No. 23-975

In the
Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE COALITION and UINTA BASIN RAILWAY, LLC,
Petitioners,

v.

EAGLE COUNTY, COLORADO et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

This Court granted certiorari to decide "[w]hether the National Environmental Policy Act requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority." Pet.i. Respondents' briefs confirm that the answer is no. As this Court has repeatedly held, an agency need only consider environmental effects with "a reasonably close causal relationship" to the agency's action, *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983), i.e., those for which the agency's action is "the legally relevant cause," *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 769 (2004). And if the agency goes further to identify more remote potential effects (that, if and when they arise, can be addressed by other agencies), NEPA's "rule of reason" ensures that the agency need not run every potentiality to ground. *Id.* at 767. The D.C. Circuit's alternative no-good-deed-goes-unpunished approach of faulting agencies for issue-spotting and deeming a 3,600-page EIS insufficient has nothing to recommend it.

Respondents' efforts to defend that approach fall flat. They spend considerable energy rehashing arguments that failed to move the needle at the certiorari stage. When they do turn to the merits, they attack strawmen. Petitioners have never suggested that tort-law concepts of proximate cause apply to NEPA lock, stock, and barrel. But this Court has repeatedly identified those tort-law principles as providing useful guidance. Thus, the failure to study remote effects that would be a complete non-starter as the basis for tort liability should not invalidate an EIS

or frustrate private investment in needed infrastructure. Nor do petitioners think that agencies should artificially truncate their study of environmental considerations. But once agencies consider the legally relevant effects stemming *from the project itself*, the identification of more remote effects from development the project enables should be applauded, not used as an excuse to mandate further study and further delay. Respondents insist that agencies have studied secondary effects from the dawn of NEPA, but they ignore that those early, relatively slim EISs simply identified potential impacts for other agencies that could regulate them if they materialized. Demanding more threatens to convert assembling an EIS into a Sisyphean task that obscures evaluation of the legally relevant effects of the project itself. As the Council on Environmental Quality aptly put it in NEPA's early days, NEPA does not demand "lengthy document[s]" "resembl[ing] encyclopedias" "which may obscure the major issues." CEQ, *The Fifth Annual Report of the Council on Environmental Quality* 412-13 (Dec. 1974), https://tinyurl.com/5yhcw84m.

The federal government acknowledges that the EIS here is sufficient and the court below erred, but it eschews any clear guidance. But both agencies and the investors who pay the price when the D.C. Circuit halts an infrastructure project based on a perceived agency foot fault deserve clarity. It should not take 3,600 pages of EIS to approve 88 miles of track, and any decision that demands even more has plainly lost sight of this Court's direction to study legally relevant causes and apply a rule of reason. This Court should

reverse the decision below and make clear that the EIS here is more than sufficient.

ARGUMENT

I. Text And Precedent Require Reversal.

A. The Decision Below Went Well Beyond the Project's Legally Relevant Effects and Demanded Consideration of Non-Proximate and Non-Environmental Effects.

1. This should have been a straightforward case, as STB's EIS went above and beyond NEPA's call. STB spent years consulting with partner agencies to put together a comprehensive EIS addressing the full sweep of environmental effects proximately caused by adding 88 miles of rail to a remote corner of northeast Utah. The EIS detailed how "construction and operation of the Railway" would affect "water resources, air quality, special status species like the greater sage-grouse, [and] land use and recreation." Pet.App.11a. It analyzed the project's effects on "local economies, cultural resources, and the Ute Indian tribe." Pet.App.11a. It forecasted the number of oil wells that (potentially) could be added in the Uinta Basin as a result of increased production spurred by the railway. Pet.App.31a. It even studied the (minuscule) impact the project could have on additional rail traffic on the national rail system. Pet.App.40a. After considering all these issues and more (including possible alternatives), STB approved the project, albeit with extensive mitigation conditions. Pet.App.76a; *see* Pet.App.149a-189a.

Despite that exhaustive process, the incentives of environmental opponents and the D.C. Circuit's *Sabal*

Trail decision made NEPA litigation all but inevitable. After all, environmental groups have learned that time is on their side, and delays for additional process can kill infrastructure projects even in the absence of any substantive deficiencies. *See, e.g.,* Pet'rs.Br.24 n.2 (discussing ultimate demise of project at issue in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989)).

The decision below vindicated that strategy and held that STB's exhaustive, 3,600-page study was not enough. In the D.C. Circuit's view, STB needed to go beyond the project's proximate environmental effects and fully study highly contingent effects of upstream, downstream, and downline developments that the rail line could spur, e.g., the "upline impacts on vegetation or special status species" that *might* be found near potential well sites *if* the new railway spurs independent development; environmental effects far afield in space and time, which *STB has no power to address*, e.g., "the effects of increased crude oil refining on Gulf Coast communities"; and even *non*-environmental effects, e.g., "accidents from additional oil trains traveling the existing Union Pacific rail line." Pet.App.12a-13a, 30a-37a, 40a-47a. Indeed, the court went so far as to hold that STB erred in failing to study "the climate effects of the combustion of the fuel intended to be extracted" at wells that *do not yet exist* but may (or may not) be constructed if the project increases demand for waxy crude. Pet.App.66a.

That demand to exhaustively study endless what-ifs violates almost every limit this Court has placed on NEPA. NEPA does not require agencies to undertake analyses of non-environmental effects, highly

contingent effects, or effects far remote in space or time; nor does it demand that agencies do more than identify secondary effects that fall within another agency's jurisdiction. If an effect is not environmental, then it falls outside NEPA's ambit by definition. *Metro. Edison*, 460 U.S. at 770. And but-for cause is decidedly not the test; if a potential effect is far remote or only tenuously forecastable, or if an agency lacks power to address an effect, then "the agency cannot be considered [its] legally relevant 'cause.'" *Pub. Citizen*, 541 U.S. at 770. Furthermore, given NEPA's mandate to consider not only "the environmental impact of the proposed action," but also "*alternatives* to the proposed action," 42 U.S.C. §4332(2)(C)(i), (iii) (emphasis added), the focus of the causation inquiry must remain *on the project itself*, not on secondary effects that any plausible alternative may engender. *See Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289, 322 (1975) ("[T]o decide what kind of an [EIS] need be prepared, it is necessary first to describe accurately the … 'action' being taken."); Pet'rs.Br.33. Simply put, NEPA draws a "line between those causal changes that may make an actor responsible for an effect"—which an agency must consider as part of its NEPA review—"and those that do not"—which an agency may consider, but need not. *Pub. Citizen*, 541 U.S. at 767 (quoting *Metro. Edison*, 460 U.S. at 774 n.7).

Those principles doom the decision below and respondents' pleas to affirm it. To be sure, the Uinta Basin Railway may be the *but-for* cause of upstream development in the Uinta Basin, which may in turn have environmental impacts. It may also be the but-for cause of increased refining (and ultimately emissions) that may result from making it easier to

get waxy crude out of the Uinta Basin and into the market. And by connecting this remote stretch of Utah to the national rail system, the project may be the but-for cause of additional train accidents somewhere on that vast system. But this Court has made crystal clear that "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." *Id.* Instead, agencies need only consider effects for which *the project itself* is the "legally relevant 'cause.'" *Id.* at 769. And in no way is 88 miles of track the "legally relevant 'cause'" of any of "th[ose] effect[s]." *See id.*[1]

2. This Court has repeatedly emphasized that defining the scope of legally relevant causes "is like" applying "the familiar doctrine of proximate cause from tort law." *Metro. Edison*, 460 U.S. at 774; *see also CSX Transp., Inc. v. McBride*, 564 U.S. 685, 708 (2011) (Roberts, C.J., dissenting) (citing *Metropolitan Edison* as an example of a case adopting "the standard requirement of proximate cause"). The Court doubled down on the "analog[y]" in *Public Citizen* and explained that "proximate cause analysis turns on policy considerations and considerations of the 'legal responsibility' of actors," and so agencies need only study effects for which the proposed action is the legally relevant cause. 541 U.S. at 767 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of*

[1] That is doubly true in light of STB's common-carrier mandate. As the Solicitor General explains, the "proper[]" way to "understand" the action STB was asked to authorize is as "a request to provide 'common carrier rail service connecting the Basin to the interstate common carrier rail network,'" not "a request to approve new oil and gas development." US.Br.43.

Torts 274 (5th ed. 1984)). And while this Court has twice held that the scope of the legally relevant effects that must be studied under NEPA is like the tort-law proximate-cause standard, it has never suggested it is "like" anything else. Thus, to claim (as respondents do) that there is some "fundamental mismatch" or unbridgeable "disconnect" between NEPA and "tort-law proximate causation," Envt.Resps.Br.21, is to defy this Court's clear and repeated teachings.[2]

As petitioners acknowledged, *see* Pet'rs.Br.32-33, while proximate-cause principles provide the most apt analogy, the scope of the NEPA mandate is not identical to the scope of tort liability. As this Court has explained, a "cause-effect relation too attenuated to merit damages in a tort suit" might still "merit notice in an EIS" given "the underlying policies" animating NEPA (and vice-versa). *Metro. Edison*, 460 U.S. at 774 n.7. Respondents seize on the acknowledged limits of the analogy to try to dismiss proximate-cause considerations out of hand. But in an area where line-drawing is both difficult and inevitable, the most apposite guidance provided by this Court cannot be so lightly swept aside. And when the prospect of tort liability for operators of 88 miles of track in rural Utah (let alone for the regulators who

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[2] Respondents' "mismatch" theory emphasizes that tort law is backward-looking, whereas NEPA is forward-looking. Envtl.Resps.Br.21. Why they think that helps their cause is a mystery. After all, cases involving prospective injuries create even greater opportunity for endless hypothetical conjecture than do cases involving an actual concrete past injury. Without a meaningful proximate-cause limitation, suits for prospective relief would be limited only by the imagination of the plaintiff or the D.C. Circuit.

green-lighted the project) for downline train accidents and pollution in the Gulf is not just doubtful, but wholly implausible, then it is a sure sign that the decision below is irreconcilable with this Court's precedents.

Notably, for all their complaints about the tort-liability analogy, respondents never deny that a tort suit for the kind of speculative remote effects the D.C. Circuit required STB to study would be laughed out of court. *Cf. Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring in the judgment) ("'For want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith."). Respondents thus essentially have no choice but to dismiss what this Court has repeatedly pointed to as a useful analogy as a useless "mismatch." Entvl.Resps.Br.21.[3]

Respondents ultimately concede that "if an effect is so attenuated from the proposed action as to be speculative, then the agency need not consider it." Envtl.Resps.Br.19. That concession essentially abandons the decision below, which explicitly held that STB *needed to "engage*[] *in … 'speculation'"* about how much of an "increase in oil production" might flow

[3] The federal government agrees that tort-law proximate-cause principles can be useful and on the bottom line that STB's EIS was sufficient, but it shies away from endorsing any clear limiting principles. But bench and bar need guidance on the extent of an agency's NEPA obligations. Federal agencies, of course, remain free—subject to the constraints of the BUILDER Act—to flag or even study more remote environmental effects. When it comes to what the agency *must* consider, this Court should provide clarity and triple down on the usefulness of the tort-liability proximate-cause analogy.

from the construction of an 88-mile railway in rural Utah and how any such (speculative) increase might affect Gulf Coast communities. Pet.App.32a-35a. And a requirement to study the effects of "as yet unknown and unplanned independent projects that would occur on as yet unidentified private, state, tribal, or federal land," "undertaken 'by as yet unknown entities,'" at a level that is "simply unknown and unknowable," Pet.App.31a (quoting CADC.Gov.Br.35-36), is a mandate to engage in rank speculation. *See* JA528-29 ("[I]t is not possible to conclude that any specific [oil well] project would be proximately caused by the proposed rail line."); Pet'rs.Br.38.

While respondents promise that agencies need not engage in speculation, their description of what agencies must study to avoid reversal is far less clear and an invitation for endless NEPA litigation. They suggest that NEPA requires agencies to study any environmental "effect [that] is both 'likely to occur' and capable of being described 'with sufficient specificity to make … consideration useful.'" Envtl.Resps.Br.23 (quoting *Sierra Club v. Marsh*, 769 F.2d 868, 878 (1st Cir. 1985) (Breyer, J.)). That "test" leaves all the critical questions unanswered. How "likely to occur" must an event be before an agency must study it? The decision below mandates further study of downline accidents that have an infinitesimally small likelihood of occurring at any particular location. And what makes "consideration useful"? The decision below demands that an agency charged with "authorizing" rail line "activities" unless "inconsistent with the public convenience and necessity," 49 U.S.C. §10901(c), study remote effects that are the inevitable consequence of increasing rail traffic and that fall

within the ambit of other agencies—federal, state, and tribal. How exactly is it "useful" for an agency to speculate about how 88 miles of track will spur upstream developments that will require their own environmental reviews (by different agencies) if and when they materialize? *See* Utah.Br.9-10; Louisiana.Br.4-12.

That is why this Court held in *Public Citizen* that an agency is under no obligation to study effects that it "has no ability to prevent." 541 U.S. at 770; *see, e.g., Ctr. for Bio. Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1295 (11th Cir. 2019) ("[I]t was sensible for the Corps to draw the line at the reaches of its own jurisdiction, leaving the effects of phosphogypsum to phosphogypsum's regulators."). To be sure, agencies must "consult with and obtain the comments of" other agencies that have "jurisdiction" or "special expertise." 42 U.S.C. §4332(C). But, contrary to respondents' suggestions, that consultation requirement does not radically expand NEPA such that agencies must speculate today about every possible secondary effect that some other agency might directly confront in a concrete context years from now. Here, STB followed NEPA's consultation requirement to a T, cooperating with the U.S. Forest Service because it has jurisdiction to grant a right-of-way for the rail line, *see* JA111-12, cooperating with three other federal agencies and one state agency for similar reasons, and meeting regularly with expert agencies like EPA to discuss the rail line's proximate effects. *See* JA116-17. NEPA required no more, and certainly did not require STB to identify and consult with every agency with jurisdiction over remote effects in any destination where trains originating in the Uinta Basin and

traveling the national rail system pursuant to common-carrier obligations might arrive.

Nor does NEPA require agencies to exhaustively study secondary effects that lie outside their area of expertise and fall squarely within the primary authority of other agencies, whether federal, state, or tribal. If FRA wants to figure out ways to improve train safety throughout the system, it can do so.[4] If EPA wants to regulate emissions at oil refineries, it can do so too (subject to congressional limits). And if Utah officials want to consider the environmental effects of upstream development projects (and balance them against the need for economic growth in these underdeveloped counties) if and when they materialize, that is all to the good. *See* Utah.Br.8-10. But forcing STB to exhaustively consider matters that fall well outside its limited and pro-development remit—or attempting to address these far-flung issues by stopping 88 miles of track in rural Utah—has nothing to recommend it, as this Court has already recognized. *See Pub. Citizen*, 541 U.S. at 767-70.

Respondents invoke a welter of lower-court decisions that predate *Metropolitan Edison* and do not support a contrary conclusion in any event. Early lower-court cases recognized that an agency "should not pour an inordinate amount of its resources into environmental forecasting." *Louisiana v. Fed. Power Comm'n*, 503 F.2d 844, 877 (5th Cir. 1974). Indeed, some of respondents' cases affirmatively *absolved* agencies from the need to chase every ripple,

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[4] *See* U.S. Dep't of Transp., Fed. R.R. Admin., *FRA Rigorously Examines Safety and Quality of Life Implications of Long Trains* (May 22, 2024), https://tinyurl.com/4tfv65rm.

particularly for "smaller projects" (like, say, an 88-mile railway in rural Utah) that need not employ "the same degree of accuracy" or "detail" as "forecasting" environmental effects for "projects of multi-billion-dollar dimensions." *Sci. Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). Even in the Ninth Circuit, it has long been established that when an EIS "could … be[] improved by a discussion of" minor or "remote" effects, failing to study those effects should not doom an EIS that otherwise "serve[s] the basic purposes" of facilitating informed agency decisionmaking. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283-84 (9th Cir. 1974).

Respondents' nostalgia about NEPA's early days only serves to underscore that things have subsequently gone awry. Respondents highlight a 1974 EIS that discussed some secondary effects of deepening the Tampa Bay Harbor from 34 feet to 43 feet. *See* Envtl.Resps.Br.6. But they overlook the key points: The agency managed to briefly identify those secondary effects (and note that state agencies could address them) in an EIS that needed just 291 pages to approve a nine-foot deepening.[5] More recently, a

[5] While the EIS did mention the possibility of more mining, it did not actually "study[]" that effect. *Contra* Envtl.Resps.Br.7. It merely recommended that *the relevant state agency* undertake "[c]areful planning and regulation" to prevent "adverse environmental damage." U.S. Army Eng'r Dist., Jacksonville, *Final Environmental Impact Statement: Tampa Harbor Project* 114 (Dec. 1974), https://tinyurl.com/yknc2z4e. That is exactly as it should be: Separately regulated secondary effects should be identified where possible; but NEPA does not demand that they be reviewed in detail by an agency without jurisdiction to address them.

further four-foot deepening of Tampa Bay necessitated a *1,700-page* EIS that took two and a half years and $700,000 to prepare. *See* U.S. Army Corps of Eng'rs, *Tampa Harbor Navigation Improvement Study* at E-6 (July 2024), https://tinyurl.com/yc2mj6wr (main document), https://tinyurl.com/5n644s7r (appendices). Similarly, respondents misleadingly suggest that a 1974 EIS studying a 113-mile rail line extension provided extensive analysis of resulting mining operations. *See* Envtl.Resps.Br.2. In reality, the proposal included *both* the rail line *and* new strip-mining operations, and the ICC's analysis focused on the rail line and covered just 181 pages, while mining operations were analyzed separately by a different agency with regulatory authority over the mining. *See* Dep't of the Interior, *Final Environmental Impact Statement: Proposed Development of Coal Resources in the Eastern Powder River Coal Basin of Wyoming* II-86 (1974), https://tinyurl.com/2p92k6j3.

Respondents try to defend the decision below as "consistent" with a longstanding "'Executive Branch interpretation.'" Envtl.Resps.Br.26. Needless to say, the Solicitor General begs to differ. And even apart from *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), it is unclear whether CEQ regulations have any force. *See Marin Audubon Soc. v. FAA*, --- F.4th ----, 2024 WL 4745044, at *3 (D.C. Cir. Nov. 12, 2024) (holding that "CEQ regulations, which purport to govern how all federal agencies must comply with [NEPA], are *ultra vires*"); *see also* NextDecade.Br.8-16. Regardless, there is nothing to this claim. CEQ promulgated the "reasonable foreseeability" standard shortly after NEPA's enactment, *see* 43 Fed. Reg. 55,978, 56,004 (Nov. 29, 1978), and never expected

agencies to spend years and thousands of pages chasing every conceivable impact. *See, e.g.*, CEQ, *Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulation*, 35A (Mar. 16, 1981) https://tinyurl.com/5t5exdtj ("Even large complex energy projects would require only about 12 months for the completion of the entire EIS process.").

Finally, respondents get nowhere with their alternative suggestion that NEPA requires consideration of every issue that "an ordinary prudent person" would want to consider before "deciding whether to proceed with a particular action." County.Br.40; *see also* Envtl.Resps.Br.23. One problem with that test is that the "ordinary prudent person" would actually want the proposed project to proceed on a timely basis, rather than allow endless speculation to delay projects for years and deter investors. Similarly, the ordinary prudent person would presumably view a 3,600-page EIS as wildly excessive, rather than insufficient for not considering speculative effects remote in time and distance.[6]

3. As a last-ditch effort to stave off reversal, respondents ask for a DIG. But this Court heard all the same criticisms (e.g., that this case is

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[6] Another problem with respondents' prudent-person test is that it does exactly what respondents (falsely) accuse petitioners of doing: It "frame[s] the dispositive question here as whether a person harmed by one of the new railway's environmental effects could seek damages in tort." Envtl.Resps.Br.33. Any 1L would recognize respondents' test as a dead-ringer for the ordinary duty of care forming the basis of negligence liability. *See* Dan B. Dobbs et al., *The Law of Torts* §127 (2d ed. 2024).

"straightforward" and "factbound," County.Br.16) at the certiorari stage, and granted review anyway—over the federal government's opposition, no less. Now that the Solicitor General has confirmed that the decision below is infirm and the EIS is adequate, there is no reason to unring the bell. *See also* Cert.Reply.7-11.

Respondents accuse petitioners of engaging in "a merits-stage bait-and-switch," "jettison[ing] the direct-authority-to-regulate test that they advanced at the certiorari stage and run[ning] with a new test that would import tort-law proximate causation wholesale into NEPA." Envtl.Resps.Br.30; *see also* County.Br.19. But petitioners have consistently argued that STB need not study speculative and remote effects that other agencies will have direct authority to regulate if and when they arise, *see* Pet'rs.Br.35-39; pp.6-11, *supra*; *see also* Cert.Reply.11, and the question presented places proximate effects front and center, *see* Pet.i ("Whether [NEPA] requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority."). Moreover, despite the County's contrary pleas—and rather extraordinary effort to file an entire brief premised on the claim that this Court's decision will not affect it—the question presented amply covers the D.C. Circuit's insistence that STB must run to ground remote downline effects (as well as equally remote upstream and downstream effects). *See* Envtl.Resps.Br.48 (so conceding).

Finally, the BUILDER Act provides no basis for avoiding the question presented, let alone for affirming the decision below. Congress has now made explicit that the scope of NEPA review turns on

foreseeability and reasonableness—i.e., proximate cause—and that NEPA does not alter statutory provisions delimiting an agency's authority or mission. *See* Pet'rs.Br.27-29.

Respondents boldly claim that the BUILDER Act actually codified the D.C. Circuit's aberrant view of NEPA. *See, e.g.*, County.Br.27-28. That claim comes with a heavy burden of persuasion given that Congress is not usually in the business of adopting lower-court interpretations that defy this Court's precedents—and does not codify even faithful lower-court precedent without doing so expressly. *See, e.g.*, *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 483-84 (2023). It did nothing of the sort here, and instead took action to put an end to bottomless process and EISs that make *War and Peace* look like a novella. The natural inference, then, is that Congress sought to incorporate into the BUILDER Act *this Court's* teachings, not the D.C. Circuit's contrary doctrine.

That leaves respondents with the claim that Congress rejected earlier proposals that would have gone even further in scaling back NEPA reviews. But "[f]ailed legislative proposals" are "a particularly dangerous ground on which to rest an interpretation," not least because "a bill can be proposed or rejected for any number of reasons." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160 (2001).

In the final analysis, any effort to suggest that Congress wanted to preserve business as usual in the D.C. Circuit or expand the scope of NEPA review in an Act entitled "Building United States Infrastructure through Limited Delays and Efficient Reviews" does

not pass the straight-face test. NEPA review in the D.C. Circuit (and the Ninth Circuit) deviated from Congress' original intent and posed a threat to infrastructure development. Congress acted to put reasonable guardrails on the process and to reaffirm that agencies (in both legislative proposals and proposed major agency actions, Pet'rs.Br.49) must consider "reasonably foreseeable" effects, but not chase down every rabbit hole or allow the perfect to be the enemy of infrastructure development. Senators.Br.4-9.

B. The Decision Below Flouts NEPA's Rule of Reason.

Because the supposed gaps the D.C. Circuit identified in STB's EIS are either not environmental effects at all or not proximately related to the project itself (or both), STB had no obligation to consider them under NEPA. But STB *did* identify them and considered some of them in considerable detail. Properly applied, the rule of reason encourages and respects that effort to go above and beyond the call of duty. No test of proximate cause or reasonable foreseeability is self-executing or beyond debate at the margins. Thus, an agency that errs on the side of identifying more remote effects and giving them modest consideration should be encouraged, not punished for failing to exhaustively investigate issues the agency itself raised. *But see Sierra Club v. FERC* ("*Sabal Trail*"), 867 F.3d 1357, 1375 (D.C. Cir. 2017).

The D.C. Circuit's no-good-deed-goes-unpunished approach flies in the face of NEPA and this Court's cases. "Inherent in NEPA and its implementing regulations is a 'rule of reason.'" *Pub. Citizen*, 541 U.S.

at 767 (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989)). NEPA review must end *somewhere*, and NEPA's rule of reason serves to ensure that courts do not endlessly second-guess agencies' judgments and "render agency decisionmaking intractable" by ordering them to consider just one more issue or draw the line just one inch further. *Marsh*, 490 U.S. at 373.

The rule of reason both buttresses and dovetails with the principle that agencies only need consider the legally relevant effects of their actions. And while the rule of reason encourages agencies to identify environmental issues that may arise from the indirect effects of extending infrastructure, it also underscores that once an agency identifies a secondary environmental effect and confirms that another entity (federal, state, or tribal) can regulate the effect rationally, the agency's task is complete. Thus, if a rail line may ultimately encourage additional upstream development or downstream refining, it is enough to identify the issues and alert the relevant actors that can rationally regulate the issues by imposing conditions on a concrete proposal or uniform regulations on refining, not by delaying or defeating an 88-mile infrastructure project that serves the public interest.

The D.C. Circuit blew past the rule of reason here. Since any environmental effects on Gulf Coast communities are both speculative and remote, STB could have declined to consider them altogether. NEPA limits an agency's obligations to "only such information as appears to be reasonably necessary under the circumstances for evaluation of the project

rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible." *N.Y. Nat. Res. Def. Council, Inc. v. Kleppe*, 97 S.Ct. 4, 6 (1976) (decision of Marshall, J.). But STB went above and beyond the immediate effects of developing 88 miles of track to identify and study the "many factors" that may affect the "possible destinations" for Uinta Basin trains. JA476; *see* JA476-78 (discussing wide variance in potential oil volumes and "the ability and willingness of refineries" on "a reasonable list of potential target markets" to accept Uinta Basin oil). STB even went so far as to identify likely destinations for additional waxy crude ranging from Puget Sound to the Gulf Coast. *See* JA478-80.

All of that extra effort, while not strictly necessary, is consistent with NEPA's goal of ensuring informed decisionmaking—and cannot rationally be a basis for saying the agency did not go far enough. Yet that is precisely what the decision below did. Applying the (il)logic of *Sabal Trail*, *see* Pet'rs.Br.16, the court held that because STB went to the trouble to trace potential increased waxy-crude production in Utah to refineries on the Gulf Coast and derailments on the national rail network, STB was obligated to follow those issues all the way down to the decimal point—and all the way up to investigating how adding 88 miles of track in Utah will contribute to climate change worldwide. Pet.App.33a-36a, 66a.

No one (save project opponents) benefits from that no-good-deed-goes-unpunished approach. The decision below perversely incentivizes agencies to study fewer issues—and thus make less-informed

decisions. After all, if the reward for doing extra credit is extra homework, then the only rational response is to aim for the minimum and omit mention of issues that cannot be exhaustively studied because they require layering speculation on speculation about matters far removed from the relevant agency's expertise.

But the real burdens of the *Sabal Trail* approach fall not on the agencies that commit the perceived foot fault, but on the project proponents who have done nothing wrong. That is particularly unmistakable in cases where a perceived EIS inadequacy causes the D.C. Circuit to vacate the authorization for an ongoing project. *See* NextDecade.Br.4-8. But it is equally true in cases like this one, where perceived inadequacies in the agency's EIS create long delays in what purports to be a streamlined process. Congress plainly wants to facilitate infrastructure, but railroads do not build themselves. It takes considerable private investment to make most infrastructure projects a reality, and that kind of investment requires predictability and reasonable time horizons. For investors, time is money, but environmental opponents know that time is on their side. A "procedural" demand for additional study or the dreaded supplemental EIS can result in the delay that serves as a substantive death knell for the project and a warning to anyone contemplating comparable projects in the future. *See* API.Br.23; Nacco.Br.8.

The rule of reason exists to provide the play in the joints necessary to ensure that a well-intentioned procedural statute does not become a substantive roadblock to everything from infrastructure projects to

military exercises. As the federal government has observed, "NEPA, like the Constitution that authorizes its enactment, is not a suicide pact." Pet. for Writ of Cert. 16, *Winter v. Natural Resources Defense Council, Inc.*, No. 07-1239, 2008 WL 859374 (U.S. Mar. 31, 2008). No statute that embraces a rule of proximate cause or reasonable foreseeability will provide perfect guidance as to every issue that an agency must study. The rule of reason ensures that an agency that does a reasonable job of identifying and studying foreseeable effects is not faulted for omitting the next-most relevant consideration or identifying but not exhaustively studying more remote effects. The D.C. Circuit's approach as exemplified in cases like *Sabal Trail* and the decision below does the opposite.

II. The Court Should Hold That STB's EIS Satisfies NEPA's Requirements.

While the D.C. Circuit has demanded endless process, this Court should make clear that enough is enough. In particular, this Court should make crystal clear that 3,600 pages of EIS is more than enough to evaluate the environmental effects of 88 miles of rail line.

This is not a case where the agency shirked its responsibilities or refused to do what Congress asked of it. Quite the opposite: This is a case in which the agency went above and beyond, only to be told that it did not go far enough in studying the remote effects it identified. As countless amici have attested, this case is hardly unique in that regard. Under the decision below and the *Sabal Trail* line of cases on which it built, "it is impossible for agencies or applicants to be

confident that a NEPA document is sufficiently expansive to satisfy whichever judge or panel will decide the case." API.Br.22.

In the end, there may be limits to how much guidance this Court can provide lower courts in limiting NEPA review to reasonably foreseeable effects. After all, this Court has twice reaffirmed those limits and the usefulness of tort-liability proximate-cause principles, and it has not stopped decisions like the one here. But this Court should reaffirm that NEPA review is limited to legally relevant causes and that the tort-law proximate-cause standard is a useful analogy, such that a remote cause that would be a non-starter for tort liability should not doom a project. It should buttress those limits by making clear that when another federal, state, or tribal entity can sensibly regulate a remote effect if and when it materializes, the agency preparing an EIS need not discuss that effect in detail. And it should emphasize that the rule of reason prevents agencies from being punished for going beyond what is strictly necessary.[7]

But perhaps the clearest signal this Court could send the lower courts is to hold that the EIS here is more than sufficient. 88 miles of track should not require more than 3,600 pages of environmental study. STB considered every environmental effect for which this project was a legally relevant cause. It cooperated

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[7] It should also remind lower courts that NEPA applies equally to legislative proposals and agency actions, and that courts should not saddle agencies with endless process that would be a wholly impractical (and perhaps unconstitutional) constraint on the Executive's constitutional prerogative to make legislative recommendations. *See* U.S. Const. Art. II, §3.

with agencies (like the Forest Service) that shared jurisdiction over the project, and it consulted with other agencies (like EPA) to get the benefit of their expertise. *See* JA116-17; Pet'rs.Br.45-46. It then went beyond the call of duty to identify increasingly remote and speculative effects and investigate them to a reasonable degree. NEPA requires nothing more.

CONCLUSION

The Court should reverse and hold that STB's EIS was sufficient.

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