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 D.C. Circuit

BRIEF OF HOWARD UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS CLINIC AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS

Howard University School of Law is the nation's first historically Black law school. For more than 150 years since its founding during Reconstruction, the law school has worked to train "social engineers" devoted to the pursuit of human rights and racial justice. As part of this mission, the Howard University School of Law's Civil Rights Clinic advocates on behalf of clients and communities whose voices often go unheard. This case involves the National Environmental Policy Act ("NEPA"), a statute that elevates such voices by requiring administrative agencies to meaningfully evaluate federal actions that "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Clinic has a particular interest in ensuring that government officials consider communities' perspectives before acting in ways that will substantially impact their health and welfare.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted NEPA to ensure that federal agencies carefully assess the impact of their actions on the human environment. Specifically, NEPA requires agencies to evaluate the actions they undertake with full awareness of the reasonably foreseeable environmental consequences; to consider feasible alternatives that might mitigate adverse effects; and to maintain transparency and engage with the public throughout the process. As a result, over time, NEPA has proven to be a vital civil rights tool that empowers those who have historically been excluded from decisionmaking processes. NEPA ensures that all people with a stake in federal action—

[1] No counsel for a party authored this brief in whole or in part and no person other than amicus and its counsel made a monetary contribution to its preparation or submission.

regardless of race, color, national origin, tribal affiliation, or income—can have a voice.

Since its enactment in 1970, NEPA has expressly required federal agencies to consider environmental impacts "to the fullest extent possible." Pub. L. No. 91-190, § 102, 83 Stat. 852, 852-53 (1970). To that end, courts and implementing agencies have long understood indirect or secondary effects to be a core part of the NEPA analysis—including many effects that might otherwise fall beyond agencies' regulatory jurisdiction or would not trigger tort liability. Indeed, Congress enacted NEPA in part to ensure that agencies could not simply ignore the environmental impacts of their actions based on perceived limits on their regulatory jurisdiction.

Notwithstanding the statutory text and history, Petitioners and their amici—attacking NEPA as little more than red tape—invite this Court to invent new, bright-line limitations on the statute's scope. Petitioners' proposed limits are difficult to discern and seem to have shifted during this litigation. But Petitioners appear to suggest, at minimum, that agencies should be free to ignore any effects of their actions that fall beyond their direct or primary regulatory authority, and even that NEPA considerations must be coextensive with damages liability in tort.

Petitioners' policy concerns are overstated.[2] But regardless, NEPA cannot mean what they say it does.

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[2] Notably, the vast majority of projects require very limited review under NEPA. For instance, approximately 96% of Federal Highway Administration-approved projects "involve no significant environmental impacts and, hence, require limited documentation, analysis, or review under NEPA." Linda Luther, Cong. Rsch. Serv., R42479, *The Role of the Environmental Review Process in Federally*

Rather, each of Petitioners' proposed restrictions relies on a misunderstanding of how NEPA works and why Congress enacted it. As illustrated below, communities have used NEPA for decades to bring to light serious, detrimental impacts that could stem from federal action—not just to block projects, but also to improve them. Had either of Petitioners' apparent rules been in place, many NEPA success stories never could have happened.

At bottom, agency decisions all too often threaten environmental consequences that are grave and widespread. Through NEPA, Congress forced agencies and bureaucrats to at least *consider* these consequences, often to the benefit of all parties. Drawing arbitrary boundaries to erase broad swaths of considerations from NEPA would rob communities around the country of the statute's promise. The Court should reject Petitioners' flawed, ahistorical standard.

ARGUMENT

I. Congress enacted NEPA to foster informed decisionmaking and amplify the voices of communities affected by federal action.

Petitioners and their amici paint a bleak picture in which NEPA, as a procedural statute, helps no one and accomplishes little.[3] That could not be further from the truth.

Funded Highway Projects: Background and Issues for Congress 4 (2012), https://crsreports.congress.gov/product/pdf/R/R42479. NEPA's more stringent requirements are reserved for projects that pose a significant risk of environmental degradation.

[3] *See, e.g.*, Pet. Br. 1-2 (lambasting NEPA as imposing "endless red tape," "endless make-work," a "boil-the-ocean approach," and an "anti-development treadmill"); Prop. & Env't Rsch. Ctr. Br. 20 (arguing that NEPA fails to facilitate consideration of local

To understand why, consider the pre-NEPA state of affairs. For decades, federal law provided no avenue for community members to voice dissent over or suggest how to improve environmentally detrimental projects. By enacting NEPA, Congress changed that: It set forth a framework that gave all Americans a voice in federal actions that would impact their environment and, therefore, their quality of life. More than that, Congress suffused NEPA with an explicit focus on how environmental effects impact *people*. And to achieve NEPA's substantive goals, in recognition of the interconnected character of the natural and human environment, Congress directed agencies to consider a very broad range of environmental impacts.

A. Before NEPA, federal agencies often ignored communities' interest in a safe and healthful environment.

Prior to NEPA, federal agency employees routinely greenlit deeply consequential projects without considering how the environmental impacts of those projects would affect people and their communities. Consider, for instance, pre-NEPA highway construction projects in Orlando, Florida and St. Paul, Minnesota.

In the late 1950s and 1960s, the construction of Interstate 4 ("I-4") and State Road 408 in Orlando devastated the formerly thriving African American

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community concerns); NACCO Nat. Res. Corp. Br. 4 (insisting that "[n]o one benefits from this approach to NEPA, except those seeking to delay projects with the aim of killing them"); Chamber of Com. Br. 16-17 (asserting that because NEPA does not "dictate[] . . . any particular outcome," broader information-gathering for projects that involve significant environmental impacts does not "yield[] any incremental environmental benefit").

community of Parramore. Among other immediate harms, these two construction projects destroyed thousands of homes, scores of businesses, and six churches in Parramore; erected a concrete wall between Parramore and downtown Orlando; and erected a physical barrier that isolated the housing complex of Griffin Park from the rest of Parramore.[4]

Yet these initial impacts were only the first of the harms the community would suffer for generations. The increased volumes of cars and exhaust following construction of these highways worsened air pollution in the surrounding neighborhoods and, in turn, caused respiratory and cardiovascular diseases.[5] As a result of these mid-20th-century construction projects, today, Griffin Park remains surrounded by two major highways that are used by hundreds of thousands of cars on a daily basis.[6] And the resultant air pollution has plagued residents for decades. Residents are unable even to open

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[4] *See* Jerry Hume, *FDOT Extension to Reconnect Parramore with Griffin Park*, Spectrum News 13 (Feb. 8, 2023), https://mynews13.com/fl/orlando/news/2023/02/08/fdot-building-new-road-to-connect-to-parramore; Kristina Costa, Lia Cattaneo, & Danielle Schultz, *When Communities Didn't Have a Say*, Center for Am. Progress (Apr. 24, 2018), https://www.americanprogress.org/article/communities-didnt-say/; Yuri Gama, *The Rise and Fall of an African American Inner City*, Modern Cities (Mar. 31, 2017), https://www.moderncities.com/article/2017-mar-the-rise-and-fall-of-an-african-american-inner-city-page-3.

[5] *See* Union of Concerned Scientists, *Cars, Trucks, Buses and Air Pollution* (Sept. 15, 2023), https://www.ucsusa.org/resources/cars-trucks-buses-and-air-pollution; Julia Craven, *Even Breathing is a Risk in One of Orlando's Poorest Neighborhoods,* Huffington Post (Jan. 23, 2018), https://www.huffpost.com/entry/florida-poor-black-neighborhood-air-pollution_n_5a663a67e4b0e5630072746e?l8=.

[6] *See* Craven, *supra* note 5.

their windows due to the fumes and dust from the heavy traffic outside. Both children and adults have suffered from asthma and other cardiovascular and respiratory diseases. Paramedics are a constant presence in the housing complex.[7]

A similar story unfolded in St. Paul, where the Federal-Aid Highway Act of 1956 funded construction of a highway linking downtown business districts—what would become Interstate 94 ("I-94").[8] The route bisected the Rondo neighborhood, home to almost 50 percent of St. Paul's Black population.[9] One in every eight African Americans in St. Paul saw their homes demolished, and many businesses were permanently shuttered.[10] And today, the air pollution generated by ongoing use of I-94 predictably harms residents of Rondo, contributing to elevated rates of death and disease in the community.[11]

As these examples show, prior to NEPA's enactment in 1970, federal agencies were not generally mandated to consider the impacts of such projects on the human environment—and affected communities and individuals had no unified framework in which to raise them. It is

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[7] *See id.*

[8] *See* Ehsan Alam, *Before It Was Cut in Half by I-94, St. Paul's Rondo Was a Thriving African American Cultural Center*, MinnPost (Jun. 19, 2017), https://www.minnpost.com/mnopedia/2017/06/it-was-cut-half-i-94-st-paul-s-rondo-was-thriving-african-american-cultural-center/.

[9] *See id.*

[10] *See* Gale Family-Minn. Hist. Soc'y Library, *Rondo Neighborhood & I-94: Overview*, https://libguides.mnhs.org/rondo.

[11] *See* Ava Kian, *Black Minnesotans Disproportionately Affected by Environmental Pollutants*, MinnPost (Feb. 17, 2023), https://www.minnpost.com/race-health-equity/2023/02/black-minnesotans-disproportionately-affected-by-environmental-pollutants/.

hardly surprising, then, that marginalized communities across the country have been disproportionately exposed to environmental factors (including airborne pollutants, heavy traffic, and industrial contaminants) that heighten their risk of illness and disease.[12] With the stroke of a pen, agency officials pre-NEPA were able to approve projects that would irrevocably alter the health and dynamics of communities for generations without even being aware of, let alone weighing, the impact of their actions.

B. Congress enacted NEPA to ensure a safe and healthful environment for every American.

NEPA changed the status quo. Congress enacted NEPA to establish a national policy designed not only to protect the environment for its own sake, but also to promote harmony between people and nature; to protect a safe and healthful environment for every individual; and to require agencies to consider all reasonably foreseeable impacts on the human environment.

For proof, look no further than NEPA's codified declaration of policy. Congress "recogniz[ed] . . . the critical importance of restoring and maintaining environmental quality," not just in the abstract, but to promote "the overall welfare and development of man." 42 U.S.C. § 4331(a). It "declare[d] that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony." *Id.* And, in particular, Congress worked to "attain the widest range of beneficial uses of the environment without . . . risk to health or safety, or other

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[12] *See, e.g.*, Schulz, A.J., et al., *Racial and Spatial Relations as Fundamental Determinants of Health in Detroit*, 80 Milbank Q. 677 (Dec. 2002), https://pmc.ncbi.nlm.nih.gov/articles/PMC2690127/.

undesirable or unintended consequences," as well as to "preserve important historic, cultural, and natural aspects of our national heritage." *Id.* § 4331(b)(3)-(4). If any doubt remained, Congress concluded its declaration with an explicit "recogni[tion] that each person should enjoy a healthful environment," *id.* § 4331(c), and it required an environmental impact statement for any federal action that significantly affects "the quality of the *human* environment," *id.* § 4332(2)(C) (emphasis added).

The history leading up to NEPA's enactment reinforces the plain meaning of its text. In introducing NEPA on the floor of the Senate on July 10, 1969, NEPA's principal sponsor and champion, Senator Henry "Scoop" Jackson, stated: "[W]e will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth. An environmental policy is a policy for people. Its primary concern is with man and his future." 115 Cong. Rec. 19009 (1969). NEPA's principal sponsor in the House similarly declared that the statute aimed "to provide each citizen of this great country a healthful environment." 115 Cong. Rec. 40924 (1969).

NEPA's text and history thus reflect Congress's embrace of the principle that every person—regardless of race, color, national origin, tribal affiliation, or income—should have the opportunity to live in environmental conditions conducive to their safety, health, and overall welfare.

C. NEPA demands a broad, holistic approach to considering environmental impacts.

To fulfill Congress's policy in light of the interconnectedness of the natural and human environment, NEPA requires federal agencies to consider a broad range of environmental impacts before

undertaking action. Here, too, the statute bespeaks breadth. To be sure, NEPA is not without limits. But Congress's declaration of policy explicitly recognized the "interrelations of all components of the natural environment." 42 U.S.C. § 4331(a). Congress accordingly directed agencies to consider environmental effects "*to the fullest extent possible*" and in consultation with other agencies having "jurisdiction by law or special expertise with respect to any environmental impact involved." *Id.* § 4332 (emphasis added).

Once again, the history leading up to NEPA reinforces this understanding. Congress was keenly aware that to achieve NEPA's goals—at least when it came to projects with significant environmental impacts—agencies needed to develop comprehensive understandings of how seemingly attenuated factors interacted with each other. In 1968, Congress laid the groundwork for NEPA in a joint House-Senate colloquium with executive branch heads and leaders of industrial, academic, commercial, and scientific organizations. The colloquium produced a report that highlighted a common error in planning and development—namely, the failure to account for complex interactions of ostensibly independent factors within a system:

> [T]he concept of single, rigid, linear cause-to-effect chains of natural events has given rise to organically unreal and practically untenable conclusions. More attention should be given to the network type of causal relations in an integrated system that establishes a multiplicity of alternative routes to such a goal of optimizing the development of environmental resources.

Staff of S. Comm. on Interior and Insular Affs. & H. Comm. on Sci. and Astronautics, 90th Cong., *Congressional White Paper on a National Policy for the Environment* 5 (Comm. Print 1968). The colloquium report further recognized that "[a]ll factors and their cohesive impact on each other need to be simultaneously considered . . . Our tendency to maximize a specific change or result too often sacrifices other interrelated parts without optimizing the total result." *Id.*

The Conference Committee Report on NEPA reflects this broad understanding. The Report noted that Congress mandated that agencies consider environmental impacts to the "fullest extent possible" to prevent any agency from using "an excessively narrow construction of its existing statutory authorizations to avoid compliance." H.R. Rep. No. 91-764, at 9-10 (1969) (Conf. Rep.). Similarly, Senator Jackson himself emphasized that NEPA "will effectively make the quality of the environment *everyone's* responsibility. No agency will then be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions." *National Environmental Policy: Hearing Before the S. Comm. on Interior & Insular Affs. on S. 1075, S. 237, and S. 1752*, 91st Cong. 206 (1969) (statement of Sen. Henry M. Jackson, Chairman, S. Comm. on Interior and Insular Affs.).

II. Consideration of all reasonably foreseeable effects on the human environment is core to NEPA's mandate.

Although NEPA is a procedural statute, its procedures exist to achieve substantive aims. As this Court long ago explained, NEPA's core premise is that informed decisionmaking will achieve better outcomes for

the environment: "[T]he strong precatory language of § 101 of the Act and the requirement that agencies prepare detailed impact statements inevitably bring pressure to bear on agencies 'to respond to the needs of environmental quality.'" *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The statute's impact statement requirement also brings participatory benefits by "ensur[ing] that the larger audience can provide input as necessary to the agency making the relevant decisions"—and this, too, helps "foster excellent action." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (internal quotation marks and citation omitted). In other words, NEPA does not merely pronounce aspirational environmental goals; to fulfill those goals, it requires an agency to engage with the public and consider a broad range of reasonably foreseeable environmental impacts of proposed action that will significantly impact the environment. *See* 42 U.S.C. § 4332.

It is therefore unsurprising that in the decade following NEPA's enactment, courts and agencies repeatedly recognized that it required consideration of the indirect, secondary, and/or cumulative environmental effects of federal action, including impacts within the jurisdiction of other regulators. As is familiar, the D.C. Circuit—consistent with NEPA's text and history—made clear early on that the statute was "not to be frustrated by an approach that would defeat a comprehensive and integrated consideration by reason of the fact that particular officers and agencies have particular occasions for and limits on their exercise of jurisdiction." *Henry v. Fed. Power Comm'n*, 513 F.2d 395, 406 (D.C. Cir. 1975).

And the D.C. Circuit was far from alone. For instance, that same year, the Ninth Circuit applied

contemporaneous understandings of NEPA in the specific context of indirect effects. *See City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975). *Davis* involved a proposal to construct a freeway exchange in an agricultural area as a means of promoting industrial development. *See id.* at 665. The state agency that approved the project in conjunction with the Federal Highway Administration ("FHWA" or "Highway Administration") argued that discussion of "secondary" environmental effects—namely, the environmental impacts of the development that the freeway exchange would induce—was unnecessary because those impacts bore some degree of uncertainty. *Id.* at 676.

The court disagreed, holding that NEPA requires an agency to investigate and analyze indirect impacts to inform its decisionmaking. *Davis*, 521 F.2d at 679. This was so, the court explained, because such effects lie at the very core of NEPA: "[W]e must bear in mind the inherent danger that the most serious environmental effects of a project may not be obvious, and that the purpose of the [environmental impact statement] requirement is to ensure that 'to the fullest extent possible' agency decisionmakers have before them and take into proper account a complete analysis of the project's environmental impact." *Id.* at 673. As the court explained, "[i]f the interchange is built, development will occur. And regardless of its nature or extent, this development will have significant environmental consequences for the surrounding area," requiring simply "an informed estimate of [those] consequences"—no more and no less. *Id.* at 676.

Davis illustrates just what a change NEPA wrought. In contrast to the pre-NEPA examples discussed *supra*

Part I.A, in which highway projects sailed through without consideration of their disruptive effects, the court in *Davis* recognized that "increased population, increased traffic, [and] increased pollution" were inevitable secondary impacts of highway construction—and, faithfully applying NEPA, it required agencies to consider and evaluate these environmental impacts. 521 F.2d at 675.

Other courts likewise recognized that NEPA demanded consideration of a broad scope of impacts on the human environment. The Eighth Circuit, for instance, promptly opined that "NEPA is concerned with indirect effects as well as direct effects," stressing the "increasing recognition that man and all other life on this earth may be significantly affected by actions which on the surface appear insignificant." *Minn. Pub. Int. Rsch. Grp. v. Butz*, 498 F.2d 1314, 1322 (8th Cir. 1974).

Other appellate courts made similar observations, including in the context of impacts that would manifest over long time horizons or those that would flow from the cumulative effects of many distinct actions. *See, e.g.*, *Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975) ("NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action under consideration."); *Sierra Club v. Morton*, 510 F.2d 813, 824-25 (5th Cir. 1975) (noting that agency guidelines, regulations, "and prior court decisions all require that federal agencies consider the cumulative effect of similar actions" under NEPA (footnote omitted));

Swain v. Brinegar, 517 F.2d 766, 775 (7th Cir. 1975) ("NEPA . . . recognizes that each 'limited' federal project is part of a large mosaic of thousands of similar projects and that cumulative effects can and must be considered on an ongoing basis.").

What's more, the Council on Environmental Quality ("Council" or "CEQ")—the agency tasked with issuing regulations to implement NEPA—shared this understanding. Less than four months after President Nixon signed NEPA into law, the Council explained that "[b]oth primary and secondary significant consequences for the environment should be included in the [NEPA] analysis," as well as "cumulative and long-term effects." CEQ, Statements on Proposed Federal Actions Affecting the Environment: Interim Guidelines, 35 Fed. Reg. 7390, 7391-92 (April 30, 1970). Other federal agencies agreed, and they considered such effects in their NEPA analyses from the statute's earliest days. *See* Env't Resp. Br. 6. Later in the decade, the Council issued its first set of formal regulations under NEPA, in which it again described "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable"—including "growth inducing effects and other effects related to induced changes"—as within the statute's scope. National Environmental Policy Act—Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. 55978, 56004 (Nov. 29, 1978) (to be codified at 40 C.F.R. § 1508.8).

Through additional guidance in 1981, the Council explained that an environmental impact statement "must identify all the indirect effects that are known, and make a good faith effort to explain the effects that are not known but are 'reasonably foreseeable.'" Forty Most Asked

Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18031 (Mar. 23, 1981). In addition, the Council stated, impact statements should include "alternative[s] . . . outside the legal jurisdiction of the lead agency" and "mitigation measures that could improve the project . . . outside the jurisdiction of the lead agency," so long as these alternative and mitigation measures were "reasonable." *Id.* at 18027, 18031. "The agency has the responsibility to make an informed judgment" about the effects of its acts, the Council explained; it "cannot ignore . . . uncertain, but probable, effects of its decisions." *Id.* at 18031.

In sum, Congress, the courts, and agencies agreed that the government would reach more informed decisions—and would better respect every American's desire for a safe and healthful environment—through public participation and mandated consideration of a broad range of environmental impacts under NEPA.

III. As several case studies illustrate, Petitioners' apparent standard would contravene the text, history, and purpose of NEPA.

Petitioners disregard the text and history of NEPA. Although the legal framework they propose is far from clear, Petitioners and their amici—capitalizing on the facts of this case—appear to suggest two unprecedented, bright-line limitations that would shrink NEPA analyses to superficial assessments. They seemingly argue that (1) NEPA limits agencies to considering effects over which they have *direct* or even *primary* regulatory control in the abstract; and (2) only effects that would impose tort liability on an agency or developer can properly be considered under NEPA.

To whatever extent Petitioners continue to advance these two limitations, the Court must reject them. Each is unmoored from NEPA's text and represents a fundamental misunderstanding of what the statute accomplishes. As illustrated in many of the real-world examples below, imposing either of these novel limitations would undo decades of exactly the type of progress Congress envisioned when it enacted NEPA. And more broadly, contrary to Petitioners' and their amici's preferred narrative, NEPA is so much more than red tape: In countless instances, the statute's framework has enabled communities to work together with developers and agencies to improve project proposals, leveraging the benefit of public participation and informed decisionmaking to safeguard the environment.

A. NEPA does not give agencies license to ignore the effects of their actions because they do not otherwise primarily regulate those effects.

For starters, at the certiorari stage, Petitioners argued that an agency need not consider adverse environmental effects if the agency can claim that it lacks direct or even primary regulatory authority over those effects. *See* Pet. for Cert 4 (arguing that precedent tightly limits "the scope of an agency's NEPA review to the limits of that agency's regulatory authority"); *id.* at 5 (citing Surface Transportation Board's lack of "authority or jurisdiction over development of oil and gas" as justification for ignoring impacts of rail project related to oil and gas development). In their merits brief, Petitioners retreat from this position (though some of their amici double down on it). *See, e.g.*, Pet. Br. 26 (arguing more vaguely that NEPA does not require an agency to "review . . . issues far outside its limited remit, but well within the

purview of other agencies' authority"); *id.* at 6, 47, 48; Ctr. for Env't Accountability Br. 11 (rejecting consideration of "effect[s] . . . squarely within the jurisdiction and expertise of another agency or state").

Petitioners' backtracking is understandable. To the extent they still contend that an agency can ignore the consequences of its actions whenever another agency is tasked with regulating those consequences directly (or "primar[ily]," Pet. Br. 24), nothing in the statutory text supports such a limit. Congress was clear that agencies must consider environmental effects "to the fullest extent possible," and to that end, it required 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." 42 U.S.C. § 4332(2)(C). That requirement would make no sense if an agency could simply ignore any impact that fell beyond its organic jurisdiction.

History confirms that Congress specifically sought to prevent agencies from relying on narrow understandings of their own jurisdiction to ignore environmental impacts—precisely the "blinders on" approach Petitioners' view would enable. *See supra* Parts I.B, I.C. NEPA does not invite agencies to play a game of hot potato; the statute was designed to *avoid* that precise outcome by requiring *all* agencies to undertake holistic examinations of environmental effects, as courts and agencies have long recognized. *See supra* Part II; Env't Resp. Br. 31-33.

Consider the Federal Highway Administration, an agency tasked with helping design, construct, and maintain physical highway infrastructure. The Highway Administration has long understood NEPA as requiring it

to consider impacts (direct and indirect) primarily regulated by other agencies—and this understanding has proven crucial in achieving NEPA's promise across the decades.

Take, for example, the much-needed redesign to the outdated Woodrow Wilson Bridge, which has spanned the Potomac River between Maryland and Virginia for over six decades.[13] As any DMV resident can attest, the daily volume of cars using the bridge has grown dramatically over the years; it eventually exceeded the bridge's design capacity, causing elevated accident rates, congestion, and accelerated deterioration of the bridge itself.[14] In the 1990s, the Highway Administration proposed a replacement and expansion of the bridge from six to 12 lanes, and it embarked on a robust public engagement process under NEPA.[15]

As part of the NEPA process, local citizens and environmental organizations urged the Highway Administration to consider future transportation needs and the air pollution that would result from a 12-lane bridge. The Highway Administration directly regulates neither. The Federal Transit Administration ("FTA"), not the Highway Administration, provides assistance to local public transit systems. And the Environmental Protection Agency ("EPA"), of course, is the leading regulatory authority on air quality; it—not the Highway Administration—sets air pollution standards, to which the

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[13] *See* FHWA, *FHWA Leads the Planning Process for Redesign of the Woodrow Wilson Bridge*, https://fhwaapps.fhwa.dot.gov/planworks/Reference/CaseStudy/8.

[14] *See id.*

[15] *See id.*

Highway Administration and other agencies must adhere. *See* 40 C.F.R. pt. 93.

But the Highway Administration did not write off these concerns as irrelevant or beyond its narrow expertise. While it ultimately moved forward with the 12-lane proposal, the comments led the agency to build the bridge in a manner that could support future public transit initiatives, such as a heavy rail line (*i.e.*, Metrorail), to mitigate these indirect air pollution impacts.[16] Joy Maria Oakes, a local environmental leader, explained: "Consideration and incorporation of mass transit options . . . likely would not have occurred without" NEPA—and, in particular, the statute's "requirement to consider indirect . . . effects."[17] While Petitioners would have had the Highway Administration turn a blind eye to the concerns of the community under the guise of "not my jurisdiction"—punting air quality concerns to the EPA and future transportation needs to the FTA—the Highway Administration properly understood NEPA to require consideration of *all* reasonably foreseeable effects of its own action, to the benefit of the agency and DMV residents alike.

Or consider another NEPA success story, this one arising from the Montana Department of Transportation's plan (in collaboration with the Highway Administration) to expand U.S. Highway 93 along a 56-mile stretch within the Flathead Indian Nation.[18] The Nation is home to the

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[16] *See* Standing Decl. Supp. Pls.' Opp'n Dismiss at SD 256, *Alaska Cmty. Action on Toxics v. Council on Env't Quality*, No. 20 Civ. 5199 (N.D. Cal. Jan. 15, 2021), ECF No. 46-1.

[17] *Id.*

[18] *See* FHWA, *Second Revised Record of Decision for U.S. Highway 93* 1 (Oct. 23, 2001), https://www.mdt.mt.gov/pubinvolve/polsoncorridorstudy/docs/record-of-decision.pdf.

Salish, Kootenai, and Pend d'Oreille Tribes. It also hosts abundant wetlands and waterways that sustain a diverse range of local wildlife—including grizzly and black bear, deer, antelope, elk, eagles, bighorn sheep, mountain lion, and western painted turtles, as well as many migratory birds and fish.[19]

Through the NEPA process, the tribes collaborated with state and federal agencies to develop measures that would protect the region's vibrant wildlife and local vegetation, restore and connect wildlife habitats that had already been fragmented by the existing highway and nearby development, design a safer road overall, and avoid construction in areas of cultural and spiritual significance to members of the tribes.[20] The agencies implemented several key mitigation efforts to advance all of these goals, including constructing over 40 wildlife and fish passage structures and wildlife fencing, restoring local vegetation along areas proximate to wildlife crossings, and conducting riparian restoration activities at the fish and wildlife passage structures, among other measures.[21]

Notably, the U.S. Fish & Wildlife Service—not the Highway Administration—is the leading federal authority on wildlife preservation. Yet the Highway Administration, too, partnered with the state agency and the tribes

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[19] *See* CEQ, *Collaboration in NEPA: A Handbook for NEPA Practitioners* 52 (Oct. 2007), https://ceq.doe.gov/docs/get-involved/Collaboration_in_NEPA_Oct2007.pdf; Salish Kootenai Coll. & CSKT Wetland Conservation Program, *Wetlands: Lifeblood of the Flathead Reservation*, https://storymaps.arcgis.com/stories/2425de87c75f4c56bb65b2871eb6bc1d.

[20] *See* CEQ, *supra* note 19, at 52-53; FHWA, *supra* note 18, at 4-5.

[21] *See* FHWA, *supra* note 18, at 6-7.

through the NEPA process, which enabled the agencies to better protect wildlife, vegetation, and the tribes' cultural interests through the aforementioned mitigation efforts.

As additional examples, consider the pre-NEPA construction of I-4 and State Road 408 in Orlando and I-94 in St. Paul. *See supra* Part I.A. These highway projects devastated the communities of Parramore and Rondo for decades, with air pollution impacts that persist generations later. As explained, there can be no reasonable dispute that constructing new highways severely impacts air quality and health in neighboring communities. But it's not clear whether Petitioners' standard would require (or even allow) the Highway Administration to consider such impacts in deciding whether to greenlight highway construction. Do air quality and health concerns, "well within the purview of" EPA, fall "outside [the] limited remit" of the Highway Administration? Pet. Br. 26. Petitioners do not say. Yet it cannot be the case that a government actor could refuse even to consider such severe, lasting impacts on the human environment under NEPA, despite the predictable and grave consequences for community safety and health, simply because these impacts also fell within the expertise of a different regulator. The Court should reject this atextual, ahistorical limitation.

B. NEPA is concerned with informed decisionmaking, not damages liability.

Petitioners also insist that the scope of consideration NEPA demands in decisionmaking must extend no further than standard tort liability. *See* Pet. Br. 2, 16-18, 31-34. If, according to Petitioners, an agency would not be liable in tort, "the result should be no different just

because plaintiffs challenge an [environmental impact statement] under NEPA." Pet. Br. 17.

Once again, Petitioners' standard is unclear—in no small part because their view of what constitutes proximate causation *in tort* appears dubious. *Compare, e.g.*, Pet. Br. 17 (arguing that "environmental consequences that may (or may not) arise if a project spurs other conduct . . . are not proximate effects" even if reasonably foreseeable), *and id.* at 38 (suggesting that development "that [a] project may (or may not) spur" categorically cannot satisfy proximate cause), *with* D.B. Dobbs, P.T. Hayden & E.M. Bublick, The Law of Torts § 211 (2d ed.) ("[T]he defendant's responsibility for negligence today is not ordinarily superseded by an intervening cause if he could foresee such an intervening cause or a similar one."); *see also* Env't Resp. Br. 39-40.

More importantly, NEPA says nothing about tort proximate cause. And importing the tort standard wholesale—let alone Petitioners' cramped view of it—makes no sense. Tort doctrine is concerned with apportioning liability and fault. NEPA, in contrast, is about informed decisionmaking. As a result, this Court long ago rejected the notion that "any cause-effect relation too attenuated to merit damages in a tort suit" would necessarily "be too attenuated to merit notice in an [environmental impact statement]." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 n.7 (1983). Rather, this Court explained, "courts must look to the underlying policies" of tort law and NEPA to identify appropriate boundaries under each. *Id.* NEPA was enacted not to punish agencies or compensate those harmed by their actions, but simply to "alert[] governmental actors to the effect of their proposed

actions," *id.* at 772, "to the fullest extent possible," 42 U.S.C. § 4332, with a particular emphasis on the interconnected and cumulative nature of such impacts. *See supra* Parts I-II; Env't Resp. Br. 36-37. That is why NEPA does not require proximate cause; instead, it requires consideration of "reasonably foreseeable" environmental impacts. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.1(i).

Yet again, decades of court decisions and agency practice demonstrate that Petitioners' extreme view of the statute would not only contravene NEPA's text and history, but also undermine the statute's impact. For example, consider the rebuilding of New Jersey's Route 52 causeway, which connects Somers Point to the resort town of Ocean City. Inspections of the road revealed that an increase in traffic to Ocean City had caused substantial deterioration and cracking in the roadway and bridges.[22] New Jersey and federal authorities worked to rebuild the causeway, and citizens used the collaborative NEPA process to raise concerns regarding potential adverse impacts to their physical environment, including impacts to wetlands and (relevant here) safety hazards to pedestrians that would result from the design of the reconstructed route.[23]

Petitioners might say that because "other conduct"—here, negligent drivers or contributorily negligent pedestrians—could disrupt a developer's liability in tort for the harm to pedestrians, the agency should have

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[22] *See* FHWA, *Route 52 Reconstruction Project: Final Environmental Impact Statement / Section 4 (f) Evaluation* I-3 (July 1, 2002), https://www.nj.gov/transportation/works/studies/rt52/eis/fulldoc.pdf.

[23] *See id.* at V-1-V-3, V-4, V-11, V-12, V-14.

moved forward with a project whose physical impacts foreseeably placed human lives at risk without a second thought. But the agencies properly understood NEPA to encompass such considerations, ultimately approving a project that narrowed the number of lanes provided in residential areas and created bike shoulders and a protected sidewalk, among other mitigation efforts.[24] Had the agencies ignored citizens' worries as beyond the scope of NEPA, the project could not have proceeded with the same collaborative effort that brought agencies, project managers, and citizens together.

Similarly, consider the Babione Vegetation Management Project within the Bighorn National Forest. This National Forest Service project was intended to reduce dangerous forest fuels (*i.e.*, flammable vegetation) that could cause wildfires and to restore overall forest health, in part by improving a road that would have ensured access to logging.[25] That road, it turned out, ran adjacent to private property, and the landowner used the NEPA process to express concern that the project's physical improvements to the road would in turn allow trespassers access to his property.[26] Under Petitioners' view of proximate cause, the agency may have been

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[24] *See id.* at II-2, III-67, III-68, III-103, V-3, V-4, V-11, V-12, V-14.

[25] *See* U.S. Forest Service, *Babione Vegetation Management Project*, https://www.fs.usda.gov/project/?project=17040&exp=overview; U.S. Forest Service, *Babione Forest Vegetation Project: Proposed Action and Request for Comments* 4-6 (Dec. 2006), https://usfs-public.app.box.com/v/PinyonPublic/file/931866853680.

[26] *See* U.S. Forest Service, *Babione Vegetation Management Project – Environmental Assessment Objection & Comments* 3 (June 29, 2009), https://usfs-public.app.box.com/v/PinyonPublic/file/931866101022.

justified in completely ignoring the concerns of this landowner as to the contingent (albeit foreseeable) conduct of third parties. *See* Pet. Br. 17, 38. But, understanding that NEPA is about informed decisionmaking and not about tort liability, the agency listened, and it incorporated design elements to reduce the likelihood of trespassing, allowing the project to move forward while still respecting private property rights.[27]

For a third example, consider the Minnesota Central Corridor project—built alongside the same Minneapolis community devastated by the pre-NEPA construction of I-94. *See supra* Part I.A. Just as I-94 sought to connect the business districts of Minneapolis and St. Paul in the 1950s, in the 2000s and early 2010s, the Metropolitan Council (a regional policy board) sought to connect downtown Minneapolis and downtown St. Paul via a light rail line along the Central Corridor, "one of the region's most ethnically, racially, and culturally diverse areas." *St. Paul Branch of N.A.A.C.P. v. U.S. D.O.T.*, 764 F. Supp. 2d 1092, 1097 (D. Minn. 2011). Importantly, the Central Corridor includes much of what used to be the Rondo neighborhood. *Id.* Because of the residual effects of I-94, many residents had concerns about the project.[28] They feared that the project could adversely impact the local environment and indirectly harm local business revenues, including by

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[27] *See* CEQ, *The Eighth Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects* 13-14 (Feb. 1, 2011), https://ceq.doe.gov/docs/ceq-reports/feb2011/CEQ_ARRA_NEPA_Report_February_01_2011_final.pdf.

[28] *See* Laura Yuen, *Central Corridor: In the Shadow of Rondo*, MPRNews (Apr. 29, 2010), https://www.mprnews.org/story/2010/04/20/centcorridor3-rondo.

reducing available parking in the community through the light rail line's physical footprint.[29]

It is difficult to imagine that the agency charged with approval of the light rail project would bear tort liability for motorists' decision to forego visits to a hard-to-park neighborhood and the economic harm to local businesses that would inevitably follow. But there is little question that the project would, in fact, have impacted the physical landscape (and, thus, local business revenues) in a profound way—the impact was, in other words, reasonably foreseeable. And given that, the agency was obligated to consider those impacts in deciding whether and how to move forward with the light rail project—as a reviewing court held. *See St. Paul Branch of N.A.A.C.P.*, 764 F. Supp. 2d at 1112. Ultimately, the Metropolitan Council undertook several measures to mitigate these and other harms, including by investing in robust parking and business assistance programs.[30]

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[29] *See* FTA, *Amended Record of Decision on the Central Corridor Light Rail Transit Project* 9-14 (Aug. 2013), https://metrocouncil.org/Transportation/Projects/Light-Rail-Projects/Central-Corridor/Publications-And-Resources/Environmental/CC-ROD/Central-Corridor-Amended-Record-of-Decision-August.aspx; *St. Paul Branch of N.A.A.C.P.*, 764 F. Supp. 2d at 1112-13.

[30] *See* FTA, *Amended Record of Decision on the Central Corridor Light Rail Transit Project, Attachment C* 2-5 (Aug. 2013), https://metrocouncil.org/Transportation/Projects/Light-Rail-Projects/Central-Corridor/Publications-And-Resources/Environmental/CC-ROD/Central-Corridor-Amended-ROD-Attachment-C-August-1.aspx.

C. NEPA has enabled everyday Americans to be heard when federal projects will impact their environment.

As these examples illustrate, NEPA enables all citizens to have their voices heard when federal actions will affect their environments. And these stories are just the tip of the iceberg. In countless cases—contrary to Petitioners' and their amici's complaints of useless red tape—NEPA's participatory procedures and holistic analyses have precipitated better outcomes for the environment, impacted community members, and developers and agencies alike.

Take, for instance, the National Science Foundation's ("NSF's") construction of a solar telescope at the summit of Haleakalā, a sacred volcanic mountain in Maui of great cultural significance to Native Hawaiians.[31] The NSF properly understood that it was required to consider its own physical impacts on the environment, including impacts that specifically might affect "resources of importance to Indigenous Peoples."[32] Relevant here, construction of the solar telescope had the potential to adversely impact local wildlife species. It further risked

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[31] *See* Nat'l Park Serv., *Discovering Haleakalā's Past: Early Archeology of Haleakalā National Park* (July 28, 2023), https://www.nps.gov/hale/early-archeology.htm.

[32] NSF, *Action Plan of the National Science Foundation to Enhance Tribal Consultation in Response to Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships* 3 (2021), https://nsf-gov-resources.nsf.gov/2022-09/Tribal%20Engagement%20Action%20Plan.PDF.

physically degrading the only access road to the site, as well as other historic and cultural resources.[33]

In accordance with the holistic and participatory process that NEPA demands, NSF held several meetings with members of the public, including a Native Hawaiian Working Group, throughout the planning stages.[34] The engagement occasioned by NEPA yielded numerous mitigation measures, including traffic controls, steps to avoid or reduce effects on wildlife, careful pre- and post-project documentation of historic features susceptible to damage, an agreement to deconstruct the telescope at the end of its lifetime to minimize the permanent footprint of the project, and partnerships between NSF and community educational institutions to develop novel cultural programs.[35] In 2022, NSF and the community inaugurated the telescope with an opening pule (prayer) led by a respected local leader in accordance with Hawaiian cultural protocol.[36] And earlier this year, the telescope "achieved a major breakthrough in solar

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[33] *See* NSF, *Draft Supplemental Environmental Assessment: Advanced Technology Solar Telescope Project, Haleakalā, Maui, Hawai'i* vi-vii, 3.1-2, 3.2-2 to 3.2-4, 3.3-3 to 3.3-4 (June 1, 2011), https://files.hawaii.gov/dbedt/erp/Other_TEN_Publications/2011-06-08-MA-NEPA-DSEA-Advanced-Technology-Solar-Telescope.pdf.

[34] *See id.* at ix, 2-2, 4-2.

[35] *See id.* at 2-2, 3.2-3 to 3.2-6, 3.3-3 to 3.3-4; Nat'l Park Serv., *Newsletter May 2009: NSF Advanced Technology Solar Telescope Project* 3, https://nso.edu/wp-content/uploads/2022/01/NPS-ATSTNewsletter-May2009.pdf. NSF, of course, is not primarily tasked with managing protected lands or helping preserve indigenous culture.

[36] *See* NSF, *NSF's Flagship Solar Telescope, the Largest in the World, to Herald a New Era of Solar Science* (Sept. 5, 2022), https://nso.edu/press-release/u-s-national-science-foundation-celebrates-the-inauguration-of-its-daniel-k-inouye-solar-telescope/.

physics."[37] The NEPA process thus facilitated a conversation between the agency and the community, which ultimately afforded the community a voice without preventing the telescope from being built.

Or look at the Northwest Corridor Project,[38] which sought to improve and expand I-75 and I-575 in Georgia's Cobb and Cherokee Counties in order to alleviate traffic congestion.[39] Here again, unlike the pre-NEPA highway projects discussed *supra* Part I.A, NEPA's public participation process empowered community members to propose alternatives that would mitigate the proposal's many interconnected environmental, economic, and health impacts. Ultimately, rather than constructing several all-new highway lanes, the agencies selected an alternative that would use existing space to create two reversible traffic lanes for high occupancy vehicles.[40] As a result, the revised project displaced a total of just six residential properties and seven business properties (as opposed to the original plan, which threatened to displace over 300 residences and businesses) and impacted, at most, 0.3 acres of wetlands (as opposed to the 4.2 acres impacted by

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[37] Association of Universities for Research in Astronomy, *Groundbreaking Achievement: NSF Daniel K. Inouye Solar Telescope Produces Its First Magnetic Field Maps of the Sun's Corona* (Sept. 11, 2024), https://www.eurekalert.org/news-releases/1057450.

[38] *See* FHWA, *Project Profile: Northwest Corridor*, https://www.fhwa.dot.gov/ipd/project_profiles/ga_northwest_corridor_project.aspx.

[39] *See* FHWA, *Record of Decision for Northwest Corridor Project* 4 (May 14, 2013), https://saportareport.com/wp-content/uploads/2013/08/NW-Corridor-record-of-decision.pdf.

[40] *See id.* at 15.

the original plan).[41] In addition, the selected alternative conserved limited financial resources by forgoing the costlier plan of constructing two new non-reversible lanes in each direction that would not have been used to capacity.[42]

Consider, too, a seismic exploration project in the Canyons of the Ancients National Monument in southwest Colorado. This monument has been inhabited by humans for at least 10,000 years, including Ancestral Puebloan cultures, and it contains the highest known density of archaeological sites in the United States—in some cases more than 100 per square mile—featuring artifacts of Native American history.[43] In August of 2002, the Bureau of Land Management approved plans for a seismic survey of oil and gas resources across 9,600 acres of the Monument, including in numerous preserved archeological sites and sensitive wildlife habitats.[44]

Environmental groups sued under NEPA and promptly won a temporary restraining order.[45] Once the concerns were aired, it took *just one month* for all parties to reach a settlement agreement that moved certain

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[41] *See id.* at 20-22; *id.*, Appendix E, at 14, 17; Elly Pepper, *Never Eliminate Public Advice: NEPA Success Stories*, NRDC (Feb. 1, 2015), https://www.nrdc.org/resources/never-eliminate-public-advice-nepa-success-stories.

[42] *See* FHWA, *supra* note 39, at 15.

[43] *See* Bureau of Land Mgmt., *Canyons of the Ancients National Monument*, https://www.blm.gov/programs/national-conservation-lands/colorado/canyons-of-the-ancients.

[44] *See* Inst. Agric. & Trade Pol'y ("IATP"), *Energy Exploration Approved in Colorado Monument* (Sept. 26, 2002), https://www.iatp.org/news/
energy-exploration-approved-in-colorado-monument.

[45] *See* Order, *San Juan Citizens v. Norton*, No. 1:02-cv-01597 (D. Colo. Aug. 20, 2002), ECF No. 10.

seismic devices away from culturally or biologically significant areas and authorized additional on-site archeological and biological monitors in especially sensitive areas.[46] The NEPA process thus enabled stakeholders to coalesce around an alternative that better protected two irreplaceable treasures: the local ecological system *and* Native American culture and history. Without NEPA, the project may well have irreparably damaged both.

To be sure, there are also cases in which NEPA analyses result in projects not going forward. But that, too, can be for the best: Public participation and full information may reveal that a project's costs outweigh its benefits. To that end, consider, as a final example, a proposed 18,000-acre strip mine just 11 miles from Zuñi Salt Lake in New Mexico, a sacred lake to members of the Zuni, Acoma, Hopi, Laguna, and Taos Pueblos, as well as other tribes.[47] NEPA's procedures enabled the tribes to explain how the proposed mine, by extracting water from an aquifer below the shallow lake, would drastically impact water levels at the lake, irrevocably harming a treasured spiritual and cultural site. Ultimately, the mining company decided to expand its operations in a lower-sulfur mine in Wyoming, saving money overall and leaving the sacred site intact.[48] As Calbert Seciwa, a

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[46] *See* IATP, *supra* note 44; Stipulated Settlement Agreement, *San Juan Citizens v. Norton*, No. 1:02-cv-01597 (D. Colo. Sept. 20, 2002), ECF No. 27.

[47] *See* Jeffrey St. Clair, *The Battle for Zuni Salt Lake*, CounterPunch (Jul. 23, 2002), https://www.counterpunch.org/2002/07/23/the-battle-for-zuni-salt-lake/.

[48] *See* Ed Taylor, *SRP Drops Controversial Coal Mine Project*, East Valley Tribune (Aug. 5, 2003), https://www.eastvalleytribune.com/money/srp-drops-controversial-

member of the Zuni Pueblo, later explained to a congressional committee: "Without NEPA, the membership of the [Zuni Salt Lake] Coalition, affected Tribal Governments, organizations and individuals, Native and Non Native, would have been largely powerless to play any productive role in the decision making process regarding this area of sacred land."[49]

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These are just a handful of the many success stories NEPA's procedures have facilitated—and the examples go on and on. While NEPA is not an outcome-determinative statute, its procedures ensure that the government acts with full information regarding the impacts of its actions on the human environment, with the goal of encouraging superior outcomes. NEPA frequently succeeds in doing just that. Moreover, as these and other success stories show, compliance with the statute need not place business interests and public participation at loggerheads.

For NEPA to fulfill its purposes, however, the courts must stay true to Congress's consistent demand that reasonably foreseeable environmental impacts be considered "to the fullest extent possible." 42 U.S.C. § 4332(2)(C). Many NEPA success stories simply could not have happened if NEPA's scope were redrawn in the radical manner Petitioners and their amici urge. Embracing either of the bright lines Petitioners seem to advance (or any others they may propose going forward) would result in significant adverse consequences for human health, safety, and welfare—particularly for low-

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coal-mine-project/article_b0447e1c-fc9a-5860-bb28-457c30a51589.html.

[49] Pepper, *supra* note 41.

income communities, communities of color, and tribal communities—contrary to history's teachings and Congress's command.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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