No. 23-975

In the Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE COALITION, ET AL., PETITIONERS

v.

EAGLE COUNTY, COLORADO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS UNITED STATES OF AMERICA AND U.S. FISH AND WILDLIFE SERVICE IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in finding that the Surface Transportation Board's analysis of the environmental effects of approving a new rail line in Utah was inadequate under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-71a) is reported at 82 F.4th 1152. The decisions of the Surface Transportation Board (Pet. App. 74a-190a; 190a-230a) are available at 2021 WL 41926 and 2021 WL 5960905.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2023. A petition for rehearing en banc was denied on December 4, 2023 (Pet. App. 72a-73a). The petition for a writ of certiorari was timely filed on March 4, 2024 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a challenge to the federal government's authorization of a new railway line in the Uinta Basin in Utah. Pet. App. 3a.[1]

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

The Board may grant an exemption authorizing rail construction when it finds that (1) a full proceeding under Section 10901 "is not necessary to carry out" the rail transportation policy in Section 10101 of the Interstate Commerce Act, and (2) either that (a) the transaction is limited in scope, or (b) the application of Section 10901 "is not needed to protect shippers from the abuse of market power." 49 U.S.C. 10502. In an exemption proceeding, the Board considers the transportation merits of a project by looking to the exemption criteria in

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[1] Federal respondent the Surface Transportation Board assessed the petition for a writ of certiorari and the Board was unable to reach a majority decision on the response. Accordingly, the Board does not join this opposition or otherwise take a position on the petition.

Section 10502, which in turn requires the Board to analyze the rail transportation policy factors identified in Section 10101.

b. The National Environmental Policy Act of 1996 (NEPA), 42 U.S.C. 4321 *et seq.*, requires agencies to take a "hard look" at the environmental consequences of a proposed major federal action. See, *e.g.*, *Baltimore Gas & Elec. Co.* v. *Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). When an agency determines that a major federal action will have potentially significant environmental impacts, it must prepare an environmental impact statement. 42 U.S.C. 4332(2)(C). Under NEPA, an agency must consider an environmental effect of a proposed major federal action if there is a "'reasonably close causal relationship' between the environmental effect and the alleged cause." *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 767 (2004) (quoting *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). This Court has "analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'" *Ibid.* (citation omitted). It has also held that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770.

2. Petitioners seek to build an 85-mile-long railway line in Utah connecting the Uinta Basin in northeastern Utah to the existing interstate freight rail network near Kyune, Utah. Pet. App. 190a. Presently, all freight moving in and out of the Uinta Basin is transported by trucks on the area's limited road network. *Id.* at 192a. The proposed rail line would connect the Uinta Basin to the interstate rail network to provide shippers with an

alternative to trucking. *Id.* at 192a, 206a, 208a. Though the new railway could carry any goods produced or consumed in the Basin, "the [petitioners] recognize[] (and no one disputes) that the Railway's predominant and expected primary purpose would be the transport of waxy crude oil produced in the Uinta Basin." *Id.* at 7a.

In May 2020, petitioners sought authorization to construct and operate the railway through the Interstate Commerce Act's exemption process and requested that the Board issue a preliminary decision addressing the transportation merits of the exemption before completing its environmental review. Pet. App. 6a, 8a. The Board issued a non-binding preliminary decision in January 2021 assessing the railway's transportation merits. *Id.* at 191a. The Board found, subject to the completion of the environmental review, that the railway met the standards for an exemption under Section 10502 of the Interstate Commerce Act. *Ibid.*

Meanwhile, the Board performed an environmental analysis under NEPA, issuing a draft environmental impact statement in October 2020, and a final statement in August 2021. Pet. App. 10a. In addition, to comply with the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, the Board consulted with the Fish and Wildlife Service (Service) regarding the effect of the new railway on endangered species, and the Service issued a final biological opinion in September 2021. Pet. App. 11a. Several months later, the Board issued its final exemption decision, which authorized construction and operation of the railway subject to environmental mitigation conditions. *Id.* at 74a-189a.

3. Eagle County, Colorado and several environmental organizations filed two petitions for review—which the court of appeals consolidated—challenging the

Board's preliminary and final exemption decisions, as well as the Service's biological opinion. See Pet. App. 13a.

The court of appeals granted the petitions in part and denied them in part. Pet. App. 1a-71a. The court concluded that Eagle County and the environmental organizations had standing to challenge both the Board's decisions and the Service's biological opinion. *Id.* at 14a-22a. The court also held that it had subject-matter jurisdiction to review the Board's decisions under the Hobbs Act. *Id.* at 22a-23a. And the court held that it had jurisdiction to review the Service's biological opinion because the Board had relied on and incorporated the opinion into its final exemption decision, and the Board's decisions are subject to review exclusively in the courts of appeals. *Id.* at 23a. The court then resolved numerous challenges to the merits of the federal agency actions in connection with the railway authorization. *Id.* at 25a-69a.

a. As most relevant here, the court of appeals held that the Board's NEPA analysis should have considered the upstream environmental effects of increased oil development and the downstream effects of refining that oil. Pet. App. 30a-37a. The court explained that the Board had offered two primary reasons for excluding those effects, and neither was sufficient to justify the agency's decision. *Id.* at 30a-31a.

First, the court of appeals rejected the Board's contention that, because of the agency's "'lack of information about the' location of future oil production sites" and the "'destination and end use of the [oil],'" the upstream and downstream effects were not "'reasonably foreseeable impacts'" that the Board was required to consider. Pet. App. 30a, 32a (citations omitted; brackets

in original). The court found that the Board had "fail[ed] to adequately explain why it could not employ 'some degree of forecasting' to identify the aforementioned upstream and downstream impacts." *Id.* at 35a (citation omitted).

Second, the court of appeals rejected the Board's contention that, under this Court's decision in *Public Citizen*, *supra*, it was not required to "identify and describe the environmental effects of increased oil drilling and refining" because the agency "lack[ed] the authority to prevent, control, or mitigate those developments." Pet. App. 36a. In the court's view, the Board had the authority to prevent those effects, observing that the Board had "exclusive jurisdiction over the construction and operation of the railway, including authority to deny the exemption petition if the environmental harm caused by the railway outweighs its transportation benefits." *Ibid.* (citing 49 U.S.C. 10501(c) and 10901(b)). The court also reasoned that the Board "is authorized to license railroad construction and operation based on the 'public convenience and necessity,'" which, the court concluded, "encompasses reasonably foreseeable environmental harms." *Id.* at 37a (citation omitted). Based on this analysis of the Board's "authority to deny an exemption to a railway project on the ground that the railway's anticipated environmental and other costs outweigh its expected benefits," the court found that "the Board's argument that it need not consider effects it cannot prevent" was "simply inapplicable." *Ibid.*

b. The court of appeals also identified several other flaws in the Board's NEPA analysis, including its failure to take a hard look at the increased risk of rail accidents downline, Pet. App. 40a-42a, the risk and impacts of wildfires downline, *id.* at 42a-45a, and the railway's

impacts on water resources downline on the Colorado River, *id.* at 46a-47a. In addition, the court rejected or declined to reach multiple other challenges under NEPA and the National Historic Preservation Act, 54 U.S.C. 304108. Pet. App. 29a, 37a-39a, 47a-50a, 55a-57a. The court also found flaws in the Service's biological opinion, *Id.* at 50a-55a, and in the Board's exemption decision under the Interstate Commerce Act, Pet. App. 57a-69a.

Based on the errors in the NEPA analysis and the biological opinion, the "fail[ure] to conduct a reasoned application" of the Interstate Commerce Act, and the Board's "fail[ure] to weigh the [railway's] uncertain financial viability and the full potential for environmental harm against the transportation benefits it identified," the court of appeals vacated the exemption order as arbitrary and capricious, and partially vacated the underlying NEPA assessment and biological opinion. Pet. App. 70a; see *id.* at 70a-71a.

4. Petitioners sought rehearing en banc. The court of appeals denied the petition, with no judge calling for a vote. Pet. App. 72a–73a.

ARGUMENT

Petitioners contend (Pet. 14-21) that this Court should grant the petition for a writ of certiorari to resolve a disagreement in the circuits regarding the proper application of this Court's decision in *Department of Transp.* v. *Public Citizen*, 541 U.S. 752 (2004). This Court's review is unwarranted because there is no circuit conflict regarding the proper application of *Public Citizen*'s holding that NEPA does not require an agency to analyze environmental effects when the agency "has no ability to prevent" those effects "due to its limited statutory authority." *Id.* at 770. What

petitioners describe as differences in the courts of appeals' understanding of *Public Citizen* are more appropriately attributed to variations in the statutory and regulatory authority wielded by different agencies in different contexts. And even if this Court were of the view that the question presented might warrant review at some point, this case would be a poor vehicle because, among other things, the government recently issued new regulations regarding the appropriate scope of NEPA review, and because the court of appeals identified several other flaws in the agency's NEPA analysis that will require a revised environmental impact statement regardless of the outcome of this case. The petition for a writ of certiorari should therefore be denied.

1. The courts of appeals uniformly recognize that, under *Public Citizen*, an agency need not consider environmental consequences it lacks the statutory and regulatory authority to prevent.

a. In *Public Citizen*, the Court considered whether an agency had reasonably excluded certain environmental effects from its NEPA analysis based on the agency's limited statutory mandate. 541 U.S. at 767. The case involved a NEPA challenge to safety regulations for Mexican tractor-trailer trucks that the Federal Motor Carrier Safety Administration (FMCSA) promulgated after the President agreed to lift a moratorium on the entry of Mexican trucks into the United States. *Id.* at 756, 760-761. The agency's NEPA analysis considered the environmental consequences of the roadside inspections required by its new safety rules. But the analysis did not consider the consequences of the increased presence of Mexican trucks in the United States because FMCSA determined that the increased presence was due to the President's decision to lift the

moratorium, rather than the agency's new regulations. *Id.* at 761. Several challengers asserted that limiting the NEPA analysis in that way was improper because the trucks' presence should be considered an effect of the regulations, on the theory that no Mexican truck could operate in the United States without obtaining a certification from FMCSA, and FMCSA could not issue any certifications for Mexican trucks until it promulgated the safety rules. *Id.* at 765-766.

This Court rejected the challenge, finding that the scope of the agency's NEPA analysis was appropriate because the agency's governing statutes prevented it from barring Mexican trucks based on the environmental effects of their entry. *Public Citizen*, 541 U.S. at 765; see *id.* at 767-770. The Court explained that, while FMCSA was required to ensure the safety and financial responsibility of the trucks operating within the United States, it had no "ability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating in the United States." *Id.* at 766. To the contrary, the Court explained, it would "violate" the agency's statutory mandate for FMCSA to refuse to authorize a Mexican motor carrier that was "willing and able to comply with the various substantive requirements for safety and financial responsibility." *Ibid.*

The Court declined to adopt the challengers' "particularly unyielding variation of 'but for' causation, where an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect." *Public Citizen*, 541 U.S. at 767. The Court explained that the challengers' theory conflicted with its prior decision in *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766

(1983), which had drawn an analogy to the doctrine of proximate cause under tort law and encouraged courts to look to NEPA's "underlying policies" to draw "a manageable line between those causal changes that may make" an agency responsible for an effect under NEPA "and those that do not.'" *Public Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774 n.7). The Court also relied on the "rule of reason" that is "inherent in NEPA and its implementing regulations," observing that "no rule of reason worthy of that title would require an agency" to analyze environmental effects when the results of that analysis "would serve 'no purpose.'" *Ibid.* (citation omitted).

Based on *Metropolitan Edison* and the rule of reason, the Court held that "where an agency has no ability to prevent a particular effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of that effect." *Public Citizen*, 541 U.S. at 770. And because FMSCA "simply lack[ed] the power to act on" the information that would have been produced by an analysis of the environmental consequences of permitting Mexican trucks to enter the United States, the Court found that the agency had acted reasonably in excluding the consideration of those effects from its NEPA analysis. *Id.* at 768.

b. The courts of appeals have relied on *Public Citizen*'s holding to affirm the reasonableness of an agency's decision to exclude a particular environmental effect from its NEPA analysis where—under the governing statutory and regulatory scheme—the agency had "no ability to prevent" that effect. 541 U.S. at 770. In *Center for Biological Diversity* v. *U.S. Army Corps of Engineers*, 941 F.3d 1288 (2019), for example, the

Eleventh Circuit held that the Army Corps of Engineers' decision not to consider certain environmental effects in issuing a discharge permit under the Clean Water Act was consistent with *Public Citizen* because the Corps could not have "hinge[d] its permitting decision" on the relevant effects without "ignoring the Clean Water Act's text and misapplying its implementing regulations." *Id.* at 1298.

Similarly, in *Ohio Valley Environmental Coalition* v. *Aracoma Coal Co.*, 556 F.3d 177 (2009), cert denied, 561 U.S. 1051 (2010), the Fourth Circuit determined that, under *Public Citizen*, the Corps was not required to consider the environmental effects of coal mining operations as a whole in issuing a permit for certain dredge and fill activities because the governing regulations assigned the "control and responsibility" for the mining operations to a different agency. *Id.* at 196-197. And in *Kentuckians for the Commonwealth* v. *United States Army Corps of Engineers*, 746 F.3d 698 (2014), the Sixth Circuit found that *Public Citizen* supported the Corps' determination that it did not need to consider the health effects of a mining project as a whole in issuing a specific permit because the agency had determined that it lacked "'sufficient control and responsibility' over the whole project" under the "complete regulatory scheme." *Id.* at 710 (citation omitted).

Courts have also cited the limited statutory and regulatory authority of other agencies in upholding the reasonableness of limits those agencies have placed on their NEPA analyses. Thus, in *New Jersey Department of Environmental Protection* v. *United States Nuclear Regulatory Commission*, 561 F.3d 132 (2009), the Third Circuit determined that the Nuclear Regulatory Commission's lack of "authority over the airspace above its

facilities" supported the agency's determination that it did not need to consider the environmental effects of an air attack on a nuclear facility. *Id.* at 139; see *id.* at 140 (explaining that the agency's "lack of control over airspace supports our holding"); see also *Protect Our Parks, Inc.* v. *Buttigieg*, 39 F.4th 389, 393, 400 (7th Cir. 2022) (citing *Public Citizen* in holding that a federal agency was not required to consider a potential regulatory option it lacked any authority to undertake).

The D.C. Circuit, too, has recognized that an agency's governing statutory and regulatory framework may limit the scope of its NEPA obligations. In *Sierra Club* v. *FERC*, 827 F.3d 36 (2016) (*Freeport*), the D.C. Circuit held that the Federal Energy Regulatory Commission (FERC) was not required "to address the indirect effects of the anticipated export of natural gas" as part of its NEPA analysis of the authorization of new natural gas facilities because "the Department of Energy, not the Commission, has sole authority to license the export of any natural gas going through the [new] facilities." *Id.* at 47 (emphasis omitted). The court explained that "[i]n the specific circumstances where, as here, an agency 'has no ability to prevent a certain effect due to' that agency's 'limited statutory authority over the relevant action,'" the agency need not consider that effect. *Ibid.* (quoting *Public Citizen*, 541 U.S. at 771).

The D.C. Circuit reached the same conclusion in two other cases involving challenges to FERC's decision to exclude the environmental effects of the export of natural gas from its NEPA analyses. *Sierra Club* v. *FERC*, 827 F.3d 59 (2016) (*Sabine Pass*); *EarthReports, Inc.* v. *FERC*, 828 F.3d 949 (2016). And in a fourth case, *Sierra Club* v. *FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal*

Trail), the court of appeals applied the same principles, but found that *Public Citizen* did not support FERC's decision to exclude certain adverse environmental effects from its NEPA analysis of the propriety of issuing a pipeline certificate because of differences in the governing statute. *Id.* at 1372-1373. The court explained that, in the first three cases, FERC could not have considered the environmental effects of natural gas exports "when regulating in its proper sphere." *Ibid.* But the court determined that in *Sabal Trail*, the agency was acting under a different and broader grant of statutory authority that instructed the agency to consider "the public convenience and necessity." *Ibid.* (citation omitted). The court found that, under that distinct provision, the agency was permitted to "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment." *Ibid.* "*Public Citizen* thus did not excuse FERC from considering these indirect effects." *Ibid.*

c. The court of appeals acted in accordance with those decisions in this case when it determined that, because of the scope of the Surface Transportation Board's statutory and regulatory authority, the Board could not rely on *Public Citizen* as a basis for not considering the environmental effects of increased oil drilling and refining in its NEPA analysis. Pet. App. 36a. The court did not dispute the principle that an agency need not consider the environmental effects of developments that it "lacks authority to prevent, control, or mitigate." *Ibid.* The court instead found that principle "simply inapplicable" in light of the Board's statutory and regulatory authority. *Id.* at 37a. In the court's view, the governing framework—including the Board's statutory mandate "to license railroad construction and

operation based on the 'public convenience and necessity'"—gave the Board "the authority to deny an exemption to a railway project on the ground that the railway's anticipated environmental and other costs outweigh its expected benefits." *Ibid.* (citation omitted).

2. Petitioners are therefore mistaken in asserting (Pet. 20) that there is a "sharp split between the D.C. Circuit's reading of *Public Citizen* and the reading employed by the Third, Fourth, Sixth, Seventh, and Eleventh Circuits." All of those courts recognize that, because *Public Citizen* held that an agency need not consider environmental effects it cannot prevent, the scope of the requisite NEPA analysis will depend on the scope of the particular agency's statutory and regulatory authority. And while the D.C. Circuit has sometimes found that *Public Citizen* does not excuse an agency's failure to consider certain environmental effects, it has done so based on its understanding of the breadth of the agency's authority in the particular case, not a disagreement regarding *Public Citizen*'s holding.

Petitioners' assertion to the contrary is based primarily (Pet. 18-19) on the Eleventh Circuit's criticism of the D.C. Circuit's decision in *Sabal Trail*, but that criticism does not establish an *inter*-circuit conflict because the Eleventh Circuit described *Sabal Trail* as "at odds with earlier D.C. Circuit cases correctly" recognizing the limits on the environmental analysis NEPA requires. *Center For Biological Diversity*, 941 F.3d at 1300. Therefore, at most, the Eleventh Circuit's criticism suggests an *intra*-circuit conflict that would not warrant this Court's intervention. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It

is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

In any event, while the Eleventh Circuit criticized *Sabal Trail* for "fail[ing] to take seriously the rule of reason announced in *Public Citizen*," in the very next paragraph, the Eleventh Circuit described that "rule of reason" as dictating that "agencies are not required to consider effects that they lack the statutory authority categorically to prevent." *Center for Biological Diversity*, 941 F.3d at 1300. Neither *Sabal Trail* nor the decision below purported to reject that principle. Instead, both held that—because the governing statutory provisions gave the agency the authority to consider and disapprove the relevant project based on the increased harm to the environment that the project would cause—the agency had the statutory authority to prevent that increased harm. See *Sabal Trail*, 867 F.3d at 1373; Pet. App. 37a.

Petitioners err in contending (Pet. 20) that differences in the governing statutory and regulatory framework "cannot account for the circuits' conflicting interpretations" because the Corps of Engineers in the other decisions had "just as much power" as the agencies in *Sabal Trail* and the decision below. The Eleventh Circuit itself held otherwise, recognizing that *Sabal Trail* was distinguishable from its own decision in *Center for Biological Diversity* because, among other things, "the agency's statutory authority in *Sabal Trail* was much broader than the Corps' here." 941 F.3d at 1299.

Petitioners also err in asserting (Pet. 19) that the Ninth Circuit's decision in *Center for Biological Diversity* v. *Bernhardt*, 982 F.3d 723 (2020), suggests disagreement in the circuits regarding *Public Citizen*'s meaning. The main NEPA challenge in that case

involved whether it was technically feasible for the agency to quantify emissions resulting from the foreign consumption of oil. *Id.* at 737-740. The court cited and described the D.C. Circuit's decision in *Sabal Trail* in justifying its conclusion that an agency may not excuse its failure to assess the environmental effects of "indirect greenhouse gas emissions" based on the agency's need to make "assumptions" in order to estimate those effects. *Id.* at 737. The Ninth Circuit did not discuss either *Public Citizen* or *Sabal Trail*'s treatment of that case, mentioning *Public Citizen* only in a "cf." cite to a sentence stating that the agency "ha[d] the statutory authority to act on the emissions resulting from foreign oil consumption." *Id.* at 740.

3. Petitioners' other arguments in support of review lack merit, and this case would be a poor vehicle even if the Court was inclined to consider the question presented.

a. Petitioners contend (Pet. 21-23) that the decision below warrants this Court's intervention because the D.C. Circuit's approach to *Public Citizen* turns agencies into "environmental-policy czars." Pet. 22 (citation and emphasis omitted). But the decision below merely found that the Board had the statutory authority to consider the environmental effects of increased oil drilling and refining, Pet. App. 36a, and remanded to the Board so that it could either analyze those effects or "explain in more detail" why it could not identify and quantify them, *Id.* at 34a (citation omitted); see *id.* at 35a (holding that the Board had not "adequately explain[ed] why it could not employ" forecasting and other methods to estimate those effects). The decision therefore does not require the Board to refuse to authorize the railway based on the environmental effects of increased oil

drilling and refining, and it does not even require the Board to consider those effects if it can adequately explain why their consideration is not feasible.

Moreover, petitioners do not challenge the court of appeals' understanding of the Board's statutory authority to deny an exemption based on the relevant environmental effects. Rather, petitioners state that the court "was right" to find "that the Board could decline the project 'if the environmental harm caused by the railway outweigh[ed] its transportation benefits.'" Pet. 23 (quoting Pet. App. 36a) (brackets in original). And petitioners do not contend that there is any disagreement in the courts of appeals regarding that conclusion.

b. Petitioners also assert (Pet. 24-25) that the Court should grant review because in 2022 the Council on Environmental Quality (CEQ) issued regulations addressing the appropriate scope of NEPA review. See 87 Fed. Reg. 23,453 (Apr. 20, 2022). Petitioners maintain (Pet. 24) that the Federal Register notice accompanying the 2022 rules contains an analysis of *Public Citizen* that differs from that reflected in the CEQ's 2020 regulations, 85 Fed. Reg. 43,304 (July 16, 2020). The court of appeals' decision, however, does not analyze or discuss either the 2022 or 2020 regulations, because the Board's NEPA analysis was performed "under pre-2020 regulations." Pet. App. 26a. And those intervening regulatory developments, as well as a further set of relevant regulations released by the CEQ earlier this month, 89 Fed. Reg. 35,442 (May 1, 2024), provide an additional reason to deny certiorari, because the circuits have not yet had an opportunity to assess whether or how the new regulations may affect their approach.

c. This case would also be a poor vehicle for review because the holding that is the subject of this petition

was just one of several independent holdings adverse to the Board and the federal government. In assessing the Board's NEPA compliance, the court of appeals also held that the Board had failed to adequately analyze three other environmental effects (downline rail accidents, risks and impacts of wildfires, and impacts on water resources). Pet. App. 40a-47a. Those holdings would not be affected by the resolution of the question presented, and the same is true with respect to the court's holdings regarding the flaws in the Fish and Wildlife Service's biological opinion, and some of the defects the court identified in the Board's application of the Interstate Commerce Act. See *id.* at 57a-69a. Because of these additional deficiencies, *id.* at 70a, the Board and the Fish and Wildlife Service would be required to issue revised decisions regardless of the outcome of this petition.

d. Finally, this case would be an unsuitable vehicle because petitioners did not challenge the D.C. Circuit's understanding of *Public Citizen* before the court of appeals. While the Board relied on *Public Citizen* in explaining the scope of its NEPA analysis, Pet. App. 135a, petitioners did not discuss or even cite that case in their panel briefing. See C.A. Doc. 1990837 (Mar. 20, 2023). And their petition for rehearing en banc likewise did not discuss *Public Citizen* or suggest that the panel's understanding of that decision implicated or created a division in the circuits. See C.A. Doc. 2019520 (Sept. 29, 2023). Instead, petitioners argued that the panel's NEPA analysis conflicted with other D.C. Circuit decisions. See *id.* at 9-13. Accordingly, the court of appeals did not have an opportunity to consider petitioners' arguments regarding the proper application of *Public Citizen*, and this Court should not do so in the first

instance. Cf. *Byrd* v. *United States*, 584 U.S. 395, 404 (2018) (observing that "it is generally unwise" for this Court "to consider arguments in the first instance").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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