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IN THE SUPREME COURT OF THE UNITED STATES
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SEVEN COUNTY INFRASTRUCTURE)
COALITION, ET AL.,)
Petitioners,)
v.) No. 23-975
EAGLE COUNTY, COLORADO, ET AL.,)
Respondents.)
- - - - -

Washington, D.C.
Tuesday, December 10, 2024

The above-entitled matter came on for
oral argument before the Supreme Court of the
United States at 10:09 a.m.

1 APPEARANCES:
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3 behalf of the Petitioners.
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7 Petitioners.
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9 of Respondents Eagle County, et al.
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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 23-975, Seven County Infrastructure Coalition versus Eagle County, Colorado.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT
ON BEHALF OF THE PETITIONERS

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

NEPA is a self-described procedural statute. It is designed to inform government decision-making, not paralyze it. Nonetheless, it has become the single most litigated environmental statute. The decision below helps explain why.

Despite an environmental impact statement spanning 3600 pages, including 20 appendices, that addressed major impacts, minor impacts, downline impacts, and cumulative impacts, the D.C. Circuit demanded more. It insisted that the Board study the future project developments in the entire basin, the prospect of accidents in train lines hundreds of miles

1 away, and the effect on refineries in Gulf
2 communities thousands of miles away.

3 All of that is not just remote in time
4 and space but falls well outside the STB's
5 limited remand -- remit, and it falls within the
6 jurisdiction of other agencies that can address
7 those issues comprehensively and concretely if
8 and when they arise. And the EIS here addressed
9 almost all of those issues or at least
10 identified them.

11 But, in classic "no good deed goes
12 unpunished" fashion, the D.C. Circuit held that
13 because the agency identified the issue or
14 flagged the issue, it was therefore foreseeable
15 and they had to do more.

16 That's a recipe for turning a
17 procedural statute into a substantive roadblock.
18 After all, infrastructure requires investment,
19 and for investors, time is money. Project
20 opponents, by contrast, know that time is on
21 their side and a remand just for a little more
22 process can kill a project.

23 The combined effect of proximate cause
24 and the rule of reason should have made this a
25 straightforward case. The Board was not

1 heedless of environmental effects here. It
2 consulted with dozens of agencies, considered
3 every proximate effect, and ordered 91
4 mitigation measures. Eighty-eight miles of
5 track should not require more than 3600 pages of
6 environmental analysis.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Mr. Clement, to the
9 extent that some of these issues fall in the
10 jurisdiction of other agencies, what role would
11 Public Citizen play in disposing of those?

12 MR. CLEMENT: So Public Citizen, I
13 think, instructs that when these -- when these
14 issues are both remote in time and effect and
15 within the jurisdiction of other agencies, then
16 the agency that approves this EIS is not the
17 legally relevant cause, to use the phrase from
18 Public Citizen, of any of the environmental
19 effects.

20 I think it's important to contrast the
21 role of other agencies when it comes to things
22 that are outside the scope of the project
23 because, if other agencies have a partial role
24 in issues that are within the scope of the
25 project -- here, for example, the Forest Service

1 had to approve a right-of-way for the train --
2 that is all taken care of in the consultation
3 process. And, here, there was consultation to a
4 fare-thee-well. There were five other
5 cooperative agencies. There were 27 agencies
6 that were consulted.

7 But it never occurred to the Board
8 that they should consult with Port Arthur,
9 Texas. And those issues that are far outside
10 the proximate effects of the -- of the project,
11 if other agencies have those within their
12 jurisdictions, then they're going to be the
13 legally relevant cause of upstream development
14 in the basin if it takes place 10 years from
15 now. If there's an accident in Colorado on the
16 train tracks, that's an FRA issue, not an STB
17 issue.

18 And, obviously, what's going on in the
19 Gulf communities is issues for Port Arthur,
20 Texas, or maybe the EPA.

21 JUSTICE SOTOMAYOR: I don't know how
22 to articulate your rule in writing. The NEPA
23 itself says that -- requires agencies to
24 "consult with any federal agency that has
25 jurisdiction by law or special expertise with

1 respect to any environmental impact involved."

2 So we can't write and say you don't
3 have to think about things that other agencies
4 have jurisdiction over because the NEPA says
5 that's what you got to do. And I don't think
6 you're saying that if the Department of
7 Transportation wants to authorize a highway
8 running near a wetland, that NEPA wouldn't
9 require the DOT to consider the environmental
10 effect on the wetlands, even though a different
11 agency has primary jurisdiction over wetlands.

12 So it's -- your generalized rule, I
13 don't have to think about it if another agency
14 has jurisdiction, doesn't make much sense in
15 this statutory scheme.

16 MR. CLEMENT: Well --

17 JUSTICE SOTOMAYOR: It has to be
18 something more nuanced.

19 MR. CLEMENT: I -- I -- I agree. And
20 that's why my favored rule is not just if it's
21 another agency's jurisdiction, you don't have to
22 look at it. But what I tried to articulate in
23 answering Justice Thomas's question is if the
24 effect's already remote in time or space and in
25 the jurisdiction of another agency.

1 JUSTICE SOTOMAYOR: I don't even know
2 what that means, because most environmental
3 effects, like effects on wetlands, are going to
4 be sometimes remote in time and geography. And
5 even the Restatement says on the issue of
6 proximate cause -- Restatement Third basically
7 says time and geography are not at issue.

8 If you've got a -- if you put a car in
9 the stream of -- of -- of commerce where you
10 know after a thousand miles it's going to blow
11 up, it could go a thousand miles and 40 states
12 away and blow up. That's a reasonably
13 foreseeable consequence that is remote in
14 geography and time.

15 These rules -- these absolute rules or
16 how we explain them really depend on each
17 individual case, so why don't we go back to this
18 case for a moment, okay?

19 I think your basic proposition and the
20 one that Justice Thomas was saying, how is this
21 similar to power? And I see it as similar to
22 power because I think what you're trying to say
23 is this agency's charged with putting a railroad
24 in place. Its obligation is to carry passengers
25 and cargo. The nature of that obligation may

1 downstream have an effect, but it doesn't affect
2 the actual decision this agency is making about
3 where to site that railroad. So it is a
4 different agency that has to decide whether the
5 extra production of oil somewhere else is going
6 to affect the environment.

7 And that's much closer to the power
8 situation because that decision is not going to
9 directly affect the agency's decision about
10 where to site this railroad.

11 MR. CLEMENT: So, I mean, I don't
12 disagree with where you ended that -- that
13 question, which is to say --

14 JUSTICE SOTOMAYOR: I hope not. I was
15 trying to help you.

16 (Laughter.)

17 MR. CLEMENT: No, no. I -- well, at
18 the end, I think you were trying to help me. I
19 think, along the way, you may have done some
20 damage to the position that --

21 JUSTICE SOTOMAYOR: Sure --

22 MR. CLEMENT: Because I think the --

23 JUSTICE SOTOMAYOR: -- because you
24 want absolute rules that make no sense.

25 MR. CLEMENT: With respect, I -- I --

1 I guess you'll decide whether they make sense,
2 but I think the lower courts are in desperate
3 need of some guidance here. And simply to
4 repeat Public Citizen to the D.C. Circuit that
5 thinks Public Citizen means that the STB has to
6 study the output of refineries in Port Arthur,
7 Texas, and Shreveport, Louisiana, I don't think
8 is going to be good enough.

9 And I think the guidance you need to
10 give them is to start with the project at hand,
11 which is where you ended.

12 This is 88 miles of track in
13 northeastern Utah. And with respect to those 88
14 miles of track, there are consultation
15 obligations, and they were done here to a
16 fare-thee-well. And when you're talking about
17 something that the agency actually controls,
18 they can really use NEPA to -- in a very
19 granular way.

20 So, in this case, they have a
21 mitigation measure that's designed to protect
22 six residents from noise pollution from the
23 tracks.

24 But, when you lose sight of the
25 project itself and you start thinking about,

1 okay, well, you know, this is going to lead to
2 this and it's going to lead to this and might
3 lead to this and this thing, then it takes you
4 way outside the lane of this agency and you make
5 them consider things that are just not their job
6 at all.

7 And, from the very beginning, the CEQ
8 has been concerned that if these environmental
9 impact statements balloon and become thousands
10 of pages long, they become useless ease -- even
11 for the things that the agency can control. So
12 I think the test is saying if it's remote in
13 time and space and it's in another agency's
14 jurisdiction, I think is the right test.

15 But another way of looking at it would
16 be to start with what's really before the
17 agency. They're supposed to consider
18 alternative routes and they're supposed to
19 consider mitigation measures.

20 JUSTICE JACKSON: So, Mr. --

21 MR. CLEMENT: So --

22 JUSTICE JACKSON: Sorry, Mr. Clement.
23 Keep going if you're not finished.

24 MR. CLEMENT: Well, I'll just finish
25 the thought --

1 JUSTICE JACKSON: Yeah.

2 MR. CLEMENT: -- which is, you know,
3 if the environmental impact statement is focused
4 on the project, it will inform -- you can pick
5 one route versus another or you can -- the
6 agency itself can impose mitigation measures.
7 But, if you have to look at everything under the
8 sun, that's outside the ambit of the agency.

9 I'm sorry, Justice.

10 JUSTICE JACKSON: Yeah, no, I just was
11 wondering whether we need a new test or whether
12 the law in terms of what we have already said is
13 supposed to be happening here is enough. And --
14 and I thought curious the fact that your brief
15 and your argument didn't rely on what this Court
16 has said about deference to the agency's own
17 determinations regarding the scope of its
18 authority.

19 I mean, I understood that an EIS,
20 based on what even Public Citizen said, is about
21 the usefulness of any new potential information
22 to the decision-making process, and the agency
23 is making a determination about that.

24 And so, in Kleppe, we said that NEPA
25 analysis requires a high level of expertise and

1 is properly left to the informed discretion of
2 responsible federal agencies.

3 So I was just curious as to your
4 decision to sort of propose a new test outside
5 of this deference framework, as opposed to just
6 saying the problem here is that the D.C. Circuit
7 did not give the agency sufficient deference, as
8 we have said they're supposed to do.

9 MR. CLEMENT: So I think what's needed
10 is a new test plus deference. And, of course,
11 you know, there was a little bit of division of
12 labor here, and I think Mr. Kneedler's going to
13 come to the podium and talk a lot about
14 deference.

15 And I suppose it is maybe true that if
16 you restated Public Citizen, reaffirmed the rule
17 of reason, reemphasized arbitrary and capricious
18 review and reminded the D.C. Circuit that the
19 APA itself builds in harmless error review, you
20 might make the world a better place, but I guess
21 the problem from my standpoint and the
22 standpoint of people that are trying to invest
23 in these projects is all of that's on the books
24 and yet the D.C. Circuit and the Ninth Circuit
25 hasn't gotten the message.

1 And the agencies are kind of in this
2 position where they don't really have a choice.
3 They have to lard up these environmental impact
4 statements to become thousands of pages because
5 they know the challenge is coming. And it's not
6 going to come in the Eleventh Circuit. The
7 challenge is going to come in the D.C. Circuit,
8 where all these agencies are based and any EIS
9 challenge can be brought.

10 JUSTICE BARRETT: Mr. Clement, what --

11 JUSTICE KAGAN: So, if I understood --

12 JUSTICE BARRETT: Go ahead. Go ahead,
13 it's fine.

14 JUSTICE KAGAN: If I understood your
15 test, it's like remote in time and effect. Is
16 that -- is that the --

17 MR. CLEMENT: Plus outside the
18 jurisdiction.

19 JUSTICE KAGAN: Plus outside the
20 jurisdiction.

21 So I -- I think I get outside the
22 jurisdiction. What does "remote in time and
23 effect" mean? And -- and I think it would help
24 me if you applied it to this case and to the
25 particular things that the agency should have

1 considered under that and -- and didn't have to
2 consider under that.

3 MR. CLEMENT: Sure. What I'm trying
4 to do with "remote in time and space" is to get
5 it outside of the realm of the project itself
6 and the realm of where mitigation measures could
7 be brought to bear or alternatives would make a
8 difference because, if -- if it's -- if it's
9 inside that realm, then, if another agency has
10 some partial jurisdiction, that's supposed to be
11 taken care of in the consultation process.

12 JUSTICE KAGAN: So is it within the
13 realm of the project -- for example, here's this
14 88 miles of line, and railroads are going to
15 cross it and wildfires are going to start as a
16 result. Is that within time and space?

17 MR. CLEMENT: Totally. And within
18 that time and space, they're not just supposed
19 to be, well -- you know, they're not supposed to
20 say: Well, we're the STB, all we care about is
21 railroad commerce, so we're not going to talk to
22 the local officials or we're not going to talk
23 to, you know, Fish and Wildlife or other
24 agencies. All of that took place here.

25 It's just that once you get outside of

1 that, now you're thinking about --

2 JUSTICE KAGAN: And the pollution that
3 those trains are going to cause, that's also
4 time and space -- within the time and space that
5 you have the trains running?

6 MR. CLEMENT: Yeah, yeah, within --
7 within -- within the confines of those 88 miles.
8 But then, as you asked me to apply it to this --
9 sort of this -- this plan, so now you're talking
10 about tracks that are a hundred -- 500 miles
11 away, that have already been there, that are
12 already regulated by other agencies. And then
13 the question is, like, what is the STB supposed
14 to do about it?

15 And I think the answer is not much
16 because they're not in a position to mitigate
17 there. I mean, the reason they can put
18 mitigation measures on my clients is because
19 they're going to own and operate that 88 miles
20 of track.

21 JUSTICE KAGAN: Are -- are -- are you
22 saying that anything that falls outside these 88
23 miles is not their problem?

24 MR. CLEMENT: I'm saying that anything
25 that is outside that 88 miles and is in the

1 jurisdiction of another agency is not something
2 that should be fatal to an EIS.

3 I'm not saying that the agency can't
4 take it into account. And I think one of the
5 problems with the D.C. Circuit's approach is it
6 actually kind of make -- you know, it has this
7 "no good deed unpunished" flavor where, if the
8 agency says a little bit about downline traffic
9 or a little bit about where this sort of waxy
10 crude is going to go, then, aha, it was
11 foreseeable, so now you have to study it to a
12 fare-thee-well.

13 And so I -- I -- I think the way I'm
14 thinking about it is you can't be reversed as
15 the agency for something that is remote in time
16 and space, plus in another agency's bailiwick.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 I wanted to just ask you about what I
20 think you just started to touch on. I have
21 trouble seeing how this is going to work out as
22 a practical matter. If you're at the agency or
23 counsel for the private party, I mean, what are
24 you going to do? Are you going to say: Okay,
25 I've identified this possible issue, but I think

1 it's too far away?

2 I mean, do you counsel your client to
3 say: Well, you better put it in because they
4 might decide that it's not too far away? Or do
5 you counsel your client in saying: Well, I
6 think that's remote enough, so don't put it in?

7 I mean, it seems to me that it's hard
8 to figure out what you should require as a
9 matter of law when it's -- a agency is going
10 to -- or your client in front of the agency
11 is -- is going to put enough in I would say sort
12 of no matter what.

13 Like, if you come in and you're
14 whoever's advising them and say: This might be
15 included, I think you'll want to address it.
16 Otherwise, you're making judgments and have a
17 higher risk when you go to court to say that
18 this should have been addressed and wasn't.

19 MR. CLEMENT: I agree, Mr. Chief
20 Justice. And in some respects, I think it would
21 be helpful to sort of distinguish between that
22 which can get an agency reversed and that which
23 is, you know, something that is available to the
24 agency.

25 And, you know, Congress in this

1 BUILDER Act has provided direction to the
2 agencies that they should try to knock these
3 environmental impact statements out in 150
4 pages. I mean, that's going to be impossible
5 unless there is a reaffirmation that you don't
6 have to look at things that are not within the
7 immediate ambit of the project and are in
8 another agency's lane.

9 And -- and I think, you know, that
10 could promote better decision-making in the long
11 run because I think, if you look at the 91
12 mitigation measures that were imposed here, and
13 that's on top of 56 voluntary measures, if you
14 stick to the 88 miles of track, you can be
15 incredibly helpful and you can direct the S --
16 you can direct my clients to consult with the
17 Railroad Safety Administration, and you can
18 direct them to consult with local agencies to
19 make sure that, like, the crossing where the
20 railroad crosses the road has the right signage,
21 or where the railroad crosses a water, that it's
22 done in a way that protects the environment,
23 including where that stream is going to go next.

24 JUSTICE SOTOMAYOR: Mr. Clement --

25 CHIEF JUSTICE ROBERTS: Thank -- thank

1 you, counsel.

2 Justice Thomas?

3 I -- I think we'll go --

4 JUSTICE SOTOMAYOR: Okay.

5 JUSTICE THOMAS: Mr. Clement, would
6 you just briefly state with respect to the 88
7 miles what your test would be?

8 MR. CLEMENT: So my -- my test would
9 be as to the 88 miles that there is an
10 obligation on the agency to cooperate with other
11 agencies that have necessary permits and to
12 consult with other agencies that have expertise
13 to bring to bear on the project itself.

14 And that happened here. There was
15 cooperation with four federal agencies and Utah,
16 and then there was consultation with 27 federal
17 and state agencies and the Ute tribe.

18 All of that happened. Among the many
19 sins that the D.C. Circuit found in this case,
20 there was no sin in terms of not doing enough
21 consultation. So that's what you need to do
22 with the project, and that was that.

23 JUSTICE THOMAS: But how far downline
24 or -- or upstream or downstream should you look?

25 MR. CLEMENT: You should stop there.

1 And you should understand -- and -- and let's
2 just take the three things that they were
3 faulted for. So upstream development. That's
4 all in the future.

5 JUSTICE THOMAS: Yeah.

6 MR. CLEMENT: And that's going to be
7 permitted either by Utah or the Ute tribe, and
8 they're going to have their own environmental
9 review.

10 So the next thing that they -- they
11 fault us for is downline. It's about 500 miles
12 in Eagle County, Colorado. That's already
13 regulated by other agencies, and that's track we
14 don't even own, so we can't mitigate there.

15 And then the last thing, kind of
16 the -- you know, the cherry on the proverbial
17 sundae, is this -- you know, is Gulf community
18 environmental quality, and, again, that's --
19 that's in the regulatory agencies of those local
20 communities. They can affect it directly. They
21 could -- they could expand the refinery. They
22 could shut it down tomorrow.

23 It would be perverse to say, yeah,
24 let's put the kibosh on 88 miles of track in
25 northeastern Utah because of effect in a

1 community when the community itself could
2 regulate it directly.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 JUSTICE ALITO: Could you just say a
5 word about the relationship of the tort concept
6 of proximate cause to the test that you're
7 asking us to apply?

8 MR. CLEMENT: Yes. I think there are
9 two things that are relevant that -- from
10 proximate cause principles. One is the
11 principle that this Court already derived in
12 Public Citizen from Prosser and Keeton, which is
13 the idea that when you're looking at proximate
14 cause in tort, what you're trying to figure out
15 is who's the legally responsible party.

16 And so you applied that in Public
17 Citizen. Obviously, the FMCSA was not the
18 responsible -- legally responsible party. It
19 was the president's determination to let the
20 trucks in subject to the safety inspections.
21 And, here, the legally responsible party for all
22 of these disparate things are the agencies that
23 will ultimately regulate them directly.

24 But the other principle, I guess I
25 would almost think of it as like a cross-check,

1 which is, if you think that -- if you sort of
2 try to re- -- restate the EIS violation in tort
3 liability claims, if it doesn't even come close,
4 if it doesn't pass the straight-face test, then
5 I think you're expanding the -- NEPA too far.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: I think that my
10 colleague, Justice Jackson, had a point that --
11 that is hard to get out of in addressing this
12 case, and it's not the argument that you've made
13 in your brief, but it is embedded in the
14 argument you're making here.

15 This agency did look at all the
16 reasonably foreseeable impacts. So it's not a
17 question of did it fail to look at something.
18 The only qualification to that might be the
19 effect of the railroad on the Colorado River.
20 That's a separate issue, okay?

21 But it did look at the impact upstream
22 and downstream. So the question before us was,
23 was it arbitrary and capricious for it not to
24 consider something more?

25 But that's not how you want us to

1 rule. You don't want us to say it wasn't
2 arbitrary and capricious because what it did was
3 enough and why. You want us in the process to
4 create rules that say -- even though you said to
5 the contrary a little while earlier, the agency
6 can choose to look at almost anything. The
7 question is, if it says I looked at it, but it
8 won't impact my views, is that arbitrary and
9 capricious?

10 MR. CLEMENT: So, to be clear, I mean,
11 you know, I'm here in front of -- you know, in
12 front of -- on the behalf of seven counties that
13 want this project to move forward and an
14 investment group that, you know, got streamlined
15 approval for this track in 2021.

16 So, if you want to affirm -- if you
17 want to reverse the D.C. Circuit and say this
18 environmental impact statement is sufficient
19 based principally on arbitrary and capricious
20 review, I'd be delighted. But I do think we're
21 here at least in part because the lower courts
22 are divided on this issue and need additional
23 guidance, so I'm also trying to be responsive to
24 that. And I think the way to be responsive to
25 that is to say focus on the project. Focus on

1 the 88 miles, and do your consultations.

2 JUSTICE SOTOMAYOR: But they did.

3 MR. CLEMENT: I --

4 JUSTICE SOTOMAYOR: That's not --

5 MR. CLEMENT: And yet, still we're
6 here thanks to the D.C. Circuit --

7 JUSTICE SOTOMAYOR: That may --
8 that -- that has --

9 MR. CLEMENT: -- that's faithfully --
10 in its mind, faithfully applying Public Citizen.

11 JUSTICE SOTOMAYOR: Okay.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: I'm wondering whether
14 your test sounds pretty good for this project
15 but may not sound quite as good for other
16 projects in the sense that, like, your project,
17 it's 88 miles, so focus on 88 miles. And that
18 sounds big enough. Thanks.

19 But, you know, suppose that the
20 project is just a single facility. I mean, you
21 wouldn't say just focus on the one square mile
22 that that plant is, right? I mean, you would
23 acknowledge that some kind of plant can have
24 effects that are far broader than just the, you
25 know, 50 acres on which it sits.

1 So how does your project work in any
2 number of other sorts of projects that might be
3 much smaller or, alternatively, might be larger,
4 like a FERC pipeline or something?

5 MR. CLEMENT: So I think it's a fair
6 question. I think that, in reality, I think the
7 lower courts haven't actually struggled much
8 with the smaller projects, and they've been able
9 to understand that, yeah, you look at -- I mean,
10 you look where the smokestack, you know, and the
11 smoke goes and you don't just, like, you know,
12 look at the -- the boundary of the property, but
13 you keep focused on the project.

14 And I -- I don't think it's an
15 accident that the lower courts that have
16 approached this more the way that I would like
17 them to have largely been dealing with in the --
18 in the context of Army Corps projects, where
19 it's a pretty discrete project and they say,
20 yeah, this is -- you know, we'll look at how it
21 affects the immediate environment, but the fact
22 that it actually facilitates phosphate mining,
23 that's not something we're going to look at.
24 That's somebody else's problem.

25 I think, you know, the FERC pipelines

1 are probably the hardest case because, you
2 know -- and -- and -- and I think they're --
3 they're less remote in the sense that, you know,
4 the pipeline might go all the way to the -- near
5 a power facility. And the D.C. Circuit has the
6 Sabal Trail case, which we don't like very much,
7 and we would say, even in Sabal Trail, pipeline
8 goes to the plant, but the emissions of the
9 plant are regulated by Florida, and so that's a
10 case where you don't have to study the
11 greenhouse gas emissions. That's our position.

12 But you could disagree with us on that
13 because you think our test would apply a little
14 differently to the pipeline. But I think our
15 test is a pretty good start. And, I mean, look,
16 you know, in the realm of defining proximate
17 cause, if I could give you a 10-word test that
18 took care of every hard case, I mean, you know,
19 they'd give me tenure at Harvard. But --

20 (Laughter.)

21 MR. CLEMENT: -- but -- but -- but I
22 think, you know, having a test --

23 JUSTICE KAGAN: I'm sure they'd give
24 you that anyway.

25 (Laughter.)

1 MR. CLEMENT: I -- I -- I -- but I
2 think, if -- if you move it in the right
3 direction and -- and maybe note that, yeah,
4 maybe this is going to play out differently,
5 maybe, you know, you have to take another NEPA
6 case someday in a pipeline, I think that would
7 still move the ball in the right direction for
8 that.

9 JUSTICE KAGAN: Can I -- can I go back
10 to Justice Alito's question about how this
11 relates to proximate cause and, you know, in --
12 in -- in Metro Edison, we clearly said that
13 there is an analogy to proximate cause concepts
14 and we're supposed to sort of think about those
15 concepts kind of. But -- but it also said "kind
16 of." It -- it said, like, whether you would be
17 held liable in a tort suit is not the right
18 inquiry.

19 And are you suggesting a change in
20 that view, or are you copacetic with it?

21 MR. CLEMENT: Call it a refinement.
22 And -- and my refinement is exactly what I told
23 Justice Alito. I mean, I think the principal
24 thing that you've already derived out of
25 proximate cause is this idea that you got to

1 think about who's the legally responsible party.

2 And that's what proximate cause does
3 in general, and that's why if there's another
4 agency, if it's -- if we're miles and miles from
5 the project and there's another agency that's
6 supposed to be focused on it, if something goes
7 wrong, they're going to be the legally
8 responsible party.

9 And then the other thing I think is
10 useful is just as a cross-check. I mean, nobody
11 in their right mind would say that a project in
12 northeastern Utah is the legally relevant cause
13 or the proximate cause of additional pollution
14 in Shreveport, Louisiana. Nobody. And if it's
15 not even a close case, then -- then the analogy
16 has got to be useful.

17 And the problem is my friends on the
18 other side describe proximate cause principles
19 as a fundamental mismatch, and that's pretty
20 unfaithful to Metropolitan Edison and Public
21 Citizen.

22 JUSTICE KAGAN: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Kavanaugh?

25 JUSTICE KAVANAUGH: Can I ask you

1 about the nature of judicial review and the
2 nature of deference? Arbitrary and capricious
3 review, of course, is deferential, but it does
4 have both a procedural and substantive
5 reasonableness component.

6 When we're talking about NEPA, it's
7 purely procedural. So how should we think about
8 the role of the Court applying deference to
9 something that's purely procedural? How does
10 that affect what we normally say about arbitrary
11 and capricious review?

12 MR. CLEMENT: I mean, I would say
13 that, if anything, that calls for an even
14 lighter touch. And if you're thinking about --
15 I mean, you know, who is better than the STB to
16 decide what it needs to consider and what's
17 outside of its ken or what it can sort of, you
18 know, usefully study and what it can usefully
19 not study. So I think there, because it's
20 procedural, you probably want to be even more
21 deferential.

22 And then I do think, you know, it's --
23 it's -- it's always worth remembering the sort
24 of due regard for prejudicial error point of the
25 APA. And so, in a case like this, you know, if

1 you think that the agency didn't perfectly study
2 something it didn't have to study, boy, that
3 just seems to me to be the quintessential
4 application of a harmless error-type principle.

5 And so I think, if you added all of
6 that to the test that I'm suggesting, I think we
7 would have a much better situation and we'd be
8 much closer to the situation Congress seems to
9 want and the CEQ initially envisioned, which is
10 you didn't have encyclopedias; you had
11 relatively tight environmental impact statements
12 that were focused on the alternatives and
13 focused on mitigation measures and things the
14 agency could control.

15 JUSTICE KAVANAUGH: What do you think
16 we should say about Sabal Trail in this
17 opinion --

18 MR. CLEMENT: Well --

19 JUSTICE KAVANAUGH: -- from your
20 perspective?

21 MR. CLEMENT: -- I -- I -- I think you
22 should say that it's wrong. But, if you want to
23 reserve the pipeline question or something, I
24 think what Sabal Trail has come to be known for
25 is worse than the decision itself, which is this

1 notion that as long as the agency mentions
2 something, that makes it foreseeable and,
3 therefore, they have to do more.

4 And I think part of the problem with
5 the D.C. Circuit's approach and, I would
6 respectfully suggest, my friend's position
7 here is that they want to decouple
8 "foreseeable" -- "reasonably foreseeable" from
9 "environmental effects."

10 And, as the SG's brief says, those --
11 those are either separate requirements or
12 they -- they clearly tell you that just being
13 reasonably foreseeable is not enough.

14 There's nothing more reasonably
15 foreseeable than, once the FMCSA in Public
16 Citizen gave the final regulations for
17 inspections, those trucks were coming across the
18 border and they wouldn't be great for air
19 quality this side of the border. That was all
20 reasonably foreseeable.

21 But this Court said: No, not the
22 legally relevant cause.

23 JUSTICE KAVANAUGH: Then last, just a
24 bigger-picture question of how to think about
25 NEPA more generally.

1 When NEPA was enacted -- or since NEPA
2 was enacted, there have been all sorts of
3 amendments and new environmental statutes, and
4 you've alluded to this in your comments so far,
5 that so many different agencies are involved, so
6 many different environmental checks are in place
7 on land, air, water, pollution.

8 What is NEPA adding to the substantive
9 statutes, and how should that affect how we
10 think about NEPA in terms of what the judicial
11 role is with respect to enforcing NEPA?

12 MR. CLEMENT: As it's currently
13 applied in the D.C. Circuit and the Ninth
14 Circuit, NEPA is adding a juicy litigation
15 target for project opponents. And I think that,
16 you know, if you --

17 JUSTICE KAVANAUGH: What -- what
18 should it add properly construed?

19 MR. CLEMENT: Well, I -- I -- I think
20 it should be more focused on the project at hand
21 and NEPA challenges -- you know, the universe of
22 situations where the NEPA challenge is
23 successful but the substantive environmental
24 statute challenge is unsuccessful should be a
25 pretty small universe.

1 And it should either be pretty
2 egregious violations of -- you know, of -- of --
3 of -- of the scope of what they should be
4 looking at, or, you know, you can also have NEPA
5 violations where they've made a consultation
6 error, which we don't have here, or there are
7 situations where you have a scoping -- or, you
8 know, the -- the segmentation problem, where
9 they break up a project into a bunch of little
10 projects and only do EAs and not EISs.

11 So, like, there still would be a role
12 for NEPA in this kind of narrower view, but I --
13 I do think that sort of historical perspective
14 is important because, when NEPA was first
15 passed, there were very few substantive
16 environmental statutes, and so it was really
17 designed to make sure that the agencies weren't
18 heedless of the environmental consequences.

19 Now, with all these substantive
20 environmental statutes, I don't think an agency
21 could possibly be heedless of the environmental
22 consequences.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 JUSTICE BARRETT: So this dovetails
2 with Justice Kavanaugh's questions.

3 I mean, NEPA's a procedural statute.
4 And, as you mentioned, now, with the amendments,
5 we've shrunk down to pretty significant page
6 limits, and now you're looking in the
7 neighborhood of 150, and you have judicially
8 enforceable deadlines. So you have shrinking
9 from the thousands of pages, like the report in
10 this case.

11 What effect do you think those
12 procedural requirements are? I mean, it's going
13 to be impossible for agencies to consider as
14 many downstream and upstream effects as they did
15 in this case just because of the procedural
16 constraints.

17 So what are -- what can we add? Or do
18 you see that -- I mean, obviously, this case
19 happened before the amendment. But what can
20 this add to that, or how can it dovetail with
21 that when we have an eye looking forward to, you
22 know, the amendments?

23 MR. CLEMENT: Yeah. And I suppose, if
24 you remanded here for additional NEPA analysis,
25 that would be subject to the statute. So I

1 think the statute is highly relevant.

2 I mean, I -- you know, I view the fact
3 that it slimmed things down as a feature, not a
4 bug. And I think, you know, to me, what would
5 be most useful is reaffirming the principle that
6 this Court has already said, which is, you know,
7 the purpose of this thing is largely to inform
8 the agency.

9 But, in the context of NEPA in
10 particular, what it should be informing the
11 agency about are the environmental qualities of
12 the reasonable alternatives that they're
13 supposed to consider. And the CEQ itself is
14 called the heart of the EIS, is the analysis of
15 the reasonable alternatives and the mitigation
16 measures.

17 And all of that is going to be
18 naturally focused on the project at hand, and
19 all of that is like -- 150 pages ought to be
20 pretty good to tell you that, yeah, Route 3 is
21 better than Route 2, and Route 3 will be even
22 better if you adopt the following however many
23 mitigation measures.

24 All of that, I think, can make an
25 150-page EIS still be valuable and, frankly,

1 probably more valuable than a 3600-page EIS.

2 JUSTICE BARRETT: A follow-up on the
3 proximate cause questions you've already
4 answered.

5 I mean, I had taken your brief to take
6 a harder line on proximate cause than you have
7 today, so are you soft-pedaling proximate cause?
8 Would it be -- it's hard for me to see when I
9 think about how an opinion would write if you
10 win. You know, is it you start with proximate
11 cause and then you ask: Well, should we go a
12 little bit beyond this, maybe applying a rule of
13 reason?

14 So -- or are you still kind of
15 pushing -- maybe I misoverread your brief. Are
16 you pushing for a harder proximate cause line?

17 MR. CLEMENT: So, I mean, I -- I
18 think, as -- as -- I'd go where this Court went,
19 which is proximate cause maybe isn't the alpha
20 and omega, but it sure is helpful.

21 JUSTICE BARRETT: Mm-hmm.

22 MR. CLEMENT: And then I -- I do
23 think, having, you know, ruminated on the
24 question a fair bit, that maybe the best thing
25 that you could say is: If it is remote in time

1 or space, which gets at proximate cause
2 principles, and in the jurisdiction of another
3 agency, then you're outside the consultation
4 requirement and you're -- you're talking about
5 something that if things go wrong years from
6 now, the STB and this project is not going to be
7 the legally relevant cause.

8 You know, maybe it'll be poor
9 management by the Federal Railroad
10 Administration or the wrong speed limit in
11 Colorado. Or maybe it'll be because Port
12 Arthur, Texas, actually likes having refineries
13 because it's the best thing for their local
14 economy. But you're not going to say 88 miles
15 of track in northeastern Utah is the legally
16 relevant cause.

17 JUSTICE BARRETT: So you see it as
18 saying what we've said before but maybe putting
19 a little bit more flesh on the bone with your
20 "remote in time and place" language as kind of
21 the measure of when you go beyond proximate
22 cause? Is that how you would think of it?

23 MR. CLEMENT: Yeah, and -- but I would
24 emphasize that if it's in the jurisdiction of
25 another agency and -- and remote --

1 JUSTICE BARRETT: Mm-hmm.

2 MR. CLEMENT: -- that really means
3 it's not the legally relevant cause because
4 another way to explain the split --

5 JUSTICE BARRETT: Mm-hmm.

6 MR. CLEMENT: -- is, you know, some
7 people look at Public Citizen and they get just
8 what I've told you out of Public Citizen.

9 Other people look at Public Citizen
10 and they say either that's a case about the
11 president or they say that's a case where the
12 last agency to act had no discretion whatsoever.
13 And I think that way narrows what Public Citizen
14 should stand for.

15 So, in -- in a sense, if -- if -- if
16 you make clear that Public Citizen and its test
17 for the legally relevant cause really looks to
18 another agency that's at a better position to
19 regulate it and not -- it's not just, like, a
20 ticket for, you know, one train --

21 JUSTICE BARRETT: Mm-hmm.

22 MR. CLEMENT: -- sorry, the pun --
23 then -- then I think that will have a lot of
24 help.

25 JUSTICE BARRETT: And do you see your

1 position as inconsistent with the government's
2 since they don't really kind of -- I don't want
3 to say go as far as you do, but they don't
4 articulate the same test. So how do you see the
5 daylight?

6 MR. CLEMENT: I don't think there's a
7 lot of distance or daylight between our
8 positions, but I think what daylight there is
9 reflects the fact that my clients have to invest
10 money and they need predictability.

11 And so the idea that, you know, there
12 are all these factors, but don't make any one of
13 them too dispositive, don't provide too much
14 guidance -- I mean, you know, I love almost
15 everything in the government's brief except when
16 it says "context-specific" or, you know, "a
17 factor but not dispositive."

18 People who are actually trying to
19 invest in these infrastructure projects need a
20 little more clarity on that and a little more
21 assurance that they're not going to get hung up
22 for years and years based on litigation in the
23 D.C. Circuit and the Ninth Circuit.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: So I guess I think
3 that my concern with your test, the remote in
4 time and effect plus outside the jurisdiction,
5 is that it feels to me to be unmoored from the
6 purposes of NEPA, which you have, I think,
7 articulated correctly as to informing the agency
8 with respect to its own decision-making process.

9 So I -- I'm trying to figure out how
10 to best articulate the concern, but your focus
11 is on identifying who is legally responsible if
12 this were to go wrong, as if NEPA is about
13 solely mitigation measures.

14 I thought NEPA was about the agency
15 who has some responsibility over an aspect of
16 this project determining whether or not to
17 approve it, and it's got to take into account
18 not only the environmental consequences of the
19 actual building of its piece but whatever
20 approving its piece is going to have happen in
21 the environment broader than that.

22 Now I understand that's really hard to
23 do. It gets far afield, and we can fight about
24 the extent of that. But your argument looking
25 only at the 88 miles, I think, might narrow in

1 too closely for a purpose of really informing
2 the agency about its approval of this piece of
3 the project.

4 MR. CLEMENT: So I -- I -- I'm going
5 to disagree. And I'm going to disagree -- I
6 mean, I think you've identified there's a
7 difference in sort of what you just
8 articulated --

9 JUSTICE JACKSON: Yeah.

10 MR. CLEMENT: -- and the position I
11 think you should adopt.

12 JUSTICE JACKSON: Okay.

13 MR. CLEMENT: And I think the position
14 you've articulated I don't think is really
15 consistent with 150-page EISs. And I think one
16 way to articulate the difference is I think part
17 of the problem with that is that views the
18 agency under NEPA, whatever its -- its organic
19 statute power, because it -- that sort of
20 suggests to every agency that they can put the
21 kibosh on a project for reasons that have
22 nothing to do with the details of the project or
23 their own jurisdiction.

24 JUSTICE JACKSON: But, no, I mean,
25 isn't that where we come in? I mean, that's

1 where I say -- that's where I say deference and
2 where the Court has previously said deference is
3 supposed to be taken into account and, you know,
4 advocacy, right? There are people who appear
5 before the agency and explain to them that the
6 statute actually presumptively says in this case
7 you're supposed to approve, Agency, and, you
8 know, if you're, like, arbitrarily saying no,
9 you can't do it because of something that's
10 happening 200,000 miles away or whatever, then
11 we're going to go to court because that's a
12 problem. And the -- and I would expect the
13 court to recognize that under those
14 circumstances.

15 But what I worry about with your test
16 is that you're suggesting that the agency can't
17 even look at the, you know, effects of the
18 project outside of the -- the very piece that it
19 has sole responsibility for, and -- and I don't
20 know that NEPA was actually designed to be that
21 narrow.

22 MR. CLEMENT: So just two responses.

23 I mean, one is what I'm saying is, if
24 they look way outside their bailiwick, it's not
25 that they can't do it. It's that they shouldn't

1 get reversed for not doing it well enough or for
2 not doing it.

3 JUSTICE JACKSON: Fine.

4 MR. CLEMENT: And -- and the second --
5 the second thing --

6 JUSTICE JACKSON: But you -- your test
7 suggests they can't or they shouldn't or they --

8 MR. CLEMENT: No, no.

9 JUSTICE JACKSON: -- they're not
10 allowed to.

11 MR. CLEMENT: We -- we tried to say
12 both in our briefs and here, if the agency wants
13 to go beyond the -- what's necessary, I mean,
14 have at it. You know, try to be brief --

15 JUSTICE JACKSON: But I guess what I'm
16 asking is, why isn't what's necessary anything
17 that would reasonably affect its own decision
18 about whether or not to approve its piece? And
19 that might be things outside of exactly what the
20 environmental impact of its piece is.

21 That's where you're saying you got to
22 cut it off there. And I'm just suggesting that
23 if we focus everyone's attention on what an
24 agency should reasonably be taking into account
25 with respect to its own approval of this 88

1 miles, whether it's the 88 miles themselves or
2 the other environmental impacts downstream or
3 whatever, I don't understand why it can't be
4 broader if we focus everyone's attention on the
5 standard being what Public Citizen says, the EIS
6 based on the usefulness of any new potential
7 information to the decision-making process.

8 MR. CLEMENT: So the reason I think
9 you shouldn't go down that route is because I
10 think that takes you to a world where an agency
11 that maybe has effectively a veto over a project
12 can consider everything under the sun and
13 essentially use NEPA to be almost like a -- a --
14 a veto and take into account everything that the
15 project is the but-for cause of.

16 JUSTICE JACKSON: I appreciate that,
17 but that's not this case. In fact, you agree
18 with the agency in this case, and we don't have
19 a situation in which the agency has not taken
20 into account. You -- it's the D.C. Circuit, I
21 thought you said, was the problem here.

22 MR. CLEMENT: Yeah. The D.C. Circuit
23 is the problem here to be sure, but the agency
24 obviously was reacting in part to what the D.C.
25 Circuit has required and where the litigation

1 would be. And if you just think how far outside
2 their mandate is, because, you know, you've
3 talked about, you know, they're really about
4 these tracks, but they not only are bound by but
5 enforce a common carriage requirement.

6 And if you think about this project,
7 almost none of the problems with this project
8 have anything to do with the trains. They have
9 to do with the cargo. But the irony of this is
10 the one thing this agency couldn't do as a
11 mitigating measure is say don't -- don't carry
12 any of that waxy crude on your trains. That
13 would clearly violate the statutory mandate.

14 So I think, rather than focus on every
15 environmental thing that might happen if the
16 agency went with the no action alternative, I
17 think, if instead they focus on, look, what's
18 going to make a difference between the
19 reasonable alternatives that actually accomplish
20 what this project is about and what mitigation
21 measures can we put on those reasonable
22 alternatives, whichever one we pick, to make
23 this project more environmentally friendly, I
24 think that accomplishes a lot.

25 It doesn't make NEPA the end all and

1 be all of all environmental policy, but that's
2 actually as it was intended and, certainly, I
3 think, what Congress was getting at in the
4 BUILDER Act.

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Kneedler.

9 ORAL ARGUMENT OF EDWIN S. KNEEDLER
10 ON BEHALF OF THE FEDERAL RESPONDENTS,
11 SUPPORTING THE PETITIONERS

12 MR. KNEEDLER: Mr. -- Mr. Chief
13 Justice, and may it please the Court:

14 This Court's NEPA decisions over the
15 last 50 years have announced principles that are
16 designed to enable an agency to concentrate its
17 environmental review on environmental issues
18 that the agency considers most useful to -- in
19 its evaluation of the project. What that --
20 that decision is reviewed, as has been said,
21 under the arbitrary and capricious standards,
22 but there are particular reasons under NEPA for
23 that deference.

24 And there are -- there are two more in
25 particular. One is that this Court's discussion

1 of NEPA constantly refers to reasonableness,
2 reasonable, rule of reason, reasonably
3 foreseeable content, actions, and reasonable
4 cause, is it a reasonable cause of the action.

5 When an agency is charged with acting
6 under a statute that calls for reasonableness,
7 that in itself suggests a broad amount of
8 discretion for the agency to focus on what is
9 actually going to affect the outcome.

10 And the last point with respect to the
11 procedural nature of NEPA, Vermont Yankee is
12 very instructive on that. It says that an --
13 a court is not supposed to impose procedures on
14 an agency that go beyond the APA or, in this
15 case, to the extent NEPA has a -- a substantive
16 element, it should not be imposing on the agency
17 outside measures of what should be considered.

18 With respect to the substance of NEPA
19 review, it might be helpful to think of it in
20 two steps. The first step is the court's review
21 has to be grounded in the first instance in the
22 action agency's organic statute. What does it
23 permit it to do, and, secondly, what is the
24 particular issue before the agency?

25 Here, that -- answering that question

1 is almost dispositive because of the unique
2 nature of this program. The -- the STB is --
3 regulates railroad -- railroad transportation
4 under a common carrier mandate. It does not
5 regulate oil. It doesn't regulate the commodity
6 on any train. It does not regulate oil and gas
7 development. And at the other end, after the
8 oil is offloaded, it does not regulate refining
9 or any other particular use of -- of the -- of
10 the product.

11 So, in this case, the NEPA review
12 is -- is concentrated or -- or guard-railed, if
13 you will, by the -- by the very nature of the
14 statutory provision. In other places, that may
15 not be true, where -- where you don't have
16 that -- that barrier.

17 The next thing is I think you can
18 condense all of the various tests or phrasing
19 that the Court has used into the one, is it --
20 is there a reasonably close causal connection?
21 And looking at that question, there are certain
22 formulations or ideas or notions that coalesce
23 into that -- that final point. Is it reasonably
24 close in -- in time or distance?

25 I think common sense suggests, if --

1 if it's not, that that's not a reasonably close
2 causal connection. And -- and, here, the -- the
3 oil development in the basin or the emissions
4 from refineries down the road are not going to
5 happen for quite some time because that will
6 depend on individual decisions by lessees of
7 land in the basin about where they're going to
8 drill. And those are individual decisions, and
9 they're also -- correspondingly, those decisions
10 are subject to the review of other agencies,
11 state, local, the -- the lessor. And then
12 downstream, the oil is not going to arrive there
13 until after the -- the drilling occurs and it's
14 loaded on the trains. That's in the distant --
15 in the -- in the future.

16 STB can't control where trains go.
17 Individual decisions of the purchaser of the oil
18 and other things will direct where it goes,
19 and -- and it may go to different refineries at
20 different times. So you have both the -- the
21 distance there and the fact that it's subject to
22 other -- other regulation.

23 And -- and it's -- and it's wrapped up
24 in this or instructive that STB can't do
25 anything. It can't prohibit any of the things I

1 just discussed. And also, it will happen so
2 much in the future that -- that the agency can't
3 mitigate whatever consequences there may be.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Mr. Kneedler,
6 Mr. Clement said that there was some difference
7 between the government's argument and his, and
8 he didn't articulate fully what that difference
9 was.

10 Would you spend a few minutes on that?

11 MR. KNEEDLER: Yes. I -- I think the
12 principal difference is I -- I think he
13 primarily wants hard-and-fast rules, rigid
14 rules. And I understand the instinct, and --
15 and as -- you know, the department defends a lot
16 of lawsuits challenging NEPA decisions by
17 agencies, and -- and we wish that the courts
18 would give more deference along the lines that I
19 just described.

20 Having said that, I think it's not
21 really right to say there should be absolute
22 rules. The -- the -- the mix of the factors
23 that I mentioned may push you in one direction
24 or another, or, in some cases, the statutory
25 mandate that the agency has will be virtually

1 dispositive, but you can't just focus -- in this
2 case, you can focus on the 88 miles because
3 that's really all the Board can do.

4 But, in other situations, it's been
5 settled for a long time that -- that a court --
6 or, excuse me, an agency should take into
7 account indirect effects too, which are not just
8 the immediate effects of the project.

9 JUSTICE KAGAN: Well, so could you put
10 some flesh on the bones of that?

11 Just, you know, thinking concretely
12 about Mr. Clement's test, which is this remote
13 in time and space and within the ambit of some
14 other regulatory authority, what are the
15 circumstances in which you would worry about
16 that kind of test?

17 MR. KNEEDLER: Well, I think, I
18 mean --

19 JUSTICE KAGAN: Or what -- you know,
20 what are the circumstances in which you think
21 that kind of test would be terrific and would
22 help everybody out?

23 MR. KNEEDLER: Yeah, no -- and -- and
24 I think both can -- both can be true. You could
25 have a situation where another agency could

1 regulate something, but there's no -- no
2 petition before it or there's no action before
3 it, and the -- the -- the federal agency might
4 think that it will have external consequences.
5 It should consult with that other agency.

6 But that doesn't absolve the -- not in
7 this case, but in another case, where the agency
8 isn't so confined, it -- that can't absolve the
9 agency from taking some account of -- of -- of
10 what's going to happen.

11 And, you know, one example is like
12 in -- in highways. The Federal Highway
13 Administration, in a funding decision, will look
14 not just at the highway but what development is
15 likely to occur if it's close in time. But, if
16 the highway is going to facilitate something
17 that may be five years down the road or 10 years
18 down the road, then maybe not.

19 So, you know, I think it does -- or --
20 or in the Corps of Engineers permitting
21 situation that Mr. Clement mentioned, where the
22 Corps of Engineers has a -- a minor role in
23 regulating the -- the discharge, it shouldn't
24 have to get into what other agencies are --
25 are requiring.

1 JUSTICE KAGAN: So I think I'm not
2 getting where you would think, oh, that's --
3 that test is not getting to the core of the
4 problem.

5 MR. KNEEDLER: Well, if you -- there
6 are other situations -- we're focusing here on
7 infrastructure projects because that's what's
8 before us.

9 But you could have -- you could have
10 land use decisions by a federal agency, where
11 there's a lot -- a lot more is within the ambit
12 of the federal agency to control. And maybe
13 when you cut timber, there -- there could be
14 some emissions that would go off -- off site or
15 something like that that another agency may take
16 account of or maybe not.

17 But the -- it wouldn't be wrong for
18 the landowner to say, in deciding whether to
19 approve a project: I'm going to consider the
20 emissions, I'm going to consider those other
21 things because of -- I -- I feel like I have a
22 special responsibility or a broader ambit
23 because I'm leasing my own land.

24 And, yes, maybe another agency could
25 step in, but -- but the agency would still feel

1 some responsibility.

2 JUSTICE BARRETT: But isn't that --

3 CHIEF JUSTICE ROBERTS: And then to --

4 JUSTICE BARRETT: -- overlapping
5 jurisdiction? I had understood Mr. Clement's
6 test to be if it's in the jurisdiction of
7 another agency, and so there's nothing that,
8 here, you know, the STB could do about it.

9 But what you're describing is -- maybe
10 I'm misunderstanding what you're saying. But is
11 what you're describing when there's overlapping
12 jurisdiction so that the agency, like the STB or
13 whatever, the Federal Highway Administration,
14 could consider it, but so could another agency?

15 MR. KNEEDLER: Or they both -- or they
16 both -- they both should consider it. If --
17 within their -- within -- if there's overlapping
18 regulatory jurisdiction, they both -- both
19 should consider it.

20 But there are also situations where
21 another agency has great insight in -- in -- in
22 what -- what might happen, technical expertise
23 or something that the action agency could
24 consult with.

25 Now, here -- here, as I said, there's

1 pretty stark separation for what the STB does or
2 what its responsibility --

3 JUSTICE BARRETT: But how is that
4 different from Mr. Clement's test, is I guess
5 what I'm getting at.

6 I mean, is the situation you're
7 talking about when another agency has insight
8 that it can offer? Are you envisioning a
9 situation in which there's not overlapping
10 jurisdiction, or are you -- or it is overlapping
11 jurisdiction?

12 MR. KNEEDLER: Well, here, there is
13 really not --

14 JUSTICE BARRETT: Well, I -- I know,
15 but I --

16 JUSTICE JACKSON: Mr. Kneedler, isn't
17 the answer it's not overlapping regulatory
18 jurisdiction, but the -- the landowner with the
19 timber has to decide under NEPA what informs
20 their decision as to whether to chop down the
21 timber?

22 And so, even though they may not have
23 jurisdiction over the area in which the
24 emissions would fall, you would still expect
25 that they would take into account, that they

1 would look at, that they would study, in making
2 their own determination about whether or not to
3 cut down the trees on their land?

4 MR. KNEEDLER: Right. And in some
5 situations, even on federal land, there may be
6 situations where another agency would also have
7 jurisdiction but that for pollution --

8 JUSTICE BARRETT: I -- I -- I
9 understand -- I understand that. I'm not really
10 disputing Justice Jackson's point here.

11 I guess what I'm just trying to
12 understand is nailing down the difference. I'm
13 not hearing a ton of difference between
14 Mr. Clement's test and yours --

15 MR. KNEEDLER: Yeah.

16 JUSTICE BARRETT: -- on the
17 jurisdictional point.

18 MR. KNEEDLER: Yeah. I -- I -- I
19 don't think there is. As --

20 JUSTICE BARRETT: Okay.

21 MR. KNEEDLER: -- as he said, I think
22 we agree that -- that some -- sometimes the
23 principles he's announcing will be dispositive
24 or close to it, close to our rule. But we think
25 it -- we think the Court should preserve the --

1 the -- the possibility or -- or the likelihood
2 in some cases.

3 JUSTICE ALITO: Well, maybe this is --
4 maybe this is unfair, but can you -- so far,
5 in what you -- you've been talking about the --
6 the relevance of the agency's jurisdiction.
7 But, if you add in the other element to the
8 standard that he mentioned, remote in time and
9 space, can you think of situations -- past cases
10 or situations that you can anticipate where both
11 of those factors are present where you think
12 that his proposal would go too far?

13 MR. KNEEDLER: Well, I guess it
14 depends what you mean by "remote in time and
15 place." I mean, one of -- one of the -- one of
16 the differences that -- that I think I have
17 on -- on the way Mr. Clement was articulating it
18 is he said -- he was saying focus only on the 88
19 miles. But NEPA has long been understood to
20 require assessment of some indirect effects.
21 Direct effects are normally what is right --
22 what -- in this case, what is happening on the
23 88 miles.

24 JUSTICE KAGAN: So that's what I think
25 I'm trying to get at, is where? I mean, in what

1 contexts would it be wrong to focus so clearly
2 on just the 88 miles or just the area around
3 whatever the project was?

4 MR. KNEEDLER: Well, I -- I think
5 where the agency is setting in motion something
6 that -- that is going to have effects, you know,
7 off the property or -- or -- or out driving cars
8 or -- or -- or future actions that might be
9 taken because of the -- the development that I
10 mentioned.

11 And the Robertson decision from this
12 Court is sort of instructive on that. There was
13 a question of whether the agency should grant a
14 permit to build a ski resort in the mountains.
15 And then there was the -- it was foreseen that
16 there would be a -- hotels and -- and whatnot
17 next to it. And the agency properly considered
18 not just what was going to happen on the federal
19 land that was being leased but what -- what
20 private development would -- would happen.
21 And --

22 JUSTICE BARRETT: That's not --

23 MR. KNEEDLER: -- if it's right next
24 door, that's close -- that's close in distance.
25 Maybe it would take a while to build the

1 project. And so that's a matter of the agency's
2 judgment, is: But what should be taken into
3 account?

4 JUSTICE BARRETT: But that's not
5 remote in time and place, right? I mean,
6 that's -- that's close in place. So is that --

7 MR. KNEEDLER: Right. No, I was -- I
8 was responding to the point that sometimes an
9 agency should take account of something that
10 isn't directly -- it's not just the place, it's
11 not just the ski lifts. It's --

12 JUSTICE BARRETT: I -- I agree. I
13 agree. It just seems like that's not -- I mean,
14 so I think, like, the 88 miles, just focusing on
15 the track itself, might be too narrow a focus.
16 But, if it's something kind of alongside either
17 in your hypothetical, it's something that seems
18 to me pretty close in space.

19 MR. KNEEDLER: Right. No, and that --
20 that -- that was my point about indirect
21 effects. Some -- it -- it's not the ski
22 resort -- it's not the ski lifts itself.
23 It's -- it's what -- what indirect consequences
24 that will have by building the ski resort there
25 or maybe a mile away. So it's a question --

1 JUSTICE KAGAN: Right. I guess what
2 Justice Barrett is saying is, you know, it
3 depends how you define the term "remote." But I
4 wouldn't think of that as remote. So I would
5 think of that as passing Mr. Clement's test.

6 Is there -- is there anything that
7 you're worried about that's not, like, just
8 around there but really is further away, that
9 the agency should really take a look at because
10 it could influence their decision-making?

11 MR. KNEEDLER: Well, I -- I think the
12 Corps of Engineers, in issuing a permit for a
13 deposit, is not just going to look at -- or
14 shouldn't just look at the immediate place where
15 there might be fill put in the river but -- but
16 should be concerned if the -- if whatever
17 pollutant is being added, what -- what's its
18 effect downstream going to be? Is it -- is it
19 poisonous? Would it affect drinking water
20 downstream?

21 JUSTICE SOTOMAYOR: That goes to the
22 issue of the nature of what the impact is,
23 correct?

24 MR. KNEEDLER: Yeah, yeah.

25 JUSTICE SOTOMAYOR: And some impacts

1 can be more localized, and some impacts might
2 not be.

3 MR. KNEEDLER: Right.

4 JUSTICE SOTOMAYOR: A smokestack might
5 be blown because of the winds in a particular
6 area to five states.

7 MR. KNEEDLER: Right.

8 JUSTICE SOTOMAYOR: In another, it
9 might be blown to two. And the same thing --
10 you just mentioned that if it's affecting the
11 water, you can't just look at the little pond
12 that's there; you have to look at where it
13 travels when it leaves the pond, correct?

14 MR. KNEEDLER: Right.

15 JUSTICE SOTOMAYOR: And it could go a
16 very far distance in some situations, correct?

17 MR. KNEEDLER: Right.

18 JUSTICE SOTOMAYOR: You can have
19 downhill motion that could take something miles
20 away.

21 MR. KNEEDLER: Yes.

22 JUSTICE SOTOMAYOR: So that's why a
23 test that just speaks about the local impact is
24 not enough if that's all you're saying.

25 MR. KNEEDLER: Right. No, I think

1 that's right. And -- and Mr. Clement was
2 concerned about context-specific analysis. To
3 some extent, that's inevitable, but I mean --
4 what I think we mean by context-specific is
5 looking at the statute that the agency's acting
6 on, what -- what is it supposed to be focusing
7 on, and enabling the agency to focus on that and
8 the particular decision that is being made.

9 Sometimes that focus will be informed
10 by the fact that another agency is also going to
11 look at this. Another agency will be concerned
12 about the downstream effects.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 You obviously focused on a lot more --
16 I don't know whether they were adjectives or
17 nouns, but particularly in your opening, to
18 determine what exactly is available here, and
19 then I think a lot of the questions were
20 pressing along the same direction.

21 In light of all that, I think the most
22 important question is going to be whether or not
23 the agency will entertain motions for extension
24 of the 150-page limit.

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: How in the
2 world -- how in the world -- putting aside
3 whether -- the question for the people who have
4 to -- and the agencies who have to fill this in,
5 how in the world is somebody going to know how
6 they should use a very, very limited, in terms
7 of government work, page limit and -- and --
8 and, at each turn, knowing that failure to
9 address a particular item could result in -- in
10 the project being either delayed or -- or
11 denied?

12 And -- and yet then -- and you sort of
13 gave yourself this safety valve: Well, in this
14 case, it's very clear, and in this case, that.
15 But, in other cases, you've left a lot of
16 uncertainty both for the agency and the people
17 appearing before it.

18 MR. KNEEDLER: Well, I -- two
19 responses to that, and there may be more.

20 The first is that the page limit, I --
21 I think, should be a statutory affirmation that
22 the agency shouldn't have to go to the ends of
23 the earth to focus -- or to decide the
24 environmental issue. It should focus on what
25 are the -- what are the core concerns,

1 identifying what the core concerns are so that
2 the agency will have that in mind, and then
3 decide how deeply it needs to go into that. So
4 I think -- I think enabling -- as this Court's
5 decisions have sought to do, enabling the agency
6 to focus closely on what it regards as most
7 material to its decision.

8 The second point is -- is the other, I
9 think, problem that comes up in judicial review
10 is the fly-specking, which really isn't present
11 here but is more present in the other aspect of
12 this case in terms of downline effects, where
13 the track is going through another state.
14 Courts review these very intensely and said, oh,
15 you should have done another study or you've
16 got -- you've got this problem over here that
17 you could have talked about more.

18 And I think -- and it's not really
19 present in this case, but I think -- I think the
20 courts need to be reminded -- and, again, this
21 comes in with the reasonableness review and
22 Vermont Yankee and arbitrary and capricious --
23 need to be reminded that the agency gets to
24 decide in the first instance, with great
25 deference, how deeply it needs to go into

1 something. And if somebody comes in with a --
2 saying, well, you know, you didn't -- there's
3 another study you could have looked at, at some
4 point, this just has to be cut off, particularly
5 given the page limits and given the -- what NEPA
6 was about was focusing on the things that are
7 most important, which may include, does include,
8 some indirect effects.

9 CHIEF JUSTICE ROBERTS: Thank -- thank
10 you, counsel.

11 Justice Thomas?

12 Justice Alito?

13 Justice Sotomayor?

14 JUSTICE SOTOMAYOR: What do you
15 understand to be the issue before us? There
16 were a lot of decisions by the court below, at
17 least five that I'm aware of. One was on
18 sending it back for the railroad to consider the
19 additional oil production in the basin and the
20 other that the railroad would spur oil refining
21 in Texas and Louisiana. And your brief was
22 limited to those two issues.

23 MR. KNEEDLER: That's what we focused
24 on because we didn't understand the question
25 presented to cover the -- the downline effects.

1 JUSTICE SOTOMAYOR: Neither did I when
2 I read the cert petition. But, having said
3 that, because they don't mention the other
4 things, the -- the -- the wildfires, the
5 railroad accidents, or the Colorado River
6 impact, you don't think those issues are before
7 us?

8 MR. KNEEDLER: I -- I -- I don't
9 think -- no, I don't think that they are before
10 you. And the precise issue, I think, before the
11 Court with respect to both the oil and gas
12 development and the -- and the refineries is
13 whether what the agency -- was it arbitrary and
14 capricious for the agency not to have done more?

15 On both ends of that, it identified
16 the aggregate. It identified a low and high
17 range of how much oil would be produced based on
18 the capacity of -- of the rail line and -- and
19 the aggregate amount of -- of emissions that
20 would happen in Louisiana.

21 JUSTICE SOTOMAYOR: So just so I'm
22 clear, the other items, the wildfires, the
23 accidents, and the Colorado River, were not
24 mentioned in the cert petition?

25 MR. KNEEDLER: I -- no, I don't -- I

1 don't believe -- but, no, the agency obviously
2 did evaluate those along the 88 miles. The
3 question is whether it -- whether it had -- and
4 it did evaluate those things downline. This is
5 an example of -- of fly-specking because the
6 Respondents said, well, they should have done a
7 little more. They should have done a little
8 more.

9 JUSTICE SOTOMAYOR: Thank you,
10 counsel.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?
12 Justice Kavanaugh?

13 JUSTICE KAVANAUGH: I want to pick up
14 on what you were saying to the Chief Justice
15 because -- and in some of the colloquy you were
16 having earlier because I think there's an
17 important distinction to be made between what an
18 agency can do or maybe should do as a matter of
19 good government and what the role of the courts
20 is in reviewing what the agencies do.

21 And we start with the deference on the
22 arbitrary and capricious standard, but given the
23 uncertain lines that were reflected in your
24 answers to Justice Barrett and Justice Kagan and
25 Justice Jackson about how far to go, it seems to

1 me the deference of the courts has to be huge
2 with respect to how the agencies think about the
3 scope of what they're going to consider.

4 And it seems to me the problem that
5 has crept in is conflating what the agency can
6 do and should do from what the role of the
7 courts is here. And by the courts taking an
8 overly aggressive role, it's in turn created an
9 incentive for the agencies to -- to do
10 3,000-page EI -- you know, environmental impact
11 statements.

12 MR. KNEEDLER: I think that's
13 absolutely correct, and it's -- it's no
14 coincidence that all -- almost all of these --
15 this Court's cases about NEPA have been where a
16 court has required the agency to do more than
17 the agency concluded in its own judgment was
18 necessary.

19 And so I -- I think the -- the Court
20 could accomplish a lot in terms of NEPA
21 litigation by emphasizing the points that you
22 just did against -- again, it's not
23 manufactured -- this Court has said
24 reasonableness is the -- you know, is the
25 standard in measuring how far an agency should

1 go. And who better than the agency in the first
2 instance, say this is the decision that's before
3 us, this is what I need or what I think I need
4 to -- to consider that, to have considered
5 environmental issues enough to go forward with a
6 decision.

7 One other point about the arbitrary
8 and capricious. Sometimes agencies treat the
9 EIS as if it's agency action that they should
10 independently review. The ultimate question is
11 whether the agency action should be set aside
12 because of some defect in the EIS in the end.
13 Analytically, the EIS is not its own agency
14 action. It's part of the record on which the
15 agency is acting.

16 So, if the -- if the court finds some
17 defect in some detail of the -- of the
18 environmental impact statement, not only does
19 that not render the whole EIS invalid, but it --
20 but you have to ask a further question, should
21 we be setting aside the agency's decision on the
22 basis of -- of something in a document? It's a
23 very important document, but, again, it shows in
24 judicial review some attenuation between what
25 the EIS does and what the agency's substantive

1 decision is.

2 JUSTICE KAVANAUGH: And just to
3 underscore something that I think you're going
4 to agree with, the new Act makes it impossible
5 for the agency to -- to do the kind of detail
6 that some courts have demanded. So --

7 MR. KNEEDLER: Yeah, it --

8 JUSTICE KAVANAUGH: -- the deference,
9 it's going to be like deference squared with the
10 new Act, it seems to me, but --

11 MR. KNEEDLER: Well, it does -- it
12 does exempt appendices from that.

13 (Laughter.)

14 MR. KNEEDLER: I know. I -- you know,
15 I --

16 JUSTICE KAVANAUGH: Yeah.

17 MR. KNEEDLER: Yes. But -- but I --
18 but I -- but I think it's like --

19 JUSTICE KAVANAUGH: Don't try that
20 here.

21 (Laughter.)

22 MR. KNEEDLER: I think it's like
23 saying we'll get around -- we'll get around the
24 word limit by put putting it in the -- but an
25 agency has to be able to -- an agency has to be

1 able to document technically some of its
2 judgments. So the E -- but I -- but I -- I do
3 think that that would ease the task of judicial
4 review because it necessarily will focus the --
5 the decision -- the decision in -- in readable,
6 understandable forms and force the agency to
7 give the -- to give its most important reasons.
8 And a further detail for, you know, some
9 hydrological studies and whatnot, that can be
10 dealt with in the appendix.

11 So I think it -- it can be a useful
12 separation of the agency's explication of its
13 reasons and what should -- what should be the
14 primary focus of the court.

15 JUSTICE KAVANAUGH: A last -- last
16 quick thing. What do you think we should say
17 about Sabal Trail?

18 MR. KNEEDLER: I think it's a close
19 question, frankly. And we -- we -- the
20 government argued that -- that FERC was not
21 required to evaluate the emissions at the -- at
22 the other end. There is a difference between
23 this case and -- and FERC pipelines because, in
24 this case, once -- you know, the STB doesn't
25 control where trains are going to go. That's

1 all left up to private decision-making.

2 When you have a pipeline, FERC is
3 authorizing the pipeline to take gas from here
4 to here. And so, if you had -- if you had the
5 power plant right, you know, at the end of the
6 pipeline, it would be sort of hard to say
7 that -- that that's not a indirect effect at
8 least of -- of the pipeline.

9 But we are very concerned, as Mr.
10 Clement is, once you start expanding that to --
11 in -- in Sabal Trail, there were five refineries
12 it could go to. And so the courts tend to look
13 that -- at that as a factual question. If you
14 could figure out where it's actually going to
15 go, you should investigate it. I don't think
16 that's the right way to look at it or not -- not
17 the full way to look at it --

18 JUSTICE KAVANAUGH: Okay.

19 MR. KNEEDLER: -- because legal
20 responsibility, they're not responsible for
21 which particular refinery it's --

22 JUSTICE KAVANAUGH: Thank you.

23 MR. KNEEDLER: -- it's going to go to.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 JUSTICE BARRETT: Just one quick
2 follow-up on that because that was my question
3 too about Sabal Trail. You know, Mr. Clement
4 said: Well, at least what Sabal Trail has come
5 to stand for.

6 And would the government agree that
7 even if Sabal Trail itself was correct for some
8 of the reasons that you say, that what courts
9 have interpreted Sabal Trail to mean is too
10 aggressive?

11 MR. KNEEDLER: Yes. No, that -- and
12 that's -- that's what I was -- was trying to
13 convey because that gets you into thing -- that
14 gets you into speculation. It gets you into
15 other agency responsible. It gets you into
16 individual decision-makers and -- and all that.

17 CHIEF JUSTICE ROBERTS: Justice
18 Jackson?

19 JUSTICE JACKSON: Yes. So I'm
20 reflecting on your conversation with Justices
21 Kagan and Barrett, and maybe I don't understand
22 how Mr. Clement's test works, but I thought that
23 each element operated independently to narrow
24 the circumstances in which further study would
25 be required.

1 So right next door but within the
2 regulatory jurisdiction of another agency, I
3 thought, would not pass Mr. Clement's test
4 because he had a separate element about it has
5 to be in your own jurisdiction.

6 Is that how you understand?

7 MR. KNEEDLER: Yep. I -- I think it
8 could be understood that way. I'm not -- I'm
9 not sure he means -- he means the hardest form
10 of that.

11 JUSTICE JACKSON: But maybe -- maybe
12 he can respond on rebuttal --

13 MR. KNEEDLER: Yes.

14 JUSTICE JACKSON: -- but that's how I
15 thought -- I thought --

16 MR. KNEEDLER: That sort of -- that
17 sort of highlights a -- a -- a --

18 JUSTICE JACKSON: Highlights the
19 concern, right?

20 MR. KNEEDLER: Right. Yes.

21 JUSTICE JACKSON: Because it could be
22 next door. It could be clearly a foreseeable
23 impact, but he, I thought, wanted a line that
24 had everybody looking at what is in your own
25 regulatory jurisdiction, so it's not an

1 overlapping jurisdiction scenario.

2 MR. KNEEDLER: Right.

3 JUSTICE JACKSON: He posits to begin
4 with that different agencies have different
5 purviews. And if this thing at step one is
6 outside your purview, you don't have to study
7 it.

8 MR. KNEEDLER: Right. And that's like
9 putting blinders on something that -- that --
10 that may happen.

11 JUSTICE JACKSON: And instead, your
12 test, which seems to, I think, reflect what the
13 Court has said about deference to agencies
14 and -- and what Justice Kavanaugh was pointing
15 out about the arbitrary and capricious standard,
16 you said in your beginning that we're supposed
17 to start with the organic statute.

18 And I hear that as sort of the step
19 one court question is, has the agency properly
20 identified its own purview under the statute?
21 Once the agency does that, then the agency makes
22 a determination about what it needs to study to
23 inform its decision.

24 And then you said at step two, the
25 court asks once the agency makes that

1 determination, is there a reasonably close
2 causal connection in time and distance to the
3 thing that the challenger is saying the agency
4 is supposed to study versus what the agency
5 itself has said given its organic statute.

6 Do I sort of have your framework right
7 as to what courts are supposed to be doing?

8 MR. KNEEDLER: On the -- on the second
9 step --

10 JUSTICE JACKSON: Yes.

11 MR. KNEEDLER: -- I would add one
12 modification.

13 JUSTICE JACKSON: Yes.

14 MR. KNEEDLER: It would be was the
15 agency arbitrary and capricious in concluding
16 that anything further than that was not a --
17 should not be regarded as a reasonably close
18 causal connection. I don't think that's the
19 test for the Court to decide in it -- in its
20 own --

21 JUSTICE JACKSON: In its own. Filter
22 that through the arbitrary and capricious?

23 MR. KNEEDLER: Right.

24 JUSTICE JACKSON: Yeah.

25 MR. KNEEDLER: Because it -- it --

1 it's one aspect of the agency's decision. It's
2 both the organic statute and NEPA, how do they
3 fit together, and given that, did the agency
4 make a reasonable -- was it arbitrary and
5 capricious in making the judgment it did that
6 going further than that was not --

7 JUSTICE JACKSON: So, in the
8 government's position, if we were to articulate
9 something like that, do you think that would
10 be -- that meaning these two steps, this is the
11 way the Court is supposed to be looking at this
12 in these situations, would that be helpful?

13 MR. KNEEDLER: Yes. I think it would
14 be very helpful for the -- for the NEPA
15 litigation that -- that we do see and then
16 identifying the factors that can reasonably go
17 into what's a reasonably for -- reasonably close
18 causal connection.

19 And this is what the agency is looking
20 at and was it on -- on those, you know, sort of
21 factors, was it arbitrary and capricious?

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Jay.

1 ORAL ARGUMENT OF WILLIAM M. JAY
2 ON BEHALF OF RESPONDENTS EAGLE COUNTY, ET AL.

3 MR. JAY: Mr. Chief -- Mr. Chief
4 Justice, and may it please the Court:

5 Petitioners' argument and this case
6 have shifted somewhat from the cert stage, as
7 Justice Sotomayor's colloquy with my friend
8 brought out, and I'd just like to focus on two
9 of those at the threshold. One is about the 88
10 miles and one is about the outside the agency's
11 jurisdiction point, that the agency itself did
12 not take this outside the 88 miles view. The
13 agency reviewed and found foreseeable the
14 downline impacts.

15 We obviously don't think those are
16 within the question presented, but it's striking
17 that Petitioners are taking a -- a view of what
18 the agency should have studied that is
19 considerably narrower than the agency itself.

20 And the second is about the agency's
21 jurisdiction. This case came to this Court as a
22 case in which the D.C. Circuit had recognized
23 that the agency had jurisdiction to this -- and
24 authority to consider the effects that were
25 being studied.

1 So, as Petitioners' position has
2 shifted, I think it's also lost any grounding in
3 the text of NEPA. So I think it would be -- it
4 would be good to -- to step back there.

5 The impacts at issue here are
6 reasonably foreseeable consequences of this \$2
7 billion railway project whose entire rationale
8 is to transport crude oil. Reasonable
9 foreseeability is the test that Congress -- that
10 has been in NEPA since the beginning and that
11 Congress has recently reaffirmed in the BUILDER
12 Act.

13 In that -- in that statute, as in
14 agency practice leading up to it, when an effect
15 is within the scope of reasonable foreseeability
16 and within the agency's authority to consider,
17 Congress doesn't direct agencies to pass the
18 buck to someone else. It directs all federal
19 agencies to cooperate on, where possible, a
20 single environmental review so that federal
21 decision-making at -- from the threshold is
22 informed by these environmental considerations.

23 Congress also addressed these policy
24 concerns that Mr. Clement has emphasized quite
25 vigorously by adopting the page limits, the time

1 limits, and also some scope limits that
2 haven't -- haven't come up this morning.

3 We agree with a number of the things
4 that the government said in its brief. In
5 particular, points B1 and B3 of its brief, I
6 think you'll find more agreement with what I've
7 said than Mr. Kneedler was able to get to today.
8 There's no reason --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. Thank you.

11 MR. JAY: Thank you, Your Honor. I
12 welcome the Court's questions.

13 JUSTICE THOMAS: Would you just spend
14 a -- articulate what you think the close
15 connection is with the Gulf Coast communities?

16 MR. JAY: So the reason that the
17 effects -- the refining effects are reasonably
18 foreseeable in this case and I think probably
19 would not be in some others is that the very
20 purpose of this project is not only to bring a
21 specific type of crude oil to the National Rail
22 Network but to transport it for refining, and
23 there are only a few places that have the
24 capacity to do that.

25 I think that's why the agency itself

1 was able to identify the limited number of
2 places where this oil could go. And, again, the
3 whole raison d'etre of this project is to
4 transport one commodity and one commodity only.

5 That -- that won't be the -- that
6 won't be the case in many other railroad
7 projects, but I do think it's -- it's a little
8 bit misleading for Mr. Clement to suggest this
9 is an 88-mile railroad, as if the train just
10 went back and forth for 88 miles. It's a
11 connection to the National Rail Network, whose
12 entire purpose was to bring this crude oil to
13 the market.

14 JUSTICE SOTOMAYOR: Do you think as a
15 common carrier that this agency could say we
16 don't like oil refining, and, hence, because it
17 creates pollution, I'm not going to build this
18 railroad because the crude oil will lead to oil
19 refining that will pollute the environment?

20 MR. JAY: So I think -- so let me just
21 say, as a prefatory matter, I think that would
22 be a question about the agency's organic statute
23 and not about NEPA. I suspect that it probably
24 could not, because of the common carrier --

25 JUSTICE SOTOMAYOR: So if it --

1 MR. JAY: -- mandate.

2 JUSTICE SOTOMAYOR: -- can't, which is
3 what I assume because the statute doesn't permit
4 it to discriminate in that way -- it says you
5 have to carry all products and person -- cargo
6 and persons -- then why is it within their
7 purview to say or determine what the increase of
8 refining will be and whether it'll be damaging
9 when there's another agency that has the power
10 to control that? It can't -- it has no power to
11 say don't refine the oil. Another agency might
12 do that.

13 MR. JAY: So the -- the purpose of
14 NEPA review of this -- on this point, I would
15 like to make three points. So one is that the
16 Board is weighing the transportation merits of
17 this project, whether to authorize this project
18 as a -- as a substantive matter, against the
19 environmental consequences. That's the test
20 that the Board applies under its organic
21 statute. And so when the Board concludes that a
22 railway project is --

23 JUSTICE SOTOMAYOR: But it's not the
24 carrying that causes the pollution; it's the
25 refining that causes the pollution. And the

1 railroad can't control that refining because it
2 can't prohibit it. You know, it could stop it
3 by not permitting the shipment, but it's not
4 entitled to make those choices. It's a common
5 carrier. It has to carry the goods.

6 MR. JAY: I think that, as a matter of
7 its organic statute, it might well take that
8 approach. Now, in -- but --

9 JUSTICE SOTOMAYOR: Isn't that what it
10 did here?

11 MR. JAY: No, I don't think so. I --
12 I think that it's closer -- what it did here is
13 closer to something that you've said a moment
14 ago, which is to say, essentially, we -- we,
15 this agency, don't regulate the refineries; and,
16 therefore, we need not look at the -- at the
17 consequences.

18 And I think that that's inconsistent
19 with what the agency -- with what NEPA requires
20 because --

21 JUSTICE SOTOMAYOR: Thank you,
22 counsel.

23 JUSTICE JACKSON: But why is --

24 JUSTICE KAGAN: Why don't you complete
25 your answer?

1 JUSTICE JACKSON: Yeah.

2 MR. JAY: Just very briefly, the --
3 NEPA requires agencies to look at even harms
4 that they cannot mitigate and harms that they do
5 not regulate directly, precisely because they
6 provide a springboard for public comment to the
7 agencies. So even if the agency doesn't think
8 that it would out -- conclude that the
9 environmental harms outweigh the transportation
10 merits, it allows the public to participate in
11 the process, and it also allows those local air
12 pollution regulators that you referred to, Your
13 Honor, to essentially be aware of the
14 consequence coming downstream from this --

15 JUSTICE KAGAN: So that --

16 MR. JAY: -- central decision.

17 JUSTICE KAGAN: If I understand you
18 correctly, Mr. Jay, that takes NEPA outside of
19 the things that are reasonable to inform agency
20 decision-making and says even if this thing
21 wouldn't reasonably inform agency
22 decision-making, couldn't reasonably inform
23 agency decision-making, still NEPA might impose
24 an obligation, has an interest in public airing
25 of that matter.

1 And that's -- that seems to go beyond
2 what I thought the statute was all about.

3 MR. JAY: So that is not our position,
4 Justice Kagan. We're not -- we're not saying
5 that -- that -- that NEPA requires the agency to
6 conclude -- to conduct environmental review that
7 wouldn't inform its decision-making.

8 And that -- that's an important aspect
9 of where I began, that the D.C. Circuit
10 concluded, and as the government pointed out in
11 footnote 7 of its principal brief, nobody sought
12 cert on the question of whether these effects
13 are -- were within the government -- the
14 agency's authority to regulate. So Public
15 Citizen is an excellent -- excellent example of
16 the point that the agency is not required to
17 study what it has no authority to -- to act on,
18 as a --

19 JUSTICE JACKSON: But Public Citizen
20 is different. I mean, it's -- it -- it does --
21 it has the authority, the Board here has the
22 authority --

23 MR. JAY: Yes.

24 JUSTICE JACKSON: -- to decide whether
25 or not this 88-mile track is approved, right?

1 MR. JAY: Yes.

2 JUSTICE JACKSON: And the question is,
3 I think, that Justice Kagan is asking, to what
4 extent does information about what happens in
5 the refining process inform this Board's
6 determination with respect to exercising that
7 authority.

8 I don't understand why it matters if,
9 as Justice Sotomayor pointed out, they're common
10 carrier, they have a -- they're not allowed to
11 discriminate as to what gets carried on the
12 tracks. So if they can't say what gets carried,
13 then what difference does it make that the
14 refinery is putting -- you know, putting out
15 environmental effects to their decision as to
16 whether or not to approve this?

17 MR. JAY: So it matters because it is
18 a reasonably foreseeable consequence of this
19 railway project because of what these trains
20 will carry and because one of the things that
21 NEPA requires agencies to do is to look at the
22 foreseeable consequences, even when they cannot
23 be mitigated.

24 I mean, that's again, Section
25 4332(C)(ii) of the statute. Any reasonably

1 foreseeable adverse environmental effects, which
2 cannot be avoided if the proposal should be
3 implemented. That's part of the study.

4 And so, in other words, for the agency
5 to say, well, we don't have authority to
6 mitigate these effects and, therefore, we won't
7 look at them at all, that is ignoring a category
8 of consequences just like --

9 JUSTICE JACKSON: Don't you have to
10 have an argument that their study -- let's say
11 they do study them, and they determine they have
12 great impact. Don't we -- doesn't someone have
13 to make the determination that those impacts
14 should really matter with respect to whether or
15 not this project gets approved?

16 I mean, they're so far down the line.
17 They're really -- they depend on a bunch of
18 other people's actions. All the things they
19 say. Don't you have to show that there's some
20 pretty close connection or tie between those
21 impacts and this decision?

22 MR. JAY: So I want to -- I want to
23 distinguish between two points. One is the far
24 down the line point, and I think the
25 foreseeability standard deals with that. And

1 the second is the thrust of your question, which
2 is, would the agency look at it? And there
3 certainly are cases where agencies either don't
4 take environmental considerations into -- into
5 account or they -- or they don't take certain
6 environmental considerations into account.

7 But the effects in this case -- and
8 we've been talking a lot about refining, but
9 there are obviously multiple categories of
10 effects in this case -- these are the types of
11 effects that the Board, in conducting this broad
12 weighing between transportation merits and
13 environmental consequences, does take into
14 account.

15 I mean, take the downline
16 consequences. The Board has an entire
17 regulation about the environmental consequences
18 of permitting a new railway, which will then
19 have trains go onto the national rail network
20 and go -- go onto other tracks. It has an
21 environmental -- an entire regulation directing
22 applicants to explain the environmental
23 consequences for other areas, for things like
24 air pollution.

25 Obviously, the Board doesn't regulate

1 air pollution, but it absolutely does take into
2 account the -- the consequences on other rail
3 lines of adding new rail traffic. The downline
4 impacts in this case, which -- which the Board
5 studied, but made basic APA errors on --

6 JUSTICE JACKSON: But you don't
7 appreciate --

8 MR. JAY: -- are an example of that.

9 JUSTICE JACKSON: You don't appreciate
10 a difference between the downline impacts of
11 having more train traffic in certain areas
12 versus what is being carried on those trains and
13 what then happens to that cargo?

14 MR. JAY: So I think the standard is
15 foreseeability for both, but I do think that it
16 will be much more rare for the trains to be
17 carrying a single commodity for refining in a
18 single location -- for consumption in a single
19 location. That, I think, is what makes this
20 case, you know, a particularly unrepresentative
21 example of -- of the foreseeability standard,
22 because in many cases, as the D.C. Circuit
23 acknowledged, the -- whatever the commodity is,
24 whether it's on a train or in a pipeline, it
25 will go into some national distribution network

1 and no one will know where it will go, what will
2 -- how it will be consumed, whether it will
3 displace other goods. And I think the -- the
4 D.C. Circuit made -- made that point in
5 distinguishing one of its own precedents
6 involving natural gas.

7 But in this case, the -- the entire
8 purpose of the project is to carry waxy crude
9 oil, and the record before the agency shows that
10 every train that leaves the Uinta Basin is going
11 to be carrying waxy crude oil, every one. And
12 the Board was able to quantify both the amount
13 of oil that would be necessary to make the
14 project financially viable and to identify where
15 it would go.

16 So if the Board has essentially
17 tracked the oil out of the basin onto the trains
18 and to the refineries, the -- what the D.C.
19 Circuit pointed out is that since the agency was
20 also assuming that all of the oil would be
21 refined, it needs to -- it needs to taut up the
22 environmental consequences at the refinery.

23 In many cases, that will not be the
24 case, but that's -- that's why the reasonable
25 foreseeability standard is met here. And the --

1 JUSTICE KAGAN: Do you -- do you think
2 that the agency could turn down the project on
3 that basis? I mean, I -- I take it you must,
4 because you were assuming that the agency
5 couldn't mitigate the harms by saying you can't
6 carry this particular product.

7 Do you think that the agency can turn
8 down the product? Is that the sort of
9 assumption that's underlying what you're saying?

10 MR. JAY: So I think that is the
11 assumption on which the D.C. Circuit decided the
12 case. But that's not a NEPA question,
13 obviously. It is a question of the -- the
14 authority under the ICCTA.

15 JUSTICE KAGAN: I mean, it seems
16 related to a NEPA question because if the agency
17 can't mitigate the harm and it can't turn down
18 the entire project, one wonders what all this
19 fuss and bother is about.

20 MR. JAY: Right. I think the D.C.
21 Circuit understood that these were the types of
22 -- the types of considerations and certainly the
23 downline impacts, I -- I -- I think probably the
24 upstream impacts as well, were the kinds of
25 considerations that -- I mean, they did motivate

1 at least one member of the Board to dissent from
2 -- to dissent from the decision.

3 So as the case came to the Court, and
4 as the question presented is framed for you,
5 that -- that is not the question. That --
6 that's -- that's taken as a given.

7 JUSTICE KAGAN: Can --

8 MR. JAY: And I take --

9 JUSTICE KAGAN: -- can I ask about
10 foreseeability? Because, I -- I mean,
11 foreseeability is certainly part of the inquiry,
12 but I'm having -- you're -- you're seeming to
13 make it the entire thing.

14 And if it were the entire thing,
15 Public Citizen couldn't have come out the way it
16 came out. Or it was perfectly foreseeable what
17 environmental effects were going to flow from
18 those trucks.

19 So I guess I'm wondering, it's got to
20 be more than that, right, Mr. Jay?

21 MR. JAY: It is more than that. So
22 the -- the government has this mantra in its
23 brief about attenuated speculative contingent or
24 otherwise insufficiently material.

25 We actually agree with a lot of that,

1 that -- that things that are too attenuated or
2 speculative for the agency to -- to look at,
3 those are excluded by the foreseeability
4 standard.

5 And then setting -- even separate and
6 apart from the foreseeability standard, this is
7 almost sort of the -- the flip side of -- of
8 Mr. Clement's position. Mr. Clement seems to be
9 saying that if somebody else has authority to
10 look at it, this agency shouldn't. So our --
11 our position is if the -- if this agency doesn't
12 have authority to look at it, it is not required
13 to.

14 And then the third point is that they
15 obviously have to be environmental in nature.
16 That was the thrust of Metropolitan Edison, that
17 some things are not environmental consequences
18 at all, because they don't bear -- there's no
19 causal relationship between the -- the agency
20 action and the effect on the physical
21 environment.

22 So I think each of those is -- is part
23 of the analysis, but quite a -- quite a bit of
24 it is accomplished by the reasonable
25 foreseeability standard. And I -- I think that

1 there -- there -- there -- it's important to
2 distinguish between two questions.

3 One is how much process should NEPA --
4 should the agency give the things that are
5 within what NEPA tells it to look at? And much
6 of Mr. Kneedler's presentation focused on that.

7 And we agree, 100 percent, that
8 agencies have a lot of discretion to say we're
9 going to prioritize these effects over others.
10 And we think that's the necessary concomitant of
11 the BUILDER Act and the 150-page limit and the
12 time limit, that agencies are going to have to
13 prioritize some effects over others. They will
14 get deference if they explain briefly what their
15 reasoning is for doing so.

16 That could have to do with their
17 statutory mission. It could have to do with
18 their expertise.

19 But what Congress did not do is say
20 that it was going to attack this -- the problem
21 of NEPA being too -- having too broad a compass
22 by saying -- by changing the reasonable
23 foreseeability standard.

24 And that's the problem with what
25 Mr. Clement is proposing, is that he's saying

1 that even where the agency finds something
2 reasonably foreseeable and says, we should study
3 that, and in that study, it makes a basic AP
4 error -- APA error, like the one that the
5 district court -- sorry, that the court of
6 appeals in this case found to be utterly
7 unreasoned.

8 Mr. Clement says: No problem,
9 harmless error, because NEPA didn't require you
10 to study that at all.

11 And that, we think, is the wrong way
12 to -- to attack the problem. Because the
13 reasonable foreseeability standard is in the
14 statute, and -- and this sort of alternative ^
15 "not my problem" standard is not.

16 If anything, the text of -- as Justice
17 Sotomayor brought out at the very beginning of
18 the argument, the text of the statute directs
19 agencies not to ask do I have this -- the
20 statutory authority to mitigate this issue? It
21 directs the federal government, together, to --
22 to bring together all agencies that have
23 jurisdiction by law or special expertise with
24 respect to any environmental impact involved.

25 And so Congress built on that in the

1 BUILDER Act by specifying that, where possible,
2 there should be one environmental review,
3 precisely because that -- that is how
4 environmental review is better streamlined,
5 rather than fragmenting environmental review.

6 JUSTICE JACKSON: Why do you say that
7 the agency here didn't do anything? I thought
8 there were 50 pages of their EIS that was
9 dedicated to the environmental consequences of
10 new oil and gas drilling and refining?

11 MR. JAY: So the -- the -- the
12 upstream development, I -- I -- I think it's --
13 it's a curious case, Justice Jackson, because
14 the -- as you say, the agency took quite a bit
15 of time looking at certain aspects of upstream
16 development.

17 And in those 50 pages, they indulged
18 the project sponsor's assumption that the
19 railroad would be viable because there would be
20 enough oil developed to -- for it to -- to be
21 carried to market and make the -- make the
22 railway a -- a financially viable going concern.

23 But then what -- with respect to a
24 couple of categories of impacts, what the agency
25 said was: Well, these are not within our

1 authority to mitigate. We don't regulate oil
2 and gas -- we don't regulate oil and gas. So
3 we're only -- we're going to look at it, but
4 we're only going to look at it where it's near
5 the rail line.

6 And what the D.C. Circuit said was
7 that that distinction base -- is based on, one,
8 something that's not driven by NEPA. This --
9 this point that we've been discussing about
10 whether agencies should look at environmental
11 effects that they don't regulate directly.

12 And, two, just whether it made any
13 sense as a matter of the APA. And so should --
14 the agency did look at an -- at upstream
15 development, and as a factual matter agreed with
16 the predicate that had been laid for looking at
17 all those things, such as how many -- about how
18 many wells will be needed to generate about this
19 much waxy crude oil.

20 And we're not asking -- we are not in
21 this case asking that the agency look at things
22 that it can't know -- can't look at without
23 knowing where individual wells would be. That
24 obviously, as the -- as the agency said, that
25 would be speculative. But that's not what's at

1 issue.

2 What's at issue is the foreseeable
3 consequences of oil development at that scale.
4 And recall that the agency, elsewhere in its
5 EIS, assumes that all of the oil shipped out on
6 the rail line would be new oil development. So,
7 in other words, it's not substituting for oil
8 that's currently being developed and shipped out
9 by truck.

10 When you make those assumptions, then
11 it follows that the agency should be -- should
12 be looking at the -- at least the basin-wide
13 effects of -- of the oil development, because
14 they're reasonably foreseeable. And that --
15 that is the applicable standard.

16 The -- the agency's response to the
17 comments basically just stopped based on this --
18 on this notion that those aren't things that it
19 regulates directly.

20 I'd like to turn for a moment to
21 Mr. Clement's allusion to the idea of -- of
22 prejudicial error. And I think that that --
23 that certainly is a standard in the APA.

24 But this case, I think, illustrates
25 why that would be of -- of grave concern. That

1 I think it's a bedrock principle under the APA
2 that when -- when an agency tackles an issue,
3 it's supposed to respond -- respond to it in a
4 way that is not arbitrary and capricious.

5 That obviously is a deferential
6 standard, but it requires intelligible reasoning
7 that -- that is subject to appropriate judicial
8 review.

9 And what Mr. Clement is proposing in
10 this case is to say that no matter the utterly
11 unreasoned nature of, for example, the -- the
12 agency's handling of the downline impacts, and
13 no matter the fact that the agency did not read
14 this to be outside the scope of NEPA because
15 it's not within the 88 miles, or for any of the
16 other reasons that -- that Mr. Clement was --
17 was offering, that the courts should decide that
18 as a matter of substantive NEPA law, I guess,
19 they -- they -- those errors are per se
20 harmless.

21 And I think there's both a NEPA
22 problem and a Chenery problem with -- with doing
23 that.

24 The -- the NEPA problem is that it
25 doesn't apply the actual foreseeability standard

1 in the statute. And that where the agency has
2 concluded that -- that effects are foreseeable
3 and that it should -- and he must tackle them,
4 that to have the courts come in and say, no,
5 that's -- that's not what's required, I think,
6 should require a higher standard and not a
7 lesser one.

8 And the second is -- is a principle
9 about Chenery, which is that this is
10 essentially -- like, not even the government is
11 here defending the -- the agency's rationale.
12 To have Mr. Clement defend it on a rationale
13 that the agency did not itself adopt, I think is
14 -- is a further problem.

15 The -- we've talked a little bit
16 about -- about the -- the basic thrust of NEPA.
17 And I want to get back to a question that
18 Justice Kavanaugh asked early on, which is:
19 What is NEPA adding to -- in this -- in this
20 suite of environmental statutes?

21 Because as you've -- as you've
22 observed, NEPA was the first of a great many
23 environmental statutes. It was adopted in 1970,
24 before a number of the agencies that we now know
25 existed.

1 And it's -- Mr. Clement seemed to be
2 suggesting that, well, its importance has eroded
3 over time.

4 But what hasn't eroded is the text,
5 right? And the -- the text sets out a
6 requirement that, to the fullest extent
7 possible, all agencies are to follow these
8 basic -- these basic NEPA procedures.

9 One of those NEPA procedures is to
10 take environmental considerations into account
11 in deciding on major federal actions. And there
12 obviously are limits on what is a federal major
13 action. But what -- what NEPA requires is that
14 they follow the -- that -- that -- sorry,
15 procedural guide to making better decisions.

16 And precisely because at the time NEPA
17 was adopted, a number of agencies might well
18 have said, not my problem, I'm just a highway
19 agency, I'm just a railroad regulator, and not
20 taken environmental considerations into account,
21 when they might well have been able to mitigate
22 or avoid environmental problems had they done
23 the proper degree of study.

24 Sometimes -- and this goes back,
25 Justice Kagan, to our colloquy a -- a few

1 minutes ago. Sometimes that might lead the
2 agency to say we're not going to approve the
3 project at all because the environmental
4 consequences are too great, and it is consistent
5 with our mission to -- to turn the project down
6 on that basis.

7 More often, we think, the -- the study
8 of environmental consequences is going to lead
9 to public comment, informed decision-making,
10 and, where possible, consideration of
11 mitigation. That's -- that's exactly what NEPA
12 sought -- sought to get at and what --

13 JUSTICE KAVANAUGH: I think the -- the
14 concern raised, though, is when the agency has
15 said -- has approved the project and a court
16 comes in and says -- in this new, as you say,
17 suite of statutes era, and says even though the
18 agency approved the project, even though the
19 project and all the effects comply with all the
20 substantive environmental laws that have been
21 passed over the years, which regulate very
22 extensively, obviously, we, court, are going to
23 come in and second-guess.

24 So I -- I don't think your answer
25 focused on that particular problem and the

1 deference given that -- maybe it's just extra
2 deference, given the -- the overall situation
3 now. Maybe "extra" is the wrong word but just
4 -- just appropriate deference.

5 MR. JAY: So I think that where an
6 agency recognizes that there is an environmental
7 issue and that it will be dealt with in the
8 mitigation process -- or, I'm sorry, in the
9 review process by other agencies, which could be
10 state or federal agencies, that rationale might
11 well be sufficient all by itself to -- to
12 satisfy NEPA review, but what we're -- what
13 we're discussing here is a different question,
14 which is whether the ring fence around NEPA
15 should be drawn so tightly that the agency
16 doesn't have to ask that question at all.

17 I mean, as I said a moment ago and I
18 think this really is one of the most important
19 pieces of this case, that how much the agency
20 has to do under NEPA is different from saying
21 that certain effects are beyond the scope of
22 NEPA so that Mr. Clement's aggressive view of
23 harmless error can come in and over -- and fix
24 an agency's flawed decision-making on grounds
25 that the agency itself did not give.

1 That -- that, I think, is -- is the
2 core of the point, that even -- even where some
3 agency -- some other agency has responsibility,
4 the first -- that agency is going to be at the
5 table in the NEPA review. The first agency may
6 well be able to rely on the -- on the agency
7 with expertise in the NEPA review, and the flip
8 side of that, and this is made explicit in the
9 2023 amendments, is that where the first NEPA
10 review answers these questions, the second
11 agency can look back to the first NEPA review
12 and say we're all done here.

13 JUSTICE JACKSON: Mr. Jay --

14 MR. JAY: We don't need another one.

15 JUSTICE JACKSON: Mr. Jay, can I just
16 give you a chance to answer what I think is the
17 hardest part for you? And that is if -- if the
18 environmental impacts come from the cargo that
19 is to be carried on these trains and the Board
20 cannot, because of the common carrier mandate,
21 really consider the cargo or discriminate on the
22 basis of the cargo, then how is it that these
23 environmental impacts are useful to the Board's
24 decision-making in the way that NEPA requires?

25 MR. JAY: So there -- as we -- as

1 we've been discussing, there are three sets of
2 -- three general sets of impacts. And I don't
3 think that, for example, the wild fire set of
4 impacts on the -- along the downline stretch, I
5 don't think that's driven by the cargo. So let
6 -- let's bracket that for the moment.

7 I think that in many cases where
8 you're building a railroad and the railroad will
9 carry whatever -- whatever all comers want,
10 whether it's passengers or freight, then the
11 Board would be justified in saying this is --
12 you know, this is a common carrier line. It
13 will be totally speculative to ask what cargo it
14 will carry.

15 In this case, it's not speculative at
16 all because the entire purpose is to carry one
17 set of cargo. And if you look at -- at the
18 record, you will see that --

19 JUSTICE JACKSON: Would the Board be
20 justified in saying we know what this cargo is,
21 and because we can't discriminate on the basis
22 of our common carrier mandate, there's no impact
23 on our decision with respect to NEPA or
24 whatever, and so, therefore, we don't have to
25 study it?

1 MR. JAY: So I think probably in the
2 context of a project like this one, where the
3 Board's mission is to weigh the transportation
4 merits against the environmental consequences,
5 and the transportation merits are heavily
6 weighted with the oil and gas -- the oil
7 development in the basin, the economic value
8 that it will create, and the -- the ability to
9 unlock this important natural resource, we're --
10 we're not saying that the Board would conclude
11 that the environmental consequences are too
12 grave to -- to permit the railway as a matter of
13 law or something like that.

14 But we are saying that what
15 environmental consequences would result
16 foreseeably from carrying one cargo to
17 particular destinations in very large
18 quantities, that's foreseeable; whereas, as the
19 Board said about the other things that -- that
20 might go along on this rail line, we don't know
21 what they might be. It would be speculative --
22 it would be speculative to wonder what they
23 might be, but we do know that there will be no
24 trains carrying anything else -- let me say that
25 more precisely. There will be no trains

1 carrying cargo other than oil and only cargo
2 other than oil. Every train leaving this basin
3 is going to be carrying waxy crude oil. There
4 might be a little, you know -- one car tacked --
5 tacked on for something else, if there were a --
6 a market for it.

7 And so under those circumstances where
8 the rationale for the project is to permit
9 unlocking more waxy crude oil development and
10 where the -- where the Board's consideration of
11 the benefits of the project is tied to the --
12 that oil development, it follows that the Board
13 would at least consider what the environmental
14 consequences of doing so would be.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 Justice Alito?

19 Justice Sotomayor?

20 JUSTICE SOTOMAYOR: I do see that
21 there are different questions here. You
22 mentioned the train accidents and the wild fire
23 or pollution. No one has ever -- I don't think
24 Petitioner has ever said the agency should not
25 study those things. Those are directly caused

1 by the train, the project.

2 MR. JAY: Mr. Clement said that this
3 morning. That's it's --

4 JUSTICE SOTOMAYOR: Exactly. And so
5 really --

6 MR. JAY: -- you know, it's 88 --
7 outside the 88 miles.

8 JUSTICE SOTOMAYOR: -- that's a
9 different challenge as to whether they did it
10 adequately or not, which is what the D.C.
11 Circuit said, they didn't do it adequately.
12 That's the question of arbitrary and capricious,
13 purely an arbitrary and capricious standard,
14 correct?

15 MR. JAY: It is purely arbitrary and
16 capricious.

17 JUSTICE SOTOMAYOR: All right. The
18 issue of whether they had to study at all the
19 increased oil -- oil refinery is the issue
20 that's before us, correct?

21 MR. JAY: Whether the -- whether they
22 had to address the environmental consequences of
23 developing the oil in the basin --

24 JUSTICE SOTOMAYOR: Right.

25 MR. JAY: -- and of refining it --

1 JUSTICE SOTOMAYOR: Okay.

2 MR. JAY: -- at the point of delivery.

3 JUSTICE SOTOMAYOR: All right. Thank
4 you.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

6 JUSTICE KAGAN: And just on that, if I
7 could get you to focus specifically on Mr.
8 Clement's test and say what you think is wrong
9 with it. And as I understood Mr. Clement's
10 test, and he will tell me if I'm wrong, but that
11 it's a kind of two-part test.

12 And if it is both remote in time and
13 place, space, and another agency has regulatory
14 authority, then you can't fault the agency for
15 not looking at it. And so, again Mr. Clement
16 will tell me if I'm making his test more
17 stringent then he would like it to be, but it's
18 two parts. If both are satisfied, you can't
19 fault the agency.

20 What's wrong with that?

21 MR. JAY: So, two things. Let me
22 start with the other agency's authority piece
23 first. And I -- I think Justice Barrett brought
24 out in a -- in a colloquy at the beginning about
25 -- about whether agencies sometimes have

1 concurrent authority. And the answer is yes,
2 they absolutely do in a lot of cases.

3 And -- and therein, I think, lies the
4 problem, that Mr. Clement's rule would say
5 agency number 1 passed the -- passed the buck to
6 agency number 2. It's not clear that agency
7 number 2 would then say we're going to do the
8 study, rather than pass the buck to someone
9 else.

10 And I think that that's directly in
11 the teeth of NEPA and the -- the provisions for
12 timely and unified federal review, like the one
13 document provision at new Section 107(b), that
14 all the agencies with expertise or jurisdiction,
15 either one, are supposed to be participating in
16 the -- in the NEPA review and to coordinate. So
17 that's one piece.

18 The second piece you asked me about is
19 the remote in time and size space point. And I
20 think, obviously, our test likewise -- the
21 statutory test would likewise rule out some
22 things that are remote in time or space, but
23 just as foreseeability doesn't have a strict
24 geographic line -- I think Mr. Clement's rule by
25 making it strictly geographic, that's not really

1 tied to the concept of the project.

2 Projects in our large federal
3 government, you know, especially multi --
4 multibillion-dollar projects like this one, may
5 well have effects that are felt beyond just next
6 door. And I think that the fact that Mr.
7 Clement says that the only rail line between
8 these -- between this railway and the Texas
9 refinery, so, in other words, every railcar
10 going to Texas or Louisiana, they're all going
11 to come out of this railway, they're all going
12 to turn left, and they're all going to go down
13 the Union Pacific line, Mr. Clement says, well,
14 that's -- that's too remote in time or space for
15 our test to -- to bring it in.

16 We think that that foreseeability test
17 makes that a really good example. It is very,
18 very foreseeable that the rail cars that come
19 off of Mr. Clement's 88 miles of track and turn
20 left are going to cross that rail line. And the
21 agency itself foresaw that, about once a year,
22 there's going to be an accident with an
23 oil-laden car and about one out of every four of
24 those is going to result in an oil spill.

25 JUSTICE KAGAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 Justice Barrett?

4 Justice Jackson?

5 Thank you, counsel.

6 MR. JAY: Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
8 Clement?

9 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

10 ON BEHALF OF THE PETITIONERS

11 MR. CLEMENT: Thank you, Mr. Chief
12 Justice. Just a few points in rebuttal.

13 First, Justice Kagan, you understand
14 our test perfectly. And the reason it has both
15 elements is to deal with this situation of
16 concurrent jurisdiction or to deal with the
17 situation where another agency has information
18 that bears directly on the project.

19 And that's why if you look at the
20 mitigation measures that were adopted, both the
21 voluntary ones and the ones imposed, they talk
22 about the other agencies that are involved.

23 And other agencies were directly
24 involved here. The most obvious is the -- the
25 Forest Service that provided a right-of-way.

1 And all of that took place in the cooperation
2 and consultation process. Twenty-seven agencies
3 were consulted and nobody's complaining about
4 that. That's why it's a disjunctive -- or
5 that's why we have to have both elements
6 practice.

7 But if it's remote in time and space
8 and it's in another agency's -- you don't put
9 them in the consultation process, and you let
10 them deal with the process.

11 The second point I'd like to make is
12 just to be specific about what's wrong with
13 Sabal Trail, in addition to its decision to
14 disregard FERC's judgment that the EIS there was
15 enough.

16 I mean, first of all, it decouples
17 reasonable foreseeability from environmental
18 effects. And that's what the Respondents do as
19 well. As long as it's reasonably foreseeable,
20 it's foreseeable that it goes down the tracks
21 500 miles, never mind that once it gets there,
22 the safety regulation is the job of a different
23 agency; the tracks are no longer operated by my
24 clients; the trucks, the -- the tanker trucks on
25 there are owned by a third-party.

1 It's got nothing to do with us. If
2 there was an accident there, FRA would come in
3 and they would talk to lots of people and they
4 wouldn't talk to us because we have nothing to
5 do with that down -- that downline accident.

6 So that's one thing that's wrong. The
7 other thing that's wrong is it has this formula
8 that if you think about it even a little bit,
9 then it's foreseeable, then you have to study it
10 to death. That creates all the wrong
11 incentives.

12 The last point I would make is just
13 about what's before you. I think the entire
14 environmental impact statement and whether or
15 not you have to consider effects that are not
16 proximate and are in the jurisdiction of another
17 agency is properly before you.

18 The question presented doesn't
19 distinguish between downline and downstream. I
20 don't even know what that exactly means.
21 There's not a stream here.

22 So I would think you look at all of
23 the things that -- that the D.C. Circuit faulted
24 this agency for and the downline impacts are not
25 materially different. Indeed, both the refining

1 in the Gulf and the extra traffic on the train
2 tracks in Colorado depends on the idea that
3 there's going to be more upstream development in
4 the basin.

5 This basin is not some small area.
6 It's as big as the State of Maryland. And all
7 of that is speculative if a project happens and
8 there are concerns with the vegetation or
9 whatever, then either the Ute Tribe or Utah can
10 make a determination, they can impose their own
11 mitigation measures.

12 Just the last thing I'll say is if
13 you're worried about sort of trying to provide
14 some additional detail to what's remote in space
15 and time, I do think the scope of the reasonable
16 alternatives and the scope of the mitigation
17 measures provides a good guide, but this is a
18 common carrier agency.

19 The one thing it could not do is say
20 let's mitigate by saying no waxy oil in these
21 trains. It just doesn't make a lot of sense to
22 make that agency responsible for combustion in
23 the Gulf.

24 Thank you, Your Honor.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 12:01 p.m., the case
3 was submitted.)

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