No. 23-975

IN THE
# Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE COALITION, ET AL.,

*Petitioners,*

v.

EAGLE COUNTY, COLORADO, ET AL.,

*Respondents.*

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

## BRIEF FOR RESPONDENT EAGLE COUNTY


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## QUESTION PRESENTED

Whether the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority.

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## INTRODUCTION

Petitioners are asking this Court to impose limits on NEPA that have no basis in its text whatsoever. And their request comes at a strange time: after Congress adopted a bipartisan compromise to revise NEPA's text and reform aspects of the NEPA process. The amendment to NEPA makes clear that agencies must study the "reasonably foreseeable" environmental consequences of their actions before committing themselves—the same standard the courts of appeals have applied for decades, including here.

As a result, some of what petitioners say is uncontroversial. Everyone agreed below that agencies are not required to review effects that are *not* reasonably foreseeable. But petitioners go much further than that, and much further than Congress's recent amendment: they ask this Court to give agencies broad permission not to study the consequences of their actions, even when those consequences affect the environment, are reasonably foreseeable, and bear directly on the decision before the agency. Petitioners offer numerous different formulations of their rule, but ground none of them in the statutory text.

The project at issue here, the Uinta Basin Railway (Railway), will affect the environment in respondent Eagle County, Colorado, in foreseeable, even obvious ways—yet petitioners seek to take them off the NEPA table. The Railway's overriding purpose is to transport crude oil onto the national rail network. Nine out of every ten trains that use it would travel eastbound through Eagle County—doubling the traffic on an existing rail line along the Colorado River. Petitioners claim that whether that doubling of traffic

will lead to environmental consequences is "imponderable[]." Petrs. Br. 1. The agency here, the Surface Transportation Board, certainly did not think so. It recognized that doubling train traffic would increase the incidence of sparks that can cause wildfires and would produce additional train accidents resulting in oil spills. And the environmental consequences of, for example, a derailment of an oil-laden train next to the river are eminently foreseeable. The agency made several case-specific errors in dealing with these "downline" consequences, as Eagle County argued below and the court of appeals recognized, but the agency did not deem them categorically unforeseeable, as petitioners now urge.

In a change from the certiorari stage, petitioners attempt to argue that their new view of NEPA *also* treats these concrete downline impacts as not foreseeable. That comes too late. And as a result, answering the question presented will not change the judgment vacating the NEPA decision. For that reason, combined with petitioners' loss of interest in the supposed circuit split they asked the Court to resolve, the Court may wish to consider whether their petition was improvidently granted.

Even if the Court entertained petitioners' belated challenge to these downline impacts, petitioners are wrong on what NEPA requires. Agencies must consider the *reasonably foreseeable* effects of federal actions, not every effect for which the action is a conceivable but-for cause. Petitioners purport to espouse the foreseeability standard—as Congress itself has done—but would change it beyond recognition by blending in concepts of tort liability and agency primacy. But those limitations are directly contrary to

the statute and to this Court's caselaw. First, an agency's obligation to study environmental consequences runs deeper than simply asking "could we be sued in tort for this?" Indeed, even the decision that petitioners incorrectly claim "all but resolves" this case, *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), expressly said that it was *not* reading a tort-liability limit into NEPA. And *Metropolitan Edison*'s key holding—that NEPA did not require an agency to consider *non-environmental* harms, such as the psychological harm caused by the fear of a nuclear accident—says little about this case, which involves classic, foreseeable environmental effects such as wildfires, water contamination, and oil spills.

Second, an agency cannot ignore a particular environmental effect of its own decision merely because another agency might have some jurisdiction over that issue. To the contrary, NEPA implements a detailed scheme for inter-agency collaboration—a scheme that the Board followed in cooperating with four other federal agencies here. The statutory text does not countenance petitioners' pass-the-buck approach.

The Court should reject petitioners' proposal to dramatically remake NEPA, along with their efforts to rewrite the record below in their attempt to shield from review multiple agency errors that are outside the question presented.

## STATEMENT OF THE CASE

### I. Legal Background

#### A. The National Environmental Policy Act

1. The National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, 83 Stat. 852 (1970) (42 U.S.C. §§ 4321 *et seq.*), embodies "a national policy" to "encourage productive and enjoyable harmony between man and his environment" and to "promote effects which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321 (2023). These "sweeping policy goals" are "realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences" and "provide for broad dissemination of relevant environmental information." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

NEPA's procedures are designed to facilitate a robust discussion among the agency and the public about the potential effects of an agency action. *Id.* at 352. This "informational purpose" is two-fold: to provide "the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process, and, perhaps more significantly, [to] provide[] a springboard for public comment in the agency decisionmaking process itself." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)). In other words, NEPA "ensure[s] that the larger audience can provide input as necessary to the agency making the relevant decisions." *Id.*

Thus, for certain "major Federal actions significantly affecting the quality of the human environment," an agency must prepare an environmental impact statement (EIS). 42 U.S.C. § 4332(2)(C) (2023). As explained by NEPA's implementing regulations, issued by the Council on Environmental Quality (CEQ), the "primary purpose" of an EIS is "to serve as an action-forcing device by ensuring agencies consider the environmental effects of their action in decision making, so that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government." 40 C.F.R. § 1502.1(a). To accomplish this goal, an EIS "shall provide full and fair discussion of significant effects and shall inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse effects or enhance the quality of the human environment." *Id.* § 1502.1(b).

As originally enacted, NEPA required an EIS to include a discussion of, among other factors, the "environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(i)-(ii) (1970). In 2023, in a bipartisan revision of NEPA known as the BUILDER Act, Congress codified the longstanding doctrine regarding the scope of the effects that an agency must consider. *See* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 321, 137 Stat. 10, 38-46. The statute now makes explicit that an EIS must address the "*reasonably foreseeable* environmental effects of the proposed agency action" and "any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. §§ 4332(2)(C)(i)-(ii) (2023) (emphasis added).

The "reasonably foreseeable" qualifier comes from CEQ's longstanding regulations, which likewise direct agencies to assess "reasonably foreseeable" environmental effects. 43 Fed. Reg. 55,978, 56,004 (Nov. 29, 1978) (40 C.F.R. § 1508.8(b) (1979)). Those regulations define "reasonably foreseeable" as "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision." 85 Fed. Reg. 43,304, 43,376 (July 16, 2020) (40 C.F.R. § 1508.1(aa) (2021)); 40 C.F.R. § 1508.1(ii).

2. NEPA requires extensive inter-agency cooperation with respect to preparation of an EIS. The statute anticipates that one agency's actions will sometimes have environmental effects either regulated by, or within the expertise of, another agency. The first agency does not get to pass the buck to the second. Rather, by statute, they work together: "the lead agency shall 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) (2023). CEQ regulations further "emphasize agency cooperation" in the NEPA process, and delineate a system of "lead" and "cooperating" agencies. 40 C.F.R. § 1501.8(a). When "more than one Federal agency" is "involved in the same action," then the "participating Federal agencies shall determine … which agency will be the lead agency" based on a set of factors, among them, which agency has "[p]roject approval or disapproval authority," the "[m]agnitude of [each] agency's involvement," and the agencies' "[e]xpertise concerning the action's environmental effects." *Id.* §§ 1501.7(a)(1), (c). "Upon request of the lead agency, any Federal agency with jurisdiction by law shall be a cooperating agency," and cooperating agencies with

"special expertise" can be asked to prepare relevant portions of an EIS. *Id.* §§ 1501.8(a), (b)(3). State and local agencies can also be "cooperating" agencies, so the EIS process can incorporate their views and expertise as well. *Id.* § 1501.8(a).

### B. Railroad Regulation by the Surface Transportation Board

Under the ICC Termination Act of 1995 (ICCTA), the Surface Transportation Board (Board) has exclusive jurisdiction over the interstate rail network, including "transportation by rail carriers" and "the construction, acquisition, [and] operation" of railway lines. 49 U.S.C. §§ 10501(b)(1)-(2). Constructing and operating a new railroad line requires the Board's approval. *See id.* §§ 10901(a), 10902(a).

To receive the necessary authorization, a party has two options. The first is to submit an application detailing the proposed use of the line, including certain operational, financial, and environmental data. *See* 49 C.F.R. §§ 1150.1 *et seq*. After entertaining public comment, the Board must issue the certificate unless it "finds that such activities are inconsistent with the public convenience and necessity." 49 U.S.C. § 10901(c).

Under an alternative pathway—the one petitioners followed here—a party may seek an exemption from the application process. The Board may grant an exemption only if it determines, among other things, that a full application proceeding "is not necessary to carry out the transportation policy of" 49 U.S.C. § 10101. *Id.* § 10502(a). Section 10101, in turn, declares that, "[i]n regulating the railroad in-

dustry, it is the policy of the United States Government" to take fifteen specified actions—including, for example, "to operate transportation facilities and equipment without detriment to the public health and safety" and "to encourage and promote energy conservation." *Id.* § 10101(8), (14).

Thus, in deciding whether to allow a new rail line, the Board considers not only competition and efficiency, but also environmental considerations relevant to "the public health and safety." The Board has "authority to deny [an] exemption petition if the environmental harm caused by the railway outweighs its transportation benefits." Pet.App.36a. For this reason, the Board's decisionmaking regularly entails assessing environmental consequences, and the Board maintains its own in-house experts in an Office of Environmental Analysis (OEA).

The Board recognizes that it must follow NEPA's requirements, including to prepare an EIS. The Board's regulations specify that an "Environmental Impact Statement will normally be prepared for rail construction proposals," except in certain specific circumstances not applicable here. 49 C.F.R. § 1105.6(a)-(b). The Board also applies its own environmental requirements, which direct an applicant for a rail construction project to submit an "[e]nvironmental [r]eport" describing a range of effects on land use, energy, air quality, noise, safety, biological resources, and water. *Id.* § 1105.7(e).

The environmental report must include an evaluation of "indirect or down-line impacts" of rail construction when certain thresholds are met, as they were here. *Id.* § 1105.7(e)(11)(v). The Board will include an analysis of potential effects on air quality if a decision

will result in an increase of either three or eight trains a day on a given line, depending on whether certain pollutants in the relevant areas exceed air-quality standards. *Id.* §§ 1105.7(e)(5)(i)(A), (11)(v). The Board has determined that these same three- or eight-train thresholds should govern the Board's review of downline safety issues, and it regularly applies these thresholds to define the downline study area for a particular project. J.A.483-484; *see also* Pet.App.39a.

## II. Factual Background

### A. The Board Prepares an EIS and Approves the Railway

1. In May 2020, petitioners sought approval from the Board to build the Railway to connect the Uinta Basin in northeast Utah to the national rail network. Pet.App.6a-7a. "[N]o one disputes" that the "predominant and expected primary purpose" of the Railway is to transport "waxy crude oil produced in the Uinta Basin." Pet.App.7a.

The Railway would connect at Kyune, Utah, to an existing railway line operated by the Union Pacific Railroad Company (the Union Pacific or UP Line). Crude oil shipped out of the Uinta Basin on the Railway and bound for points east—which would be 90% of the oil, J.A.513—would have no way to travel except by the UP Line between Kyune and Denver, Colorado. For about half of that stretch, including the portion crossing respondent Eagle County (the County), the UP Line follows the upper Colorado River. Thus, nine out of ten trains carrying crude oil out of the Uinta Basin would take the UP Line along the Colorado River—and cross through the County. J.A.513-514;

Pet.App.12a, 113a; *see also* J.A.7-8, 42-43. Each train can be nearly 2 miles in length. C.A.App.888.

2. Petitioners sought an exemption for the Railway under 49 U.S.C. § 10502. Pet.App.6a-8a. The Board's OEA determined that an EIS was necessary; set the scope of study for the EIS based on public input, 84 Fed. Reg. 68,274 (Dec. 13, 2019); and published a Draft EIS on October 30, 2020. During the comment period, the Board received over 1,900 submissions. J.A.115-116. The Final EIS followed on August 6, 2021. Pet.App.76a.

As relevant to the County, the EIS identified a set of "downline impacts," referring to "impacts that could occur along existing rail lines as a result of increased rail traffic due to the addition of new trains originating or terminating on the proposed rail line." J.A.511; *see* 84 Fed. Reg. at 68,278. "Increased rail traffic would have the greatest impacts on the segment of the existing UP rail line between Kyune and Denver because this segment is the longest existing rail line segment in the downline study area and would receive the most new rail traffic if the proposed rail line were constructed." J.A.202.

OEA calculated that the UP Line would experience an increase in traffic of up to 9.5 additional trains per day. J.A.294; C.A.App.886, 888. And based on that forecast, OEA determined that "some downline impacts are reasonably foreseeable." J.A.511. Relying on national data for train accident rates, J.A.487-490, OEA determined that the UP Line would experience a significant increase in the risk of rail accidents, ranging between a 40% jump in a low traffic scenario to "more than two times" the current risk in a high traffic scenario. J.A.202. This increase translates to up

to 0.89 additional predicted accidents per year involving a loaded oil train on the UP Line. J.A.203. In other words, "accidents involving a loaded crude oil train would occur slightly less than once per year under the high rail traffic scenario" as a result of construction of the Railway. *Id.*

OEA further determined that approximately 26% of these accidents would result in an oil spill. J.A.495-496. Put slightly differently, once every four years the environment adjacent to the Union Pacific Line will face an oil spill. *Id.* And given the size of a train, the vast majority (almost 75%) of those spills will involve 30,000 gallons or more of oil. *Id.*

The EIS also discussed the increased risk of wildfires near the UP Line. As OEA explained, trains "can contribute to wildfires by providing an ignition source," most commonly exhaust sparks (carbon particles emitted from the locomotive engine) or matter from overheated brakes. J.A.282. Among other factors, grade changes—which are unavoidable as a train crosses the Rocky Mountains, for instance—are a significant factor for exhaust-spark fires. *See id.* Matter from overheated brakes also starts fires. *Id.*

OEA recognized that "[t]rains originating or terminating on the [Railway] could be an ignition source for wildfires along existing rail lines outside of the study area." J.A.284-285. Despite that, OEA reasoned that, "because those existing rail lines are active rail lines that have been in operation for many years, construction and operation of the proposed rail line would not introduce a new ignition source for wildfires along the downline segments." J.A.285. OEA also determined that there was a "low" probability that a train would cause a wildfire based on historic data on the causes

of wildfires in Utah between 1992 and 2015. J.A.245-246. OEA thus concluded that "the downline wildfire impact of the proposed rail line would not be significant." J.A.285.

The EIS notably did not evaluate the effect of the downline increase in rail traffic on the Colorado River, despite its proximity to the UP Line along much of the relevant stretch. Pet.App.46a; J.A.206-242; C.A.App.902-949. Rather, OEA's analysis of the impacts on water resources pertained solely to the area directly adjacent to the new Railway in Utah—specifically, the watershed study area that the Railway itself would cross, along with a "1,000-foot-wide corridor along much of the rail centerline." C.A.App. 902.

3. Following issuance of the final EIS, the Board granted petitioners' exemption petition and authorized construction and operation of the Railway in December 2021. Pet.App.74a-189a. The Board determined that "the transportation merits of the project outweigh the environmental impacts," Pet.App.121a, largely adopting OEA's environmental analysis from the EIS, Pet.App.84a-85a.

The Board "adopt[ed] OEA's reasonable analysis concerning wildfires," including its analysis that because the "existing rail lines are active rail lines that have been in operation for many years, construction and operation of the Line would not introduce a new ignition source for wildfires along the downline segments." Pet.App.94a. The Board did not separately discuss the EIS's analysis of effects from downline rail accidents, nor did it address the potential impact on the Colorado River.

Board Member Oberman dissented on the basis that the "project's environmental impacts outweigh its transportation merits." Pet.App. 23a.

### B. The Board's Decision and EIS Are Vacated On Multiple Grounds

The County and several environmental organizations petitioned for review of the Board's decision. The D.C. Circuit granted the petitions in part, denied them in part, vacated the underlying order and part of the EIS, and remanded to the Board. Pet.App.1a-71a.

1. The court of appeals agreed with the County that the Board made several foundational errors in assessing the Railway's downline impacts.[1] None of the court's analysis of downline impacts turned on foreseeability.

First, the court concluded that OEA erred in determining that "the downline wildfire impact of the proposed rail line would not be significant." Pet.App.42a. OEA's determination rested on its conclusion that the "construction and operation of the [Railway] would not introduce a new ignition source for wildfires along the downline segments," because the rail lines are "active rail lines that have been in operation for many years." Pet.App.42a-43a. The court characterized this conclusion as "utterly unreasoned," "not the 'hard look' that NEPA requires." Pet.App.44a-45a. Regardless of whether new trains are a new type of ignition source, the court explained that the "significant increase in the frequency of which existing ignition sources travel" the Union Pacific Line—"up to 9.5 new

[1] The court also identified APA violations separate from NEPA. Pet.App.50a-69a.

trains a day"—"equally poses an increased risk of fire." *Id.*

Second, the court of appeals agreed with the County that the Board erred by failing to evaluate adverse impacts on downline water resources, in particular the "sensitive" Colorado River that "parallels the Union Pacific Line." *Id.* As the court explained, the record had "no evidence … that the Board even considered the potential impacts on water resources downline of running up to 9.5 loaded oil trains a day on the Union Pacific Line—about 50% of which abuts the Colorado River," even though the County, the State of Colorado, and others had squarely raised those concerns. Pet.App.46a; *see* J.A.8-9, 23-24 (discussing the effect of an oil spill on the Colorado River, a "water supply for millions"). Indeed, the "Board concededly fail[ed] altogether to mention the Colorado River in the Final EIS's discussion of impacts on water resources." Pet.App.46a. Again, this analysis was not the "hard look" NEPA requires. *Id.* at 47a.

Finally, the court of appeals concluded that the Board erred by modeling the risk of rail accidents based on generalized national data. Pet.App.41a. As the court explained, OEA failed to account for the particular "likelihood of derailment for long trains carrying oil through the Mountain West." *Id.* It also assumed with no foundation "that accident rates for loaded trains would be the same as those for empty trains." *Id.* When commenters identified this problem, OEA shrugged that "insufficient data exist" on the accident rates for oil trains. *Id.* But when relying on a lack of information, the court of appeals held, the EIS must at least explain "why the information was

unavailable and what actions the agency took to address that unavailability." Pet.App.41a-42a; *see also* 40 C.F.R. § 1502.22(b) (2020) (outlining process for contending with "incomplete or unavailable information" relevant to an EIS).[2] Once again, OEA thus "failed to take a 'hard look' at the increased risk of rail accidents downline given the increased rail traffic resulting from the Railway." *Id.* at 40a.[3]

2. Separately from its discussion of downline impacts, the court of appeals concluded that OEA erred in failing to consider the impacts of increased crude oil refining along the Gulf Coast. The court disagreed with OEA that these effects were not reasonably foreseeable, and further rejected the argument that OEA was not required to consider these effects on the basis that it could not "regulate or mitigate" these impacts. Pet.App.30a-31a.

3. In light of the "significant" "deficiencies" in the Board's analysis, the court of appeals concluded that the Board had improperly approved the Railway. Pet.App.70a. As the court explained, the "poor environmental review alone renders arbitrary the Board's consideration of the relevant Rail Policies and the final order's exemption of the Railway." *Id.* The court

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[2] This provision is now found in 40 C.F.R. § 1502.21. *See* 85 Fed. Reg. at 43,366-67.

[3] The court of appeals did not accept the County's and environmental groups' arguments in their entirety, instead undertaking a careful, nuanced assessment of each downline impact. To take one example, the court rejected the environmental groups' argument that OEA failed to take a hard look at the geological risk of landslides attributable to the Railway downline. Pet.App.48a-50a.

therefore vacated the underlying approval and part of the EIS and remanded the case to the Board.

## SUMMARY OF THE ARGUMENT

The Court should affirm the D.C. Circuit's vacatur of the Board's analysis of downline impacts in Colorado. The Board properly concluded that certain downline impacts were reasonably foreseeable and therefore needed to be included in the Board's evaluation of whether to approve the Railway. The Board erred, however, by relying on demonstrably incorrect assumptions or otherwise faulty premises when evaluating the magnitude of those effects. As the D.C. Circuit recognized, the Board's determination therefore failed to comply with NEPA's well-established "hard look" requirement. There is no basis for disturbing this straightforward, highly factbound component of the decision below.

I. Petitioners' belated objection to the D.C. Circuit's evaluation of downline impacts in Colorado is not properly before the Court. The petition for certiorari limited its challenge to the D.C. Circuit's holding that the Board erred in declining to consider the upstream and downstream effects of oil and gas development. While the D.C. Circuit's analysis of this issue was correct, it does not bear on the separate, highly factbound question whether the Board correctly evaluated downline impacts (*e.g.*, wildfires, rail accidents, and water contamination) in Colorado. Critically, until petitioners' opening brief before this court, no one—the Board included—questioned whether these downline impacts were reasonably foreseeable and therefore properly part of the Board's analysis. Regardless of the answer to the question presented, this Court

should not disturb the D.C. Circuit's vacatur with respect to downline impacts.

II. Petitioners' approach to NEPA is wrong. Particularly after the BUILDER Act, petitioners have no choice but to accept that NEPA requires agencies to evaluate the "reasonably foreseeable" impacts of a federal action. As reflected both by decades of circuit precedent and by CEQ regulations, whether an effect is reasonably foreseeable turns on the materiality of information for the decisionmaker. If an effect is sufficiently likely to occur that a prudent person would take it into account in reaching a decision, then it is reasonably foreseeable. *See, e.g.*, *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992); 40 C.F.R. § 1508.1(ii).

This standard does not, and should not, mirror the scope of private tort liability. The purpose of NEPA is to inform both the agency and the public of the impacts of a particular project. Limiting this review to effects that could give rise to tort liability flouts NEPA's directive to consider indirect effects, and more fundamentally conflicts with NEPA's goal of ensuring that the agency and the public writ large are informed of the reasonably foreseeable outcomes of a project.

Nor is the scope of NEPA review properly limited to those effects over which the lead agency has exclusive or even primary jurisdiction. As reflected by this case, NEPA includes a comprehensive scheme for cooperation among both state and federal agencies. When a particular effect falls within the expertise of a different agency, NEPA contemplates that the agency will participate in the EIS process as a cooperating agency—and not, as petitioners appear to contemplate, that an effect can simply fall by the wayside

because it is not in the wheelhouse of the agency in charge of the EIS.

III. Applying these well-established standards, the D.C. Circuit correctly determined that the Board erred in its evaluation of downline impacts. As the court recognized, OEA's evaluation of the magnitude of these impacts rested on a series of fundamental errors. Nothing in petitioners' amorphous concept of foreseeability, or their references to the "rule of reason," justifies ignoring these significant defects in the agency's NEPA analysis.

First, OEA disregarded the increased risk of wildfires from the significant increase in train traffic. OEA concluded that additional trains crossing the Union Pacific Line would not be a new *type* of ignition source, but as OEA recognized elsewhere in the same EIS, the increased risk comes from the greater frequency of trains.

Second, OEA entirely failed to evaluate the effect that the increase in rail traffic will have on the Colorado River, even though the river abuts half of the UP Line. The Board's *post hoc* suggestion that it could use OEA's evaluation of the impacts on waterways in *Utah* as a stand-in is both procedurally improper and factually flawed.

Finally, OEA incorrectly evaluated the risk of accidents—a fundamental underpinning of its entire review of downline effects—by relying on *national* rates of derailment. This project would involve a significant increase in long trains loaded with crude oil traversing difficult terrain in the Mountain West. Given these three significant errors, the D.C. Circuit

properly vacated the portion of the EIS evaluating downline impacts in Colorado.

## ARGUMENT

### I. The Court of Appeals' Evaluation of Downline Impacts Is Not Implicated By The Question Presented.

The question presented is about foreseeability under NEPA, but petitioners have opportunistically tried to smuggle in more. They ask this Court to validate the Board's EIS in its entirety—but several flaws in the EIS are outside the question on which this Court granted certiorari. Indeed, petitioners' entire merits theory has shifted substantially from their petition, and the split they claimed needed resolution has disappeared from their briefing.

Eagle County demonstrated below several failures of the Board's EIS that had nothing to do with the Board's approach to reasonable foreseeability. The Board did not attempt to argue that either NEPA or its own authorizing statute allowed it to ignore the risks of wildfires caused by trains, oil spills caused by derailments, and other effects on the Colorado River next to the UP Line. To the contrary, it concluded that these possibilities were reasonably foreseeable, Pet.App.110a, and proceeded to consider them. *See* Gov't Br. 40. And petitioners did not dispute the foreseeability of those effects. Nor did the decision below, which held that the Board had failed to take the necessary "hard look" at these potential consequences of a decision to let the Railway proceed.

Petitioners therefore brought to the Court a question that does not encompass the substance of that "hard look" review. Rather, they contended that what

needed review was whether NEPA "requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority." Pet. i. Specifically, they contended that the court of appeals had erred in "order[ing] the Board to study the local effects of *oil wells and refineries* that lie outside the Board's regulatory authority." Pet. i (emphasis added). The petition contained no argument at all about "downline" impacts along the UP Line, such as wildfires and oil spills.

But now petitioners want the Court to validate the Board's *entire* EIS and hold that wildfire, oil spills, and river pollution are too remote from the Board's decision on the Railway—or, perhaps, excused from consideration by some more nebulous "rule of reason." Their position is incorrect, as shown below, but the Court need not even consider it. Any challenge to the court of appeals' evaluation of downline impacts in Colorado is not "fairly included" within the question presented. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993); S. Ct. Rule 14.1(a).

Put another way, the answer to the question presented will not affect the D.C. Circuit's decision to vacate the Board's NEPA analysis as arbitrary and capricious. Because the Board and the D.C. Circuit agreed that the downline impacts *are* reasonably foreseeable effects of the regulatory action over which the Board has regulatory authority, their analysis of those impacts did not implicate the supposed circuit split that petitioners asked this Court to resolve.

Petitioners have now all but dropped any mention of that split, *see* Petrs. Br. 5-6 (briefly suggesting in the Background that some circuits "take a decidedly

more balanced view" of the scope of NEPA review), but petitioners' own description of the purported split illustrates that it does not implicate the downline impacts raised by the County. *See id.* Petitioners argue that their preferred circuits make clear that "agencies need only study effects that are both proximate and environmental and do not fall outside the agency's scope of authority." *Id.* The Board never suggested that the increased risk of wildfire started by sparks from a train, or the increased risk of an oil spill into the Colorado River caused by a train accident, were not proximate, not environmental, or outside the scope of its authority.

The Government agrees: It does not argue for reversal of the entirety of the court's NEPA analysis, but only the "portion of the court of appeals' decision" addressing "the upstream and downstream effects of oil and gas development." Gov't Br. 45.

Thus, the outcome of this case cannot save the Board's NEPA analysis. The County prevailed on its arbitrary-and-capricious claims because the Board's analysis of downline impacts was simply not an adequate "hard look"—not because of a lack of foreseeability or a lack of regulatory authority. And petitioners cannot bring the entire EIS within the scope of this Court's review just by sprinkling the term "rule of reason" over everything.

## II. The Scope of EIS Review Turns on the Materiality of Information to the Decisionmaking Process.

On the merits of the legal standard, petitioners oscillate between asking the Court merely to restate its

holdings in *Metropolitan Edison* and *Public Citizen*, and asking for something far more extreme.

To the extent petitioners argue—as they must—that NEPA requires agencies to consider reasonably foreseeable environmental effects, that reasonable foreseeability is not but-for causation, and that an agency need not study an effect that it has no authority to consider in its decision, then all parties and the court below are in agreement. Many of petitioners' straw-man arguments about supposedly "unlimited" process simply disregard these well-settled limitations.

But petitioners attempt to sneak new limitations into these well-established principles—a rule equating the scope of NEPA review with the boundary of tort liability, and a free-floating version of the "rule of reason" that would let agencies decline to study effects they would rather ignore. Those limitations find no support in the text, structure, decades-long history, or congressional understanding of NEPA. And adopting them would substantially restrict the ability of states, localities, and the public to meaningfully participate in decisions regarding the federal actions that will substantially impact their communities.

### A. NEPA Has Long Been Understood to Extend to "Reasonably Foreseeable" Impacts.

As originally enacted, NEPA directed agencies to prepare an EIS evaluating "the environmental impact of [a] proposed action" and "any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(i)-(ii)

(1970). The statute did not define either "environmental impact" or "environmental effect[]," but from the outset, courts and agencies alike interpreted this provision to require agencies to evaluate environmental effects that are reasonably foreseeable. That concept—reasonable foreseeability—has now been made explicit in the statute, in the 2023 amendment postdating the Board's EIS.

The earliest NEPA decisions recognized that an EIS "need not review all possible environmental effects of a project," but rather those that are "reasonably foreseeable." *Swain v. Brinegar*, 542 F.2d 364, 368 (7th Cir. 1976). Thus, while NEPA does not "demand what is, fairly speaking, not meaningfully possible," it does require agencies "to describe the reasonably foreseeable environmental impact" of the program under considerations. *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). In other words, the statute compels some "[r]easonable forecasting." *Id.*

CEQ adopted the "reasonably foreseeable" standard in its regulations almost five decades ago. 43 Fed. Reg. at 56,004 (40 C.F.R. § 1508.8(b) (1979)); 87 Fed. Reg. 23,453, 23,466-67 (Apr. 20, 2022) (40 C.F.R. § 1508.1(g) (2022)). Under the regulations both then and now, agencies must consider the "direct," "indirect," and "cumulative" effects of an action. 40 C.F.R. § 1508.1(i). Direct effects "are caused by the action and occur at the same time and place"; indirect effects are "reasonably foreseeable" effects that "are caused by the action" but "are later in time or farther removed in distance"; and "cumulative" effects are "effects on the environment that result from the incremental effects of the action when added to the effects of other

past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.*

Congress then added the "reasonably foreseeable" standard to NEPA in 2023. 42 U.S.C. § 4332(2)(C)(i) (2023). An earlier draft of the BUILDER Act would have directed agencies to consider "reasonably foreseeable environmental effects with a reasonably close causal relationship to the proposed agency action." H.R. 2515, 117th Cong., § 2(a)(3)(B)(i). But the version of the bill that ultimately passed maintained only the "reasonably foreseeable" requirement; it excised the phrase "reasonably close causal relationship." *See* 42 U.S.C. § 4332(2)(C)(i) (2023).[4] It likewise dropped particular temporal and geographic limits on what agencies needed to evaluate. *See* H.R. 2515, *supra*, § 2(b) (proposed new NEPA § 109(13)). The final Act requires agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on (i) reasonably foreseeable environmental effects of the proposed agency action [and] (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the

[4] From 2020 to 2022, CEQ briefly included the same "reasonably close causal relationship" language in its NEPA regulations. 40 C.F.R. § 1508.1(g) (2020). CEQ reverted to the prior language in 2022, asking solely whether an effect was reasonably foreseeable. 87 Fed. Reg. at 23,453. In so doing, it explained that the phrase "reasonably close causal relationship" was "unnecessary and unhelpful because an agency's ability to exclude effects too attenuated from its actions is adequately addressed by the longstanding principle of reasonable foreseeability that has guided NEPA analysis for decades." 87 Fed. Reg. at 23,465.

proposal be implemented." 42 U.S.C. § 4332(2)(C) (2023).

Rather than unsettle the concept of reasonable foreseeability, Congress chose to include reforms in the BUILDER Act that would speed the NEPA process in other ways. Most notably, the BUILDER Act imposed page and time limitations on NEPA review and adopted exclusions from NEPA's requirements. 42 U.S.C. §§ 4336a(e), (g) (2023), 4336e(10)(B) (2023).

### B. Reasonable Foreseeability Turns on the Materiality of Information for the Decisionmaker.

1. NEPA "does not mandate particular results," but rather "prescribes the necessary process" to ensure that the choice will be a well-informed one. *Robertson*, 490 U.S. at 350. The EIS process in particular is designed to ensure "that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Id.* at 349. By engaging in this process, agencies are "more likely to consider the views of those who live and work in the surrounding community" when evaluating a particular project. Council on Environmental Quality, Executive Office of the President, *The National Environmental Policy Act: A Study of Effectiveness After Twenty-Five Years* 7 (1997). And, as a corollary, agencies are less likely to "steamroll local communities with federal projects." Robert L. Glicksman & Alejandra E. Camacho, *The Trump Card: Tarnishing Planning, Democracy, and the Environment*, 50 ENV. L. REP. 10281, 10282 n.12 (Apr. 2020) (quoting a Colorado official's description of NEPA). Ultimately, NEPA's "fundamental objective is promoting good

government and democratic decisionmaking." *Id.* at 10283.

Reflecting these principles, the touchstone of the reasonable foreseeability standard is the materiality of information for the decisionmaker. Agency officials should consider effects that will inform whether to move ahead with a project. For decades, then, circuits across the country have defined an environmental consequence as "reasonably foreseeable" when it is sufficiently likely to occur that a prudent person would take it into account in reaching a decision.

The First Circuit articulated this consensus standard in *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). There the court explained that the "'duty' to discuss in the EIS" is "measured by an objective standard." *Id.* "That is, a likelihood of occurrence, which gives rise to the duty, is determined from the perspective of the person of ordinary prudence in the position of the decisionmaker at the time the decision is made about what to include in the EIS." *Id.* Applying this standard, agencies "need not consider potential effects that are highly speculative or indefinite." *Id.* at 768. And "[w]hether a particular set of impacts is definite enough to take into account, or too speculative to warrant consideration," turns on the relevance and usefulness of particular information to the agency's decisionmaking process. *Id.* The First Circuit elaborated: "With what confidence can one say that the impacts are likely to occur?" *Id.* And "[c]an one describe them 'now' with sufficient specificity to make their consideration useful?" *Id.* The "ordinary prudence" standard became the settled understanding of whether a particular impact was reasonably foreseeable. *E.g.*, *Solar Energy Indus. Ass'n v. FERC*,

80 F.4th 956, 995 (9th Cir. 2023); *Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 853 (10th Cir. 2019); *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1293 (11th Cir. 2019); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Circ. 2016); *Ark. Wildlife Fed'n v. U.S. Army Corps of Engineers*, 431 F.3d 1096, 1102 (8th Cir. 2005); *La. Crawfish Producers Ass'n-W v. Rowan*, 463 F.3d 352, 358 (5th Cir. 2006).

2. This definition is now in CEQ's regulations as well. *See* 40 C.F.R. § 1508.1(ii). In 2020, CEQ "propose[d] to define 'reasonably foreseeable' consistent with the ordinary person standard—that is what a person of ordinary prudence would consider in reaching a decision." 85 Fed. Reg. 1,684, 1,710 (Jan. 10, 2020). It then adopted this definition in the 2020 final rule, citing the First Circuit's decision in *Sierra Club v. Marsh* to explain the "ordinary prudence" standard. 85 Fed. Reg. at 43,351.

CEQ maintained this definition in its 2022 regulations, explaining that agencies "are not required to 'foresee the unforeseeable' or engage in speculative analysis," but are required to evaluate "what a person of ordinary prudence would consider in reaching a decision." 89 Fed. Reg. 35,442, 35,550 (May 1, 2024). While commenters suggested various changes to this formulation, CEQ responded that it was "unaware of any practical challenges or confusion that has arisen from connecting this definition to the ordinary person," and it saw no need to "create uncertainty" by changing the regulatory text. *Id.*

3. This decades-old understanding of "reasonable foreseeability" plainly informed Congress's decision to codify that standard in the BUILDER Act. That is

not just the ordinary presumption when codifying an administrative interpretation—that is also what the Chair of the House Natural Resources Committee confirmed. He explained that, "in amending NEPA to include the concept of reasonable foreseeability, Congress intends to establish in statute *Sierra Club v. Marsh*, 976 F.2d 763 (1st Cir. 1992)." 169 Cong. Rec. H2704 (daily ed. May 31, 2023) (remarks of Rep. Westerman).

4. The Government adopts a differently worded formulation, suggesting that an agency may "find that the requisite causal connection is absent or diminished where the scope of the agency action and the nature and requirements of the governing statutes render a particular harm too attenuated, speculative, contingent, or otherwise insufficiently material to the agency decision under consideration." Gov't Br. 27. This standard is difficult to evaluate in the abstract, and the Government (properly recognizing the scope of the question presented and the nature of the decision below) does not apply it to the agency's evaluation of downline impacts in Colorado.

To the extent it captures the question whether a particular impact will "influence the agency's decisionmaking" or "provide 'a springboard' for meaningful public comments," Gov't Br. 27 (quoting *Public Citizen*, 541 U.S. at 768), the government's reformulation may not be a substantial revision. But this standard cannot be used as a free pass—akin to versions of Petitioners' rule of reason theory—to decline to study certain environmental effects otherwise within NEPA's scope. In particular, as described in the brief for the Environmental Respondents, NEPA does not

permit agencies to decline to study reasonably foreseeable effects just because they deem them "otherwise insufficiently material"—separate and apart from being "too attenuated, speculative, [or] contingent." *See* Br. of Env't Resps. at 43-44.

### C. The NEPA Reasonable Foreseeability Standard Is Broader Than Tort Liability.

Petitioners rely on *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), and *Department of Transportation v. Public Citizen*, 541 U.S. 752, 754 (2004), to argue that the NEPA reasonable foreseeability standard equates to tort law's standard of proximate cause. Petrs. Br. 4, 16, 23. It is noncontroversial that NEPA's causal requirement is, as the Court put it in *Public Citizen*, "akin to" proximate cause. 541 U.S. at 754. The concept of "proximate cause" has been consistently invoked by the courts of appeals—including the D.C. Circuit, which petitioners repeatedly criticize—to underscore that NEPA does not require agencies to consider every but-for cause of a particular project. *See Sierra Club v. FERC*, 867 F.3d 1357, 1380-81 (D.C. Cir. 2017) (using the concept of "proximate cause" to explain that "the fact that [an agency's] action is a 'but for' cause of an environmental effect is insufficient to make it responsible for a particular environmental effect"); *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (same).

Petitioners are wrong, however, to the extent they suggest that the scope of NEPA review should be coextensive with the scope of tort liability—a fictitious scope at that, because the federal government is not *actually* liable in tort even for harm proximately caused by its "discretionary" decisions, *see* 28 U.S.C. § 2680(a). This Court specifically said in *Metropolitan*

*Edison* that it "d[id] not mean to suggest" any such strict equivalence with tort liability. 460 U.S. at 774 n.7. Nor would one make sense in a statute that regulates the *process* of agency decisionmaking rather than substantive outcomes. NEPA is a "look before you leap" statute; properly informed, the agency can leap even if it will cause a tort on the way down, and it would be incoherent to argue that it can just ignore every consequence that would not be tortious.

1. Petitioners contend that "*Metropolitan Edison* all but resolves this case." Petrs. Br. 21-22. *Metropolitan Edison* bears little resemblance to this case, particularly as to the downline effects highlighted by the County. While petitioners attempt to wrench a favorable legal standard from the decision, the Court took pains to explain that it "d[id] not mean to suggest" exactly what petitioners now say it held. 460 U.S. at 774 n.7.

In *Metropolitan Edison*, this Court concluded that the Nuclear Regulatory Commission (NRC) was not required to account for the possibility that the risk of an accident at Three Mile Island's nuclear power plant "might cause harm to the psychological health and community well-being of residents of the surrounding area." *Id.* at 768. As the Court explained, psychological health problems were not effects on "the air, land and water," and were therefore "simply too remote from the physical environment to justify requiring the NRC to evaluate" them. *Id.* at 773-774. The Court further emphasized that any psychological health effects would stem from the risk of an accident, and not from reopening the nuclear plant. *Id.* at 775. NEPA, however, "does not require agencies to evaluate the effects of risk, *qua* risk." *Id.* at 779.

In explaining that NEPA requires "a reasonably close causal relationship between a change in the physical environment and the effect at issue," the Court likened this requirement to "the familiar doctrine of proximate cause from tort law." *Id.* at 774. The Court clarified, however, that in "drawing this analogy," it "d[id] not mean to suggest that any cause-effect relation too attenuated to merit damages in a tort suit would also be too attenuated to merit notice in an EIS …" *Id.* at 774 n.7. Rather, "[i]n the context of both tort law and NEPA, courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Id.*

The Court repeated its reference to "proximate cause" in *Public Citizen*, which involved the sufficiency of NEPA review by the Federal Motor Carrier Safety Administration (FMCSA) in implementing safety regulations governing Mexican trucks in the United States. 541 U.S. at 759-61. The regulations were prompted by the President's lifting of a moratorium preventing Mexican trucks from entering the country; FMCSA was charged with creating a post-moratorium "safety-inspection regime" for these trucks. *Id.* at 759-60. As FMCSA explained, it did not "consider any environmental impact that might be caused by the increased presence of Mexican trucks within the United States," as that increase was attributable to the President's decision to lift the moratorium, and not to FMCSA's implementation of the new safety regulations. *Id.* at 761-762.

The Court agreed with the agency's approach, explaining that FMCSA had no "ability to countermand

the President's lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States." *Id.* at 766. To the contrary, FMCSA was obligated by statute to register any Mexican carrier that was "willing and able to comply with the various substantive requirements for safety and financial responsibility contained in DOT regulations." *Id.* The Court declined to accept the challengers' "unyielding variation of 'but for' causation, where an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect." *Id.* at 767.

2. As the Government notes (Br. 34), this Court recognized in *Metropolitan Edison* and *Public Citizen* that reasonable foreseeability does not extend to the limits of but-for causation. The Court's references to "proximate cause" just reinforce that an agency need not consider everything from which a project "could conceivably be a but-for cause." *Sierra Club*, 827 F.3d at 46; *see also Vill. of Bensenville v. FAA*, 457 F.3d 52, 65 (D.C. Cir. 2006) ("Even under NEPA, a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect."). "Instead, the effect must be 'sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.'" *Id.* at 47 (quoting *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005)); *see supra*, pp. 26-28.

"[T]he *term* 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011). The phrase thus captures "the policy-based judgment that not all factual causes contributing to an injury should be legally

cognizable causes." *Id.* at 701. Proximate cause has taken "many shapes," including both the "concepts of direct relationship and foreseeability." *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 12 (2010). The use of the phrase "proximate cause" in the NEPA context merely illustrates the well-established principle that the scope of an EIS is not governed by a standard of but-for causation.. *See, e.g.*, *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 769 (2018) (explaining that "the law recognizes several types of causation" and distinguishing "but-for cause" from "proximate cause").

3. Petitioners latch on to the Court's reference to proximate cause—while failing to mention the Court's footnote disclaiming the tort-law analogy—and argue that NEPA's "reasonably foreseeable" standard turns on the application of tort law's proximate cause standard. Petrs. Br. 4, 16, 23. Petitioners push these principles to the breaking point by equating NEPA review with the limits of tort liability. According to Petitioners, if "respondents brought a tort claim against STB on the theory that approving" the Railway "proximately caused downline rail accidents" in Colorado, "they would be laughed out of court." Petrs. Br. 2. In other words, they ask this Court to hold that an agency needs to consider an effect during its administrative decisionmaking only if the agency might be held liable in a trial court for any injury arising from that effect.

Petitioner seem to be suggesting that NEPA does not require an agency making a decision even to *consider* any consequence that the agency will not have to pay for in tort damages. But it is well-established

that NEPA requires a process, not a particular outcome. The Board can determine, for example, that the risk of environmental harm is justified by the transportation benefits of a particular project. *See Robertson*, 490 U.S. at 351. Because the agency's NEPA obligation is limited to properly evaluating and accounting for the risk of environmental consequences, it makes little sense to apply the same standards that would govern the agency's liability for a substantive outcome *if* the agency's substantive decisionmaking were not immunized from tort liability anyway, *see supra*, p. 30.

For that reason, neither *Metropolitan Edison* nor *Public Citizen* held or even suggested that NEPA review is coextensive with tort liability. To the contrary, as noted, the Court expressly cautioned in *Metropolitan Edison* that its invocation of proximate cause did not suggest that "any cause-effect relation too attenuated to merit damages in a tort suit would also be too attenuated to merit notice in an EIS." 460 U.S. at 774 n.7. Petitioners' "laughed out of court" theory cannot be squared with the statute.[5]

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[5] Petitioners do not go so far as to expressly attempt to divorce proximate cause under NEPA from reasonable foreseeability. Nor could they, particularly after the BUILDER Act. While this Court has noted in the *damages* context that "foreseeability alone does not ensure the close connection that proximate cause requires," these decisions were grounded in concern for unbounded monetary liability. *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 202-03 (2017). Under NEPA, by contrast, where what is at stake is not monetary compensation but well-informed agency action, reasonable foreseeability has always been the operative test.

### D. Petitioners' Suggestion That the "Rule of Reason" Allows Agencies to Pass the Buck Contradicts NEPA's Scheme of Interagency Cooperation.

Petitioners' remaining arguments fall into a category that they call the "rule of reason." While they try to hitch onto references in this Court's NEPA decisions, they actually seek to break up the NEPA process into agency-specific silos that the statutory text expressly rejects. Petitioners contend that "reason" requires an agency *with statutory authority* to consider environmental consequences *not to use it*, but to pass the buck to other agencies based on relative expertise. NEPA requires no such thing: it expressly contemplates a *coordinated* environmental review that brings all relevant agencies' expertise to bear in a single assessment.

1. The "rule of reason" is not a more stringent version of reasonable foreseeability that an agency can invoke whenever it wishes. Rather, it serves as a narrow addendum to the reasonable foreseeability standard—namely, that where consideration of a particular effect "would serve 'no purpose' in light of NEPA's regulatory scheme as a whole," then the agency is not required to consider that effect. *Public Citizen*, 541 U.S. at 767.

*Public Citizen* provides an apt example. Applying the "rule of reason," the Court concluded that FMCSA was not required to evaluate the environmental effects created by the presence of Mexican trucks in the United States. *Id.* at 768; *see also supra*, pp. 31-32. FMCSA's decision-making process was constrained: it had no power to just refuse to carry out its statutory

task because it thought the environmental consequences too grave. *Id.* In that unique circumstance, requiring FMCSA to study this impact would not serve NEPA's goal to "provid[e] a springboard for public comment in the agency decisionmaking process." *Id.* at 768 (internal quotations omitted). FMCSA had no ability to provide a "larger audience" with the opportunity for meaningful input when FMCSA had no authority to "act on whatever input this 'larger audience' could provide." *Id.* at 769.

Here, by contrast, it is "conceded[]" that the Board's "exclusive jurisdiction over the construction and operation of the railway" includes the "authority to deny the exemption petition if the environmental harm caused by the railway outweighs its transportation benefits." Pet.App.36a. While agencies need not consider effects on which their decisions have no bearing, an agency with authority to weigh environmental consequences in deciding whether to approve of a federal action *does* have authority to prevent any harm that would flow from that project.

Petitioners twist the rule of reason into something different, to argue that *even if* the Board has authority to consider environmental consequences, it has no obligation to learn what those consequences may be before exercising that authority. Petitioners contend that the issues in this case are "far outside [the Board's] limited remit, but well within the purview of other agencies' authority," and urge that "those other agencies can address such issues more comprehensively." Petrs. Br. 26. Much like Petitioners' proximate cause theory, it is not clear how far Petitioners believe this rule should extend. As the Government notes, if Petitioners are merely repeating the holding

of *Public Citizen*, then that is a noncontroversial statement of governing law: NEPA requires agencies to assess the effects of their actions, not effects they have no authority to control. *See* 42 U.S.C. § 4332(2)(C) (2023); Gov't Br. 31. But petitioners are wrong to the extent they suggest that NEPA imposes a "primary jurisdiction" limitation (Petrs. Br. 24)—*i.e.*, that agencies need only evaluate effects they are directly charged with regulating.[6]

A "primary jurisdiction" approach is squarely inconsistent with NEPA, which requires extensive interagency cooperation. *See supra*, pp. 6-7. The statute expressly states that the agency leading the EIS process "shall 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) (2023). NEPA thus envisions that multiple federal, state, and local agencies will have separate or overlapping jurisdiction over aspects of the effects at issue, and will collectively participate in the EIS process under the lead of a single agency—precisely as occurred here. J.A.111-114; C.A.App.823-825. The EIS process does not require an agency to stray far outside its expertise; rather, the lead agency has the authority to ask cooperating agencies to assume responsibility for aspects of the environmental analysis, particularly in areas for "which the cooperating agency has special expertise." 40 C.F.R. § 1501.8(b)(3).

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[6] The question presented asks whether an agency must study effects "beyond the proximate effects of the action over which the agency has *regulatory authority*." Pet. i (emphasis added). After the question presented, however, petitioners' brief never again uses the phrase "regulatory authority."

2. Petitioners' approach cannot be squared with this federal scheme. It is the rare federal action that does not involve impacts cutting across agency lines. In every other case, several agencies will have jurisdiction and expertise over the effects of an action being taken by one of those agencies. To the extent petitioners suggest that a project should involve multiple EIS processes, one for each involved agency, that will lead to more process and more paperwork—the precise opposite of what petitioners believe should happen.

Petitioners' remake of NEPA would mean that an agency can excise from consideration any effects that it deems more directly regulated by another agency. An agency would no have no obligation to consider, for example, a project's effects on water and air, because those domains fall within the jurisdiction of the EPA. And an agency like STB would find itself with no NEPA obligations all—notwithstanding the statutory command that "all agencies of the Federal Government shall" comply with the requirement to evaluate the environmental effects of their actions. 42 U.S.C. § 4332(2)(C) (2023).

3. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), is not to the contrary. While not clear from petitioners' distorted description (Petrs. Br. 24), *Robertson* primarily resolved whether NEPA requires an EIS to include "a fully developed plan to mitigate environmental harm." *Robertson*, 490 U.S. at 335-336. The Court answered in the negative, explaining in part that it will sometimes be infeasible for an EIS to include "a complete mitigation plan," including when certain effects (there, "off-site effects on air quality and on the mule deer herd") could not be

mitigated "unless nonfederal government agencies take appropriate action." *Id.* at 352. Because state and local authorities had jurisdiction over the relevant area and authority to mitigate the effects, it would make little sense to conclude that the Forest Service had "no power to act until the local agencies ha[d] reached a final conclusion on what mitigation measures they consider[ed] necessary." *Id.* at 352-353.

The decision in no way suggests that the Forest Service could ignore these effects in its EIS. To the contrary, petitioners' quoted portion of the decision extols the values of a robust EIS, and the discussion of these effects in particular that the Forest Service did not directly regulate. Because "the adverse effects on air quality and the mule deer herd [were] primarily attributable to predicted off-site development that w[ould] be subject to regulation by other governmental bodies," a fulsome EIS served the purpose of "offering those bodies adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." *Id.* at 350.[7]

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[7] The Court separately rejected the argument that the agency was required to consider the "worst case" scenario when assessing the environmental impact of a project. 490 U.S. at 354. Petitioners' description notwithstanding, the case is not an example of NEPA run amok. As the Court's decision explains, prior CEQ regulations had provided that if an agency was unable to obtain certain data relevant to its evaluation, the agency instead had to include a "worst case analysis and an indication of the probability or improbability of its occurrence." *Id.* (quoting 40 C.F.R. § 1502.22 (1985)). That regulation had been replaced by the time of the review at issue in *Robertson*, and the Court disagreed with the court of appeals that the "worst case" requirement nonetheless still controlled. 490 U.S. at 354.

* * *

NEPA is critical to ensuring that the public is informed about the potential environmental effects of an agency action. The scope of NEPA evaluation thus turns on the information that an ordinary prudent person would take into account when deciding whether to proceed with a particular action. This standard accords with the governing regulations, with a consistent and extensive body of circuit caselaw, and, most fundamentally, with NEPA's animating purpose.

## III. The D.C. Circuit Correctly Identified Multiple Errors in the Board's NEPA Reasoning, All Regarding Foreseeable Effects of the Railway.

The environmental consequences of doubling the train traffic on the UP Line—by adding lengthy trains filled with crude oil, which will run right next to the Colorado River—fit any definition of reasonable foreseeability. More trains mean more sparks (and more wildfires) and more accidents. The agency was required to take a hard look at those consequences. Indeed, while the agency contended that it *had* taken a hard look, the agency did not disagree that it was *required* to take one. Nor did petitioners, at least not in their petition for certiorari. Petitioners' belated attempt to dismiss these effects as too attenuated does not square with the record or the law.

### A. The Board Failed to Take the Requisite Hard Look at a Series of Downline Environmental Effects.

Petitioners' caricature bears no resemblance to the actual D.C. Circuit fact-specific decision. Far from demanding "bottomless process," Petrs. Br. 43, the court rejected many of the challenges to the EIS. Pet.App.37a-39a, 48a-50a. But for a couple of key downline impacts—wildfires, water contamination, and derailments of oil-bearing trains—the court found the EIS lacking. While petitioners now suggest that these downline impacts were not sufficiently foreseeable, neither the parties nor the Board nor the court of appeals saw it that way. Rather, all agreed that these impacts were reasonably foreseeable and needed to be evaluated. Petitioners' attempt to dismiss wildfires, water contamination, and oil spills as *categorically* off the table completely fails to grapple with the actual facts before the D.C. Circuit. And petitioners' contention that the court of appeals violated the "rule of reason" just confirms that petitioners are using that term to encompass essentially anything in a NEPA case that petitioners do not like.

#### 1. The Board's consideration of the downline wildfire impact was "utterly unreasoned."

As the D.C. Circuit explained, the Board's conclusion that wildfire impact "would not be significant" (J.A.285) suffered from two major errors. First, the Board decided that adding 9.5 new trains a day to the UP Line would not significantly increase the risk of wildfires because these trains "would not be a qualitatively 'new ignition source.'" Pet.App.44a. In other words, because the UP Line is currently host to some

(low) number of trains, adding more trains would not increase the risk of wildfires. That conclusion is, as the D.C. Circuit put it, "utterly unreasoned." *Id.* More trains mean more ignition sources; more ignition sources mean more sparks; and more sparks mean more wildfires. *See* J.A.282-283; *supra*, p. 11. Regardless of whether new trains are a new *type* of ignition source, they are undoubtedly new ignition sources—and "[a] significant increase in the frequency of which existing ignition sources travel this route equally poses an increased risk of fire." Pet.App.44a-45a. Indeed, OEA itself repeatedly recognized in other sections of the EIS that "more trains could increase the risk of sparking a wildfire." J.A.259, 280.

A second mistake exacerbated this error. The Board reasoned that "trains make up a small percentage of fire starts" based on pre-2015 data from Utah, and concluded that "the probability that a train would trigger a wildfire is very low." J.A.284-285. As the D.C. Circuit explained, however, that fails to grapple with the "concededly 'low volume of rail traffic' on the Union Pacific Line currently." Pet.App.45a.

**2. The Board entirely failed to address adverse impacts on the Colorado River.**

Fully half of the downline UP Line parallels the "sensitive" Colorado River. Pet.App.45a-46a. Yet neither the Final EIS nor the Board's discussion of impacts on water resources even mentioned the River. Pet.App.46a. The Board conceded as much below, and conspicuously did not argue that impacts on the river are beyond the scope of a proper NEPA analysis.

Instead, on appeal it contended that it *had* done the work, just by other means—it had reviewed waterways *in Utah*, and its counsel posited that the impacts to downline waterways would be "the same" in Colorado. Pet.App.46a; *see also* C.A.App.906-911, 939-948. But that appears nowhere in the EIS or the Board's approval decision, *see* Pet.App.46a-47a, and the APA is not satisfied by the "*post hoc* rationalizations" by "appellate counsel[]." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

The Colorado River, the "most important river in the Southwest United States," raises unique considerations. J.A.8-9, 23-24. Despite that, there "is no evidence" that the "Board even considered the potential impacts on water resources downline of running up to 9.5 loaded oil trains a day on the Union Pacific Line." Pet.App.46a. Nor did the Board reconcile its conclusion with its finding that there would be "major impacts" on Utah waterways from the Railway's construction and operations, requiring significant mitigation measures. J.A.121-122, 240-242; C.A.App.1168. If the analysis really did apply equally to Colorado, the Board needed to examine the corresponding "major impacts" on Colorado waterways.

### 3. The Board erred in assessing the impact of train accidents.

The shipment of crude oil poses serious risks. J.A.49-50. In 2018, the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) reported to Congress that the safety record of crude oil shipments by rail has been highly variable based on certain "high-impact incidents." J.A.49-50 (quoting

U.S. Dep't of Transp., PHMSA, Report on Shipping Crude Oil by Truck, Rail and Pipeline, at 7, Fig. 3 (Oct. 2018), https://www.phmsa.dot.gov/news/report-congress-shipping-crude-oil-truck-rail-and-pipeline). As the County put it: "[W]hen things go wrong with shipments of crude oil by rail, they go dramatically wrong." J.A.50.

OEA accordingly recognized that downline rail accidents could have a range of significant impacts, among them the release of toxic crude oil on land or into the adjacent Colorado River and the possibility of starting a fire. J.A.199-201, 220-222. But its assessment of the accident *rate* was incorrect.

To model the accident rate based on the increase in rail traffic on the Union Pacific Line, the Board used the national average of derailment accidents, with no consideration of the location of the trains (the highly variable and steep terrain of the Rocky Mountains) or their cargo (heavy crude oil). C.A.App.1340. Nor did the EIS address the unique derailment risks posed by the particular trains that would be traveling on the UP Line— "heavy, long unit trains that would exclusively transport crude oil." C.A.App.1340-1341.

The Board did not dispute these unique risks, but disclaimed responsibility on the basis that "[i]nsufficient data were found on accident rates for unit trains carrying crude oil." J.A.519. That does not cut it under NEPA, which expressly contemplates that agencies will sometimes have insufficient data available. If an agency lacks "information relevant to reasonably foreseeable significant effects," the EIS must include a "summary of existing credible scientific evidence" on this topic, and the "agency's evaluation of such effects

based upon theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. § 1502.21(c).

The Board did not engage in any of this analysis: It "concededly relied on national freight train accident rates without explanation and assumed that loaded freight trains were as likely to derail as unloaded trains." Pet.App.42a; *see supra*, pp. 10, 14. Because the Board "failed to respond to significant opposing viewpoints concerning the adequacy of its analyses of" rail accidents, the D.C. Circuit correctly found its analysis "deficient." Pet.App.42a.

### B. Petitioners Do Not Meaningfully Challenge the D.C. Circuit's Analysis of These Downline Impacts.

Petitioners raise a set of scattershot arguments to the D.C. Circuit's review of downline impacts. None is persuasive.

1. Petitioners first attempt to wave away all of the challenges to the Board's approval on the basis that they were too attenuated to merit consideration. Petrs. Br. 13-14. The County and the environmental challengers objected to the EIS's treatment of several different effects, among them the impact of oil refining on the Gulf Coast; the potential effects of construction, drilling, and truck traffic in the Uinta Basin; and downline impacts involving rail accidents, wildfires, and water resources in Colorado. Petrs. Br. 13-14; *see supra*, pp. 41-45. According to petitioners, the Board provided a single, collective response to all of the objections—namely, that it "did not need to consider those far-downstream (or down-track) potentialities,

all of which lay outside STB's limited remit," and none of which it could "accurately predict." Petrs. Br. 14.

That is a significant rewrite of the record. For the downline impacts addressed above, the Board in fact said the opposite. As the Board recognized in its approval decision, OEA examined a set of "reasonably foreseeable impacts that could occur outside the project area as a result of construction and/or operation of trains using the Line" (*i.e.*, "downline impacts"). Pet.App.110a. OEA was able to assess these impacts precisely because there were a "predicted number and length of trains," a set of "likely regional destinations" and "projected reasonably foreseeable routes for this traffic." Pet.App.111a. Taken together, this information allowed OEA to identify "a downline impact study area eastward from Kyune to the northern, southern, and eastern edges of the Denver Metro/North Front range that met the Board's regulatory thresholds for analysis." *Id.* This downline study area was defined in reference to Board regulations that specify precisely when the Board must evaluate downline impacts. *See* 49 C.F.R. § 1105.7(e); *supra*, pp. 8-9. In other words, the downline impacts the Board addressed made their way into consideration precisely because they were reasonably foreseeable and had a sufficiently close causal relationship with approval of the Railway.

2. Petitioners separately suggest that the increased risk of downline train accidents does not result in an *environmental* effect, and therefore does not fall within NEPA's ambit. Petrs. Br. 40-41. According to petitioners, an accident might not "have any meaningful impact on the 'air, land and water,'" and therefore would not pose an environmental risk that STB

must review under NEPA. Petrs. Br. 40. This argument fails several times over.

To start, petitioners do not suggest the other two downline impacts (the risk of wildfires and the impact on the Colorado River) are not environmental. Nor could they: these are clearly effects on the "air, land and water" that fall within the heartland of environmental risks. *Metro. Edison*, 460 U.S. at 773, 775 (describing "increased fog" and "the release of warm water into the Susquehanna River" as direct environmental effects). Thus, even assuming the risk of accidents is not an environmental effect, that does not call into question the D.C. Circuit's conclusions that the Board failed to conduct the requisite "hard look" with respect to downline impacts on wildfires and water resources.

Petitioners are also wrong that rail accidents that result from adding the Railway and its oil-bearing trains to the rail network are not an environmental impact. OEA itself describes the range of environmental consequences that could result from a rail accident, whether on the Railroad or downline. J.A.199-200, 220-222; *see also supra*, pp. 10-12. Among other outcomes, "[t]rain accidents or derailments could cause train cars to rupture or overturn and spill crude oil or frac sand into the environment." J.A.220. "Uinta Basin crude oil is toxic, and an accidental release would have negative effects on the environment." J.A.221. "If an accident were to release crude oil near a waterway"—for example, the adjacent Colorado River—"crude oil could enter the waterway, which would affect water quality." J.A.199. And "[i]f

the force of the accident were sufficient to ignite the crude oil, a fire could result." J.A.200.[8]

Petitioners' respond that an accident is not *certain* to result in an environmental effect: a train might be "unloaded or carrying innocuous cargo," resulting in "a safety risk for the Federal Railway Administration to consider substantively—but not an environmental risk for STB to review under the auspices of NEPA." Petrs. Br. 40. The EIS, however, reports that on the Union Pacific line, "accidents involving a *loaded crude oil train* would occur slightly less than once per year under the high rail traffic scenario"—with a spill occurring every four years. J.A.202 (emphasis added).[9] These spills are concrete, predictable, environmental effects—the core of what NEPA directs agencies to study. Petitioners attempt to brush away these "downline accidents *actually affecting the physical environment*" as "vanishingly narrow and remote," but roughly one accident per year involving a loaded crude

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[8] Petitioners also obliquely suggest that the Railway would not *proximately* cause downline train accidents. *See* Petrs. Br. 40. The Board did not see it that way: It calculated a specific risk of accidents based on the increased train traffic, and then proceeded to evaluate the effects of those accidents. *See supra*, pp. 10-12.

[9] Petitioners state that, "although STB estimated that marginal increases in rail traffic could cause 0.89 new accidents per year, accidents *involving a loaded crude train* would occur far less frequently." Petrs. Br. 15. That is simply wrong: "OEA predicts that accidents *involving a loaded crude oil train* would occur slightly less than once per year under the high rail traffic scenario." J.A.203.

oil train is hardly "vanishingly narrow." Petrs. Br. 40.[10]

Nor is an evaluation of these impacts comparable to the evaluation of "risk, *qua* risk" that the Court rejected in *Metropolitan Edison*. Petrs. Br. 41. There was no question that the NRC needed to evaluate "effects that will occur if" the risk of a nuclear accident were realized. 460 U.S. at 775 n.9. Rather, NRC was not required "to evaluate *the effects* of risk, *qua* risk"—*i.e.*, the psychological health effects engendered by concerns about risk. *Id.* at 779 (first emphasis added).

Even putting all of that aside, the Board treated the risk of rail accidents as an environmental effect that it needed to evaluate under NEPA. J.A.198 (discussing the "[e]nvironmental [c]onsequences" of rail accidents). The Board's decision cannot be upheld on the theory—entirely at odds with the Board's actual analysis—that these were non-environmental impacts that it had no obligation to study under NEPA. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

3. Finally, petitioners describe the D.C. Circuit as invoking "a rule of bottomless process, not a rule of reason." Petrs. Br. 43. Contrary to petitioners' mischaracterization, the court of appeals did not require the Board to do just one more study. Rather, it called out, correctly, glaring errors in the Board's analysis. Whatever boundaries the rule of reason puts around a NEPA study, it does not shield arbitrary deci-

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[10] Petitioners' approach would have required the Board to ignore (as "not environmental") not just downline accidents, but accidents on the proposed Railway itself. *See* J.A.222 (Board forecasting the accident rate on the Railway).

sionmaking on matters *within* that boundary. "Reason" does not support excluding agencies cannot excuse themselves from the ordinary APA requirement of *reasoned* decisionmaking. In other words, the Board did not need to "go[] further"—it needed to avoid relying on false premises and plainly inaccurate data.

The Board determined, correctly, that these downline impacts were reasonably foreseeable. *See supra*, pp. 10-11. It was therefore required to evaluate them under the legal standard that all parties agree applies. It could not satisfy this requirement through a series of deeply flawed determinations.

* * *

This Court is used to hearing litigants say that their adversaries' policy arguments would be better addressed to Congress. This case is unusual because Congress *has already addressed those arguments*, in an amendment after the relevant agency action that is only indirectly before the Court here. And it is even more unusual because the answer to the question presented cannot affect the outcome of this particular case given the D.C. Circuit's decision on the County's "hard look" claims. And because the agency will have to re-do its NEPA analysis, the agency may well take into account the amended statute if it chooses—whether this Court resolves the question presented in the agency's favor or not.

To try to avoid those consequences, petitioners have substantially reconfigured their arguments between the certiorari and merits stages in an attempt to convince this Court to reach well beyond the question presented. But there is no occasion for the Court

to do so. Petitioners' merits arguments are not only incorrect, they are also completely disconnected from any division in the courts of appeals that they presented at the certiorari stage. And because this case involves the pre-amendment version of NEPA, it can shed light on the current statute only indirectly. Given the likelihood that a decision will neither affect the outcome of this case nor clarify the law, the court may wish to simply dismiss the writ as improvidently granted.

## CONCLUSION

If the Court does not dismiss the writ, the judgment should be affirmed.

Respectfully submitted.

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