply a heightened standard of review, essentially reviewing *de novo* whether an agency's environmental-impact statement complies with NEPA.[2] Those courts eschew ordinary arbitrary and capricious review by framing the error as one of "procedure." *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (en banc). Others turn the APA's deferential arbitrary and capricious review into an unrecognizable form of "hard look" review. *See, e.g.*, *Grand Canyon Tr. v. FAA*, 290 F.3d 339, 340–41 (D.C. Cir. 2002); Mandelker, *supra*, § 8:7 (collecting cases).

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[2] *See* Daniel Mach, *Rules Without Reasons: The Diminishing Role of Statutory Policy and Equitable Discretion in the Law of NEPA Remedies*, 35 Harv. Env't L. Rev. 205, 211–12 & n.34 (2011) (noting split of authority on the question).

Some courts also stretch NEPA's text, turning the duty to prepare an environmental-impact statement for "major Federal actions" that "significantly affect[]" the environment, 42 U.S.C. § 4332(C), into a duty to prepare one whenever "there is a *substantial question* whether an action '*may* have a significant effect'" on the environment, *Ctr. For Biological Diversity v. NHTSA*, 538 F.3d 1172, 1185 (9th Cir. 2008) (emphases added). Lower courts, therefore, often require agencies to consider speculative, insignificant risks, despite this Court's holding that NEPA does not require "distorting the decisionmaking process by overemphasizing highly speculative harms." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989).

Finally, when enforcing NEPA, some courts grant injunctive relief near-automatically, despite this Court's repeated insistence that injunctions are extraordinary, not a matter of right, and that the traditional four-factor test for equitable relief applies all the same to NEPA.[3] Courts therefore often halt critically important infrastructure for years, even decades, just to have agencies write a better and longer essay on environmental or other effects that are vastly outweighed by the public interest. As courts grade agency essays and spawn case after case, the Nation's

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[3] *See* Marc Rutzick, *A Long and Winding Road: How the National Environmental Policy Act Has Become the Most Expensive and Least Effective Environmental Law in the History of the United States* 8 & n.41, Federalist Soc'y (2018), https://perma.cc/5RKJ-V3TL (collecting cases); *cf. Winter v. NRDC*, 555 U.S. 7 (2008); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010).

infrastructure decays, its economy suffers, and its foreign adversaries benefit.

II. The D.C. Circuit's expansion of NEPA threatens the separation of powers.

The latest lower-court effort to expand NEPA is the *Sabal Trail* doctrine. In the D.C. Circuit, agencies must now discuss the "downstream" effects of their projects, even when those effects are well-beyond the agency's delegated authority. *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) ("*Sabal Trail*"). This multiplies the scope of issues that a reviewing court may use as a basis to reverse the decision of the agency. It pushes agencies to go beyond the bounds of their authority and expertise into areas that Congress has not entrusted to them. And it encourages regulatory overreach. The decision below, *Eagle County*, expands on the mistakes in *Sabal Trail* and must be reversed.

A. The D.C. Circuit abandons NEPA's "rule of reason."

In *Sabal Trail*, the D.C. Circuit faulted the Federal Energy Regulatory Commission ("FERC") for failing to consider, when approving an interstate natural gas pipeline, the "downstream effects" of a power plant's emissions. According to the court, authorizing the natural gas pipeline would have the "reasonably foreseeable" effect of allowing natural gas to be transported to power plants, which would encourage power plants to use natural gas, which would in turn lead those plants to increase carbon-dioxide emissions, which could in turn have an effect (minimal, to be sure) on climate change over centuries or millennia. *Id.* at

1371–72. That power plant emissions are the province of "another federal agency or state permitting authority" did not matter. *Id.* at 1375. That, under the Natural Gas Act, FERC "lacks jurisdiction" over power plants was irrelevant too. *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019) (citing *Sabal Trail*). The court merely asserted that FERC has "legal authority to mitigate" those downstream power-plant emissions under the Natural Gas Act. *Sabal Trail*, 867 F.3d at 1374. To support this surprising claim, the court referenced FERC's authority to "attach" "such reasonable terms and conditions" to a permit that the "public convenience and necessity may require." 15 U.S.C. § 717f(e); *see Sabal Trail*, 867 F.3d at 1373–74. But the court never explained how FERC could impose, as a condition for building a natural gas *pipeline*, a duty to mitigate a *power plant*'s emissions.

The *Sabal Trail* saga continued in *Food and Water Watch v. FERC*, 28 F.4th 277 (D.C. Cir 2022). Even though Congress specifically denied FERC any authority over "the local distribution of natural gas or … the facilities used for such distribution,"[4] 15 U.S.C. § 717(b), the D.C. Circuit still held that FERC must consider emissions from the end users of natural gas (whoever they might be), even though those emissions would only occur *after* the gas exited the interstate gas

[4] *See also Missouri ex rel. Barrett v. Kan. Nat. Gas Co.*, 265 U.S. 298, 308 (1924) ("With the delivery of the gas to the distributing companies, however, the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. In such case the effect on interstate commerce, if there be any, is indirect and incidental.") (citation omitted).

system, entered the intrastate distribution system, and was used by retail customers, *see Food & Water Watch*, 28 F.4th at 289.

The decision below illustrates the true breadth of what *Sabal Trail* unleashed. The D.C. Circuit vacated a permit for a rail line in Utah, faulting the STB for failing to disclose "the effects of increased crude oil refining on Gulf Coast communities" that the court characterized as "already overburdened by pollution from refining." *Eagle Cnty.*, 82 F.4th at 1168. It similarly faulted the STB for not considering the upstream effects of increased oil production that the new line might induce. *Id.* at 1177–80. The court reasoned that the STB must consider such a broad sweep of environmental effects because the STB approves railroads based on a broad "public convenience and necessity" standard. *Id.* at 1180. Thus, in the court's view, the STB can deny a rail line when its "environmental and other costs outweigh its expected benefits." *Id.* Given how broadly the court interprets the range of effects that the STB must consider, this places on the agency the responsibility of evaluating the environmental effects of the production and consumption of the products its rail lines transport and weighing them in some sort of global cost benefit analysis.

The exceedingly broad NEPA review demanded by *Eagle County* requires analysis of issues well beyond the STB's authority and expertise. Congress assigned the STB the statutory mission of "the economic regulation of … freight rail" and gave it jurisdiction over "railroad rate, practice, and service issues and rail

restructuring transactions."[5] It further entrusted the STB with the oversight of a common-carriage mandate, requiring trains to carry all commodities upon "reasonable request." 49 U.S.C. § 11101. Nevertheless, *Eagle County* requires the STB to consider and weigh a host of effects far from that bailiwick. And it further demands that the STB consider environmental effects unrelated to *transportation*, which stem from the production and use of a specific commodity, despite the reality that the STB cannot allow a railroad *exclude* any specific commodity.

This boundless view of NEPA runs counter to its statutory text. NEPA prescribes a process to help agencies make decisions. *Vt. Yankee*, 435 U.S. at 558. Specifically, the text requires review of the "reasonably foreseeable" effects of the "proposed *agency action*," which the "*responsible* official" is preparing to make. 42 U.S.C. § 4332(C) (emphases added). NEPA does not command an agency to write an environmental science textbook exploring any and all environmental effects to which a federal action could be, in some sense, causally related. Such would rely on a "particularly unyielding variation of 'but for' causation." *Public Citizen*, 541 U.S. at 767. Rather, NEPA asks more narrowly for consideration of reasonably foreseeable effects of the specific actions within the responsibility of a federal agency.

Because of the role an environmental-impact statement plays in the statutory scheme, it must be

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[5] Surface Transp. Bd., *About STB*, https://perma.cc/BD2L-XLBM (visited Sept. 3, 2024); *see generally* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (creating the STB).

evaluated with "[c]ommon sense," as NEPA's demands are "bounded by some notion of feasibility." *Vt. Yankee*, 435 U.S. at 551. It would not help an agency decisionmaker to review analysis of "remote and speculative possibilities." *Id.* (quotation omitted). And, therefore, an agency need not consider alternative proposals that require changes to "statutes" or the "policies of other agencies." *Id.* (quotation omitted). Otherwise, agencies would waste resources studying issues that are not "relevant to their congressionally assigned functions." *Metro. Edison Co. v. PANE*, 460 U.S. 766, 776 (1983).

It follows that NEPA is only a procedural tool meant to assist agencies acting within the scope of their jurisdiction, *not* a law that *expands* that jurisdiction. *NRDC v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987). Thus, the Nuclear Regulatory Commission ("NRC") *does* need to consider the environmental effects of approving a reactor. *Metro. Edison*, 460 U.S. at 775. But it does *not* need to consider the effects of approving a reactor on issues such as the anxiety of those living near a reactor "because the causal chain is too attenuated." *Id.* at 774. Likewise, when the Federal Motor Carrier Safety Administration was stripped of statutory authority to prevent the cross-border operations of Mexican motor carriers, NEPA did not require a study of the effects of cross-border operations. *Public Citizen*, 541 U.S. at 765–66. An effect is not relevant to an agency's statutory duties when the agency "lacks the power to act on whatever information might be contained in the EIS." *Id.* at 768.

In such a case, the agency is not the "legally relevant cause." *Id.* at 769.

The decision below stretches NEPA to impose duties far beyond the scope of the STB's authority and expertise—the economic regulation of railroads. By doing so, the D.C. Circuit abandons NEPA's "rule of reason." *Id.* at 767.

B. The D.C. Circuit ignores the limits on agency authority.

To be sure, Congress sometimes delegates authority to agencies in broad terms. In both *Eagle County* and *Sabal Trail*, Congress instructed the agencies to evaluate proposed projects based on the "public convenience and necessity."[6] *Eagle Cnty.*, 82 F.4th at 1180.

But the "public convenience and necessity," in the context of economic regulation, does not encompass *any* environmental harms that are in some sense traceable to the transportation services that the STB regulates. "[T]he use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take

[6] The STB's order under review emerged from the exemption process under 49 U.S.C. § 10502(a), which authorizes STB to exempt a rail carrier from the standard permitting process when that process is "not necessary to carry out" the nation's transportation policy. But whether the STB reviews a proposal through the exemption process or the certificate process of 49 U.S.C. § 10901(c), the STB applies the same standard, asking whether the rail line serves the "public convenience and necessity." *See Seven Cnty. Infrastructure Coal.*, No. FD 36284, 2021 WL 5960905, at *24 (S.T.B. Dec. 15, 2021); *see also id.* at *32 (Oberman, Bd. Member, dissenting).

meaning from the purposes of the regulatory legislation." *NAACP v. FPC*, 425 U.S. 662, 669 (1976).

Indeed, in *Metropolitan Edison*, Congress had similarly delegated to the NRC the broad authority to act to "protect the health and safety of the public." *See PANE v. NRC*, 678 F.2d 222, 250 (D.C. Cir. 1982) (quoting 42 U.S.C. § 2012(d) (1976)), *rev'd sub nom. Metro Edison*, 460 U.S. 766. Nevertheless, forcing the NRC to study the effect of a nuclear plant on the mental health of nearby residents was too causally attenuated even though such a concern could, to a naïve interpreter, fall within such a broad, general delegation of authority.

This Court already set the limits of similar congressional delegations to agencies in the context of rail transportation regulation, while interpreting the organic statute of the STB's predecessor, the Interstate Commerce Commission ("ICC"). 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." *N.Y. 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. Congress has not tasked the STB with weighing the merits and demerits of the oil and gas industry.

If the term "public convenience" were as "vague and indefinite" as *Eagle County* suggests, it would violate the nondelegation doctrine. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943). Under such a reading, the STB could address any foreseeable harm that it chooses, and Congress, therefore, has given no "intelligible principle" to the STB to which it could "conform" its determinations. *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, the "public convenience" must be read through the lens of the statutory scheme Congress entrusted the STB with implementing. *Cf. N.Y. 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.

A hypothetical illustrates the point. If STB were to promulgate a *rule* requiring railroads to reduce the greenhouse gas emissions that result from the eventual use of oil that the trains on the lines it approves carry, this would prompt scrutiny—to say the least. Even with a delegation of authority to regulate for the

"public convenience," this Court would expect a clearer statement from Congress to uphold STB's assertion of such authority. After all, emissions standards are not in the "wheelhouse" of the STB, *Biden*, 143 S. Ct. at 2374, and such an "expansive construction" of a general delegation would go far beyond what we could assume Congress "intended," despite some measure of "textual plausibility" in a seemingly broad public interest standard, *West Virginia*, 597 U.S. at 721–22.

The same logic applies in adjudications. Congress may have authorized STB to reject rail-line applications for the "public convenience," but that does not mean it has authorized conditioning approval on resolving *all* "environmental harms," as the D.C Circuit assumes. *Eagle Cnty.*, 82 F.4th at 1180. Instead, open-ended delegations must be interpreted in context, relying on "common sense," and ensuring that the organic statute is not turned into an "open book to which the agency [may] add pages and change the plot line." *West Virginia*, 597 U.S. at 722–23 (quotation omitted).

This makes clear that a general "public convenience" clause in an organic statute does not make *every* environmental concern "relevant" to the agency's "congressionally assigned functions" for NEPA purposes. *Metro Edison*, 460 U.S. at 776. Agencies (and reviewing courts) must use "common sense" to determine what kinds of environmental harms are within the scope of the agency's consideration, and thus within the appropriate scope of an environmental review. *West Virginia*, 597 U.S. at 722.

In this case, the broad study the plaintiffs demand is not "relevant" to the STB's functions. "[C]ommon sense" dictates that Congress has not entrusted a railway regulator with regulating pollution from oil refineries or oil production. *Id.* at 722. For good reason: the environmental consequences of producing and refining oil are simply not in the STB's "wheelhouse." *Biden*, 143 S. Ct. at 2374.

C. The D.C. Circuit empowers agencies to regulate beyond their statutory authority.

Sabal Trail and *Eagle County* ultimately lead to more than unnecessary NEPA paperwork. The line of cases has emboldened agencies to regulate beyond the authority Congress has given to them.

In 2022, FERC announced in a policy statement that it would consider a pipeline's "impact on climate change … as part of its public interest determination." *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61108, 61741 (2022) ("Policy Statement"). FERC invoked *Sabal Trail* as its rationale. *Id.* at 61739–41. Perhaps because of *Sabal Trail*'s nearly limitless interpretation of FERC's authority, the Policy Statement put forward a "standardless standard" as to how FERC would address these considerations. *Id.* at 61749 (Danly, Comm'r, dissenting).

But the most troubling aspect of this Policy Statement was that FERC purported to impose *de facto* emissions regulations on natural gas plants and other end uses of natural gas, even though FERC's authority is limited to the interstate pipelines that transport natural gas. 15 U.S.C. § 717(b). It lacks authority to

regulate any other use of natural gas or "the facilities used for … the production … of natural gas." *Id.* To facilitate this power grab, FERC "encourage[d]" pipelines to make proposals in their applications to "mitigate" those downstream emissions from the plants and other end users. Policy Statement, at 61741. FERC neither prescribed forms of mitigation, nor explained how much mitigation would be needed to obtain project approval. Once a pipeline is approved on the condition that the pipeline will mitigate emissions, FERC can bring enforcement actions against the pipeline operator for failing to meet them.

FERC never explained why it has authority to impose liability on a *pipeline operator* for failing to mitigate the emissions created by the *end user* of natural gas. Natural gas pipeline companies do not typically produce gas, nor are they in any way in control of residential or industrial gas use. FERC simply repeated *Sabal Trail*'s breezy conclusion that its authority to impose conditions on pipelines as the "public convenience and necessity may require" includes the "legal authority to mitigate" downstream emissions. 867 F.3d at 1374; *see also* Policy Statement, at 61740.

After a spirited Senate oversight hearing,[7] FERC backed down and deemed the Policy Statement a

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[7] *Hearing to Review the Recent Actions of FERC Relating to Permitting, Construction, and Operation of Interstate Natural Gas Pipelines and Other Natural Gas Infrastructure Projects: Hearing Before the S. Comm. on Energy & Nat. Res.*, 117th Cong. (2022), https://tinyurl.com/4ta89b35.

"draft."[8] Nevertheless, the endeavor's effects continue to reverberate through the industry. The D.C. Circuit recently relied on the now "draft" Policy Statement as a reason to vacate another pipeline authorization, faulting FERC for failing to explain the significance of the project's downstream greenhouse gas emissions. *N.J. Conserv. Found. v. FERC*, No. 23-1064, 2024 WL 3573637, at *5 (D.C. Cir. July 30, 2024).

The Council on Environmental Quality ("CEQ") has picked up the mantle. CEQ implements NEPA across the federal government. It recently promulgated a final rule requiring all agencies to analyze "climate change-related effects, including, where feasible, quantification of greenhouse gas emissions, from the proposed action and alternatives." 40 C.F.R. § 1502.16(6).[9] For authority, CEQ relied on *Sabal Trail*. *National Environmental Policy Act Implementing Regulations Revisions Phase 2*, 89 Fed. Reg. 35442, 35509 (May 1, 2024). Under the rule, "agencies should consider the potential global, national, regional, and local contexts as well as the duration…." 40 C.F.R. § 1501.3(d)(1). In guidance, CEQ encouraged agencies to also substantively "mitigate" such effects, as had the FERC Policy Statement. *National Environmental Policy Act Guidance on Consideration*

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[8] *See Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61197, at P 2 (2022)).

[9] Whether CEQ has authority to promulgate regulations in the first place is questionable. *See Food & Water Watch v. U.S. Dep't of Agric.*, 1 F.4th 1112, 1118–19 (D.C. Cir. 2021) (Randolph, J., concurring).

*of Greenhouse Gas Emissions and Climate Chang*e, 88 Fed. Reg. 1196, 1197 (Jan. 9, 2023).

These episodes reveal a danger of the *Sabal Trail* line of NEPA cases—they empower the substantive regulation of an endless array of issues that Congress has not empowered agencies to address. The harms an agency must study under NEPA and those that it has authority to address are two sides of the same coin, but lower courts give short shrift to the careful statutory analysis needed to address this nuance in the NEPA context. *Sabal Trail* concluded that FERC must consider downstream emissions within its analysis of the "public convenience and necessity" after *one paragraph* of statutory analysis. 867 F.3d at 1373. The court accurately noted that FERC could consider environmental factors, but it did not consider how those factors might be bounded within FERC's statutory mission. *Id. Eagle County* likewise took for granted that the STB's organic statute encompassed upstream and downstream environmental effects after three sentences. 82 F.4th at 1180. Neither decision addressed this Court's repeated warnings that seemingly broad delegations are to be interpreted narrowly to capture the best meaning of statutory text and avoid potential nondelegation issues. *See, e.g.*, *West Virginia*, 597 U.S. 697; *NAACP*, 425 U.S. 662; *N.Y. Cent. Sec. Corp.*, 287 U.S. 12.

This Court must make clear that NEPA review is not unbounded. As always, "Congress expects courts to do their ordinary job of interpreting statutes." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2267 (2024). Courts reviewing an agency's compliance with NEPA must only ascribe the authority to

agencies that Congress actually delegated. *See West Virginia*, 597 U.S. at 721. Otherwise, the judicial push to require agencies to consider an ever-broader scope of environmental effects, with an ever more attenuated relation to agencies' statutory responsibilities, will push agencies to wield a commensurately unwarranted scope of regulatory power.

III. The lower courts' expansion of NEPA creates dysfunction and harms the national interest.

The decision below and its expansion of the scope of NEPA review frustrates the statutory schemes that Congress has tasked agencies with implementing. With it, the universe of issues open to a reviewing court to flyspeck has expanded exponentially, and the executive branch is empowered to use NEPA as a central tool in its "government-wide" campaign against the "climate crisis" that is not grounded in grants of authority from Congress.[10]

The combined effect of the judicial and executive branch weaponization of NEPA is the frustration of congressionally directed efforts to responsibly develop the nation's energy infrastructure, manage the nation's resources, protect national security through energy independence, and promote the growth of the economy. As a stark example, in the years since *Sabal Trail*, the amount of interstate gas pipeline capacity added annually has shrunk from 13 billion cubic feet

[10] Exec. Order No. 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Feb. 1, 2021).

per day in 2018 to under 1 billion in 2023.[11] This is an order of magnitude drop and represents the smallest annual capacity increase on record—breaking only last year's record for the same dubious title.[12] This dramatic change has happened alongside the United States' rise to become the world's largest producer and exporter of natural gas. In parts of the country, the absence of pipeline capacity leaves supply bottled up and demand unserved. This harms consumers who rely on natural gas for heating and other energy needs; the power system, which increasingly depends on natural gas for its reliable operation; and foreign allies who could use American natural gas as a clean and responsible alternative to other foreign energy sources.

It is easy to see why NEPA has become a point of public fixation. As applied today with a nearly unbounded scope and searching judicial review, it consistently delays economically valuable projects of all kinds for frivolous reasons. The uncertainty of the process means many projects are never proposed. As of 2021, a single environmental-impact statement took an average of 33 months at a cost of $5.8 million,

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[11] *See* U.S. Energy Info. Admin., Natural Gas Intrastate Pipeline Capacity Additions Outpaced Interstate Additions in 2023 (Mar. 20, 2024), https://www.eia.gov/todayinenergy/detail.php?%20id=61623.

[12] U.S. Energy Info. Admin., *The Least U.S. Interstate Natural Gas Pipeline Capacity On Record Was Added In 2022* (Mar. 2, 2023), https://www.eia.gov/todayinenergy/detail.php?id=55699.

which is to say nothing of the untold economic costs of projects that have been deterred outright.[13]

Sabal Trail and the decision below intensify these problems. If the decision below is upheld, an economically valuable rail line in Utah will face additional delay while the STB studies environmental problems in Texas and Louisiana. It also creates unpredictability in project approvals. Similar projects face different fates as courts argue over whether FERC or another authorizing agency adequately discussed the downstream climate change implications of a project. *Compare N.J. Conserv. Found.*, 2024 WL 3573637, *with Food & Water Watch v. FERC*, 104 F.4th 336 (D.C. Cir. 2024). That unpredictability further disincentivizes development and growth.

To illustrate, consider how decisions applying *Sabal Trail* have wreaked havoc on oil and natural gas drilling on federal lands. The Bureau of Land Management ("BLM") must hold "[l]ease sales" to auction off the right to drill for oil and natural gas on public lands. 30 U.S.C. § 226(b)(1)(A). The lease sales themselves are subject to NEPA review. But no drilling can occur until the new leaseholder undergoes its own permitting process, which includes a second round of NEPA review. 43 C.F.R. §§ 3162.3-1(c), 3162.5-1. Nevertheless, since 2015, nearly every oil and gas *lease sale* held by BLM has been challenged under NEPA on the basis of the effects on global climate change from the mere procedural act of holding a lease sale.

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[13] Michael Bennon & Devon Wilson, *NEPA Litigation over Large Energy and Transport Infrastructure Projects*, 53 Env't. L. Rep. 10836, 10846 (2023).

And following the logic of *Sabal Trail,* the challengers have often *won*. *See, e.g.*, *WildEarth Guardians v. Zinke,* 368 F. Supp. 3d 41 (D.D.C. 2019). This obstructs the congressionally mandated lease program even though the issuance of a lease does not, in and of itself, authorize *any* impact to the environment, as a leaseholder must still undergo one or more rounds of NEPA review before it is permitted to drill a well on the lease. This puts economically valuable projects on hold despite the obvious conclusion that one well will have no measurable, quantifiable impact on global climate change.

The judicial expansion of NEPA's scope also undermines the legislative process. Congress knows that the funds that it may appropriate for infrastructure or other needs will be wasted, as agencies study any conceivable environmental effect in an effort to litigation-proof their projects. *See* Rutzick, *supra* note 3, at 4.

Congress has recognized these issues and taken steps to address them. Congress amended NEPA to impose time and page limits. The Fiscal Responsibility Act of 2023 requires agencies to complete an environmental-impact statement within two years and in fewer than 150 pages (or 300 pages for actions "of extraordinary complexity"). *See* Pub. L. No. 118-5, § 321, 137 Stat. 10, 42 (2023); 42 U.S.C. § 4336(a)(1) (2024). It also codified *Public Citizen*'s holding that only "reasonably foreseeable environmental effects" for which the agency action itself is the legal proximate cause must be studied. 42 U.S.C. § 4332(c). Many federal courts have not heard Congress's clear message. This Court should take the necessary steps to rein in the lower courts.

Finally, while some advocates will urge this Court to resolve the question presented in this case narrowly, on a rationale specific to the facts of this case, this Court should clearly reverse the decision below and repudiate *Sabal Trail*. Otherwise, the judicial frustration of congressional designs will continue. The courts have transformed NEPA's simple think-before-acting framework into a judicial veto, while empowering federal agencies to flaunt congressional directions. Relying on NEPA, courts have seemingly directed agencies to incorporate questions of "deep 'economic and political significance,'" *Biden*, 143 S. Ct. at 2375 (quoting *UARG v. EPA*, 573 U.S. 302, 324 (2014)), into their decision making, even when such considerations are far from their wheelhouse. This Court should make clear that NEPA does not empower agencies to answer the questions that are Congress's to address.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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