

No. 23-975

IN THE

Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE
COALITION, *et al.*,

Petitioners,

v.

EAGLE COUNTY, COLORADO, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE*
UTAH AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS
IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE¹

The Utah AFL-CIO is one of nearly five-hundred state and local labor councils of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). The Utah AFL-CIO is a democratically elected body dedicated to representing the interests of working people in the state of Utah. The Utah AFL-CIO represents 38 unions and more than 40,000 members across Utah.

Jeff Worthington, President of the Utah AFL-CIO, has over 45 years of dedicated involvement in labor unions. Mr. Worthington's goal is to foster collaboration between employee groups and employers to promote mutual benefit and a sense of equity and harmony between these two essential groups. The Utah AFL-CIO has a vested interest in creating more jobs in Utah and the overall increase in economic welfare of the workers of the state.

The railway project into the Uinta Basin would empower the individuals that the Utah AFL-CIO represents within the labor industry to secure meaningful employment, while at the same time providing a professionally built infrastructure that will benefit federal, state, county, and city governments; private entities; and the citizens of the state of Utah. In doing so, the Uinta Basin railway

¹ Counsel for Utah AFL-CIO authored this brief in whole. No person other than Utah AFL-CIO and its members and counsel made any monetary contribution to fund the preparation or submission of this brief. Counsel of record received notice on March 26, 2024, of Utah AFL-CIO's intent to file this brief.

project would strengthen the Utah economy as well as enrich the laborers who work on this project.

The Court should reverse the order blocking the Uinta Basin railway project. The lower court's holding, which is based on a faulty construal of [*Department of Transportation v. Public Citizen*, 541 U.S. 752 \(2004\)](#), will foster arbitrary and inconsistent decisions in lower courts across the country because the "foreseeability standard" is vague and overreaching and will result in a wide variety of varied decisions based upon similar facts.

SUMMARY OF ARGUMENT

The Uinta Basin Railway Project would foster jobs and economic growth in the Uinta Basin and the surrounding region. Shipping oil by rail is a safer and a more environmentally friendly alternative to transport by semi-trucks. There are two concerns that impact the *Amicus* in this case: (1) the practical effects that this ruling will foster arbitrary and inconsistent rulings, potentially based upon politics rather than legal reasoning because the various judges' decisions in making future determinations of "foreseeability" will necessarily vary based upon highly subjective and personal preference rather than the rule of law; and (2) the result in this particular case does not seek to protect the environment but elevates form over substance, and thus will negatively affect the labor and economic well-being of these rural communities in Utah by potentially killing a worthwhile project due to its delay.

The *Amicus* is concerned that, based upon the lower court's conclusion, the National Environmental

Policy Act (NEPA) is being used to kill a worthwhile project for arbitrary reasons and not based upon logic or concern for the environment. The lower court's decision enables a myriad of subjective decisions based upon how the judge or judges imagine the concept of "foreseeability."

ARGUMENT

This *Amicus Brief* essentially adopts the legal reasoning in the Petition for Writ of Certiorari and will not repeat their legal arguments except as necessary to make a point about the lower court's ruling and the standard it applied.

Further, unlike most *Amicus* briefs, this brief is written on behalf of Jeff Worthington, the head of the Utah AFL-CIO, who personally studied the idea of this particular railroad project because he saw its benefit to the labor and economy in these rural communities in Utah. While the Utah AFL-CIO has no desire to harm the environment, it does see the benefit of this project to the lives and economic wellbeing of Utah laborers who would work on the project.

The U.S. Supreme Court held in *Department of Transportation v. Public Citizen* that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect. Hence . . . the agency need not consider these effects" in its statement of the proposed action's environmental effects pursuant to NEPA. [541 U.S. 752, 770 \(2004\)](#).

In this case, the Surface Transportation Board issued its decision approving the Railroad and addressing all the relevant environmental effects of the project. In other words, the Board did its job as required by its statutory grant of authority. The Board appropriately noted that it did not possess “authority or jurisdiction over development of oil and gas in the Basin nor any authority to control or mitigate the impacts of any such development.” Pet.App.108.a. The sole fact that this oil and gas development, and other distant environmental impacts, would not occur without the Board’s approval of the railway project does not make those impacts an “indirect effect” for NEPA purposes. *Id.*

The D.C. Circuit vacated the Board’s decision, reasoning that because “the Board has authority to deny an exemption to a railway project on the ground that the railway’s anticipated environmental and other costs outweigh its expected benefits, the Board’s argument that it need not consider effects it cannot prevent is simply inapplicable.” [*Eagle Cty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1180 \(D.C. Cir. 2023\)](#).

The D.C. Circuit’s decision opens a Pandora’s box of potentially arbitrary issues that are not within the purview of the Surface Transportation Board, focusing not on what activities the STB oversees but on the potential to kill a worthwhile project because it might be “too harmful to the environment.” [*Sierra Club v. FERC \(Sabal Trail\)*, 867 F.3d 1357, 1373 \(D.C. Cir. 2017\)](#). The D.C. Circuit wrongly focused on hypothetical environmental effects and not on the expertise and statutory focus of the agency. The appellate court further held, “[T]he existence of permit

requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis.” *Id. at 1375*. This ruling invites agencies to delve into matters that are beyond their control and require review of issues outside their scope of authority, when they are ill-equipped to do so.

The Utah AFL-CIO is frustrated that the lower court’s decision allows an agency to study issues that are beyond its statutory authority, such that the result will be to delay the Uinta Basin railway project, potentially indefinitely. This delay potentially will prevent the project from being implemented even though no environmental issue within the STB’s purview of jurisdiction has been identified as a basis to stop this project.

The effect of the lower Court’s decision is a personal issue with Jeff Worthington. In 2018, while Mr. Worthington was attending the Uinta Basin Energy Summit in Vernal, Utah, an idea emerged about building an 88-mile Short Line Railroad terminating in the Uinta Basin and connecting with a Class 1 Railroad in Helper Utah, which is located in Carbon County. Drawing on his thirty-nine-year career as a Locomotive Engineer with Union Pacific Railroad before assuming the role of President of the Utah AFL-CIO, Mr. Worthington brings a unique perspective and valuable institutional knowledge of shipping products and goods by rail.

Recognizing the efficiency and benefits of this mode of transportation in and out of the Uinta Basin for delivering a wide range of commodities, Mr. Worthington was enthusiastic about the positive impact it could have on the entire state of Utah. A

long-awaited project in a region that has experienced cycles of prosperity and decline for far too many years, this eighty-eight-mile short-line railroad would finally provide Vernal, Utah and Roosevelt, Utah some stability in their economies.

The construction of the railroad not only promises to boost the economy of the Uinta Basin but also presents a significant opportunity for Utah labor unions to compete for contracts in constructing the railroad connecting the Uinta Basin to Carbon County. This expansive project, spanning multiple years, would greatly benefit Utah's construction trades. Thousands of hours of technical work would be needed to excavate a new roadbed for the railroad, bore tunnels, and build bridges. American workers would install electrical wiring for a brand-new signal system, lay large-diameter underground pipes and culverts to manage seasonal runoff, and construct office buildings for railroad crews and management to oversee the railroad's daily operations. The volume and range of needed construction activities underscore the scale and beneficial impact of this endeavor.

This collaborative effort among Utah labor professionals, unions, investors, and corporations aims to revitalize a previously depressed region of the state, breathing new life into its economy. Utah's unemployment rate stands at 2.8 percent. In contrast, Uintah County, Utah, most of which lies within the Uinta Basin, has an unemployment rate of 3.4

percent.² As of 2021, the median annual household income in Uintah County was \$61,293, almost \$15,000 below the 2021 Utah median household income of \$79,133.³ The labor-force participation rate in Utah as a whole was 77 percent in the years 2016 through 2020, while it was only 71 percent in Uintah County.⁴ While Uintah County's gross domestic product (GDP) grew 34.74 percent from 2002 to 2021, Utah's GDP grew 99.78 percent over the same period.⁵

The GDP growth rate of Vernal and Roosevelt, Utah may vary from year to year, but in general, these two cities have experienced slower GDP growth compared to the rest of the state. This is mainly due to their reliance on industries such as oil and gas

² Utah Department of Workforce Services, *Utah Seasonally Adjusted Unemployment Rates*, JOBS.UTAH.GOV, <https://jobs.utah.gov/wi/update/une/season.pdf> (last accessed April 3, 2024).

³ Utah Department of Workforce Services, *Annual Income and Wages by County*, JOBS.UTAH.GOV, <https://jobs.utah.gov/wi/data/library/wages/annualprofilewages.html> (last updated October 16, 2023).

⁴ Utah Department of Workforce Services, *County Labor Force Profile*, JOBS.UTAH.GOV, <https://jobs.utah.gov/wi/data/library/laborforce/laborforceprofile.html> (last updated September 2022).

⁵ Utah Regional Economic Analysis Project, *Uintah County vs. Utah Comparative Trends Analysis: Gross Domestic Product Growth and Change, 2001-2021*, UTAH.REAPROJECT.ORG, <https://utah.reaproject.org/analysis/comparative-trends-analysis/gross-domestic-product/tools/490047/490000/> (last accessed April 3, 2024).

extraction, which can be more volatile and subject to fluctuations in prices. Additionally, the population size and economic diversity of these two cities in the Uinta Basin are smaller compared to other cities in Utah, which can also impact their GDP growth rates.

Overall, Utah has a strong economy with low unemployment rates and opportunities for job growth in various industries. Conversely, the Uinta Basin's economy depends largely on its ability to export and import commodities such as agricultural and energy products out of the northeastern corner of the state of Utah. Access to the Uinta Basin is restricted to two-lane highways and depends on heavy semi-truck traffic to grow the region's economies.

The Uinta Basin is renowned for its vast reserves of oil and gas that lie beneath the surface, but the construction of a rail line into the basin holds the potential to benefit various industries beyond just the energy sector. The abundant agriculture industry in the Uinta Basin stands to gain significantly from having a railroad available for shipping products and commodities in bulk. The railway will also allow for shipments of all types of building materials, food and dairy products, clothing and retail products, and more. Every imaginable good could be delivered to the Uinta Basin by rail shipment, reducing the area's reliance on 18-wheeled semi-trucks on the current dangerous two-lane highway that now serves as the only option to ship or receive anything in or out of the Uinta Basin.

One factor in the D.C. Circuit's analysis was the increased risk of oil spills from additional train cars that would carry Uinta-Basin oil on existing rail lines. *See [Eagle Cty.](#), 82 F.4th at 1168, 1182, 1184-1185.*

[1187-1188, 1195](#). This *Amicus* is concerned that this lower court decision should have stayed within the holding of *Public Citizen* and not required the Board to exceed its “limited statutory authority,” causing the Board to be concerned about remote environmental effects of oil that would be transported out of the Basin. See [Public Citizen, 541 U.S. at 770](#) (“where an agency has no ability to prevent” an environmental effect “due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”). In such situations, as we have here, the agency was not required to study that effect in its National Environmental Policy Act review. *Id.*

The Eleventh Circuit labeled the D.C. Circuit’s approach as an “outlier” view, because of its “failing to take seriously the rule in *Public Citizen*.” [Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs, 941 F.3d 1288, 1299–1300 \(11th Cir. 2019\)](#). The Eleventh Circuit correctly holds, contrary to the lower court here, that when an agency “lacks the authority to regulate” an effect “wholesale,” *Public Citizen* does not require the agency to consider that effect. [Id. at 1294](#). The Eleventh Circuit further correctly held that an environmental review may exclude “distantly caused effects” that are subject to “independent regulatory schemes.” [Id. at 1292](#). The lower court here ignores and rejects these principles that are based on *Public Citizen*, to seemingly allow a “watch dog” mentality that exceeds the agency scope of review.

The Board concluded it lacked “authority or jurisdiction over development of oil and gas” and could not “control or mitigate the impacts of any such

development.” Pet.App.108a. The Board further decided that those impacts were not direct effects of the rail line as required by *Public Citizen*. *Id.* The D.C. Circuit ignored *Public Citizen* by holding, “The Board [] cannot avoid its responsibility under NEPA to identify and describe the environmental effects of increased oil drilling and refining on the ground that it lacks authority to prevent, control, or mitigate those developments.” [Eagle Cty., 82 F.4th at 1180](#). This holding requires the Board to consider the hypothetical, localized effects of processing the oil carried on the line at separately regulated Gulf Coast refineries a thousand miles away. *Id.* It is not the job of the Board to entertain such speculations regarding such issues outside of their statutory authority. However, the reasoning of the lower court is also misplaced in substance and this is yet another reason why the holding in *Public Citizen* makes sense from both a legal reasoning and fairness perspective.

These trains would be transporting waxy crude oil. *See id. at 1166* (No one disputes “that the Railway’s predominant and expected primary purpose would be the transport of waxy crude oil produced in the Uinta Basin.”). This type of oil requires heating to liquify before loading and solidifies once again inside the tank cars, making it a stable product for transportation. While there are fears of potential derailments and spills into rivers, it is essential to consider the safety measures in place for transporting hazardous materials by rail in addition to the waxy, solid characteristics of this waxy crude oil.

Tank cars are designed to withstand severe impacts and likely will not break or leak at all.

Moreover, the tank cars' contents will be a waxy crude oil, which is a "wax"-like product, not liquid, so it may not leak into a water supply at all as suggested. This waxy crude oil is far less likely to leak into rivers and water supplies than what is currently shipped on railroads all over the country. Moreover, waxy crude oil is unlikely to ever seep into the water supply because it will be easy to clean up even if a derailment were to occur.

Furthermore, the track record of safely transporting hazardous materials by rail, including chlorine gas, ammonia, acids, and nuclear waste, underscores the industry's commitment to safety. These products currently shipped by rail are far more dangerous than the waxy crude oil at issue in the court below. The particular facts of this case point to exactly why it is inappropriate for an agency to concern itself in matters that are beyond its purview.

Federal law requires that when railroads transport hazardous commodities that Americans use daily including crude oil, fertilizer and chlorine, 99.9 percent of these hazardous materials shipped by rail reach its destination safely. Trains already transport these materials on the very route in question between Denver, Colorado and Salt Lake City, Utah.

These facts about waxy crude oil alone show that the conclusion to delay this matter and to do further review is arbitrary and capricious. The facts, on their face, do not support the D.C. Circuit's ruling, even if this issue were within the purview of the Board's jurisdiction. It is as if the lower court simply saw that crude oil was being transported and assumed there could be negative consequences, but did not bother to

understand that waxy crude oil is far less likely to ever damage the environment in the event of a train derailment as compared to liquid materials.

Having been a locomotive engineer for thirty-nine years, Mr. Worthington has transported all these commodities that were brought into Salt Lake City via Rio Grande Railroad and later, Union Pacific Railroad and Burlington Northern Santa Fe Railroad. It is his opinion that waxy crude oil represents a far reduced risk of ever harming the environment than normal liquid crude oil and that it is far more stable to transport.

Finally, while the D.C. Circuit made much of the remote possibility of railway accidents, it failed to consider that the oil currently transported by semi-trucks now could be transported by rail, decreasing the likelihood of automobile accidents on the dangerous two-lane highway between Vernal and Heber City, Utah. Shipping by rail is significantly safer than relying on thousands of semi-trucks on the nation's already deteriorating interstates, contributing to unsafe driving conditions.

In conclusion, shipping by rail offers a safer and more environmentally friendly alternative to the heavy reliance on semi-trucks, providing a viable solution for transporting goods while mitigating risks and enhancing overall safety. It was inappropriate for the lower court to empower the agency to exceed its statutory scheme by raising issues that are not within its purview.

CONCLUSION

This case is a prime example of why agencies should be required to “stay in their lanes” of authority under federal law. The results of the D.C. Circuit’s ruling seem more aimed at arbitrary delay than the substance of the Board’s responsibilities in this instance. It opens a Pandora’s box of potentially impossible obstacles for good projects that have little or no ill effects upon the environment.

The Uinta Basin Railway Project holds the potential to employ thousands of Union and non-Union hard-working, skilled professional trade workers, and would contribute to rebuilding the middle class. So many entities have signed onto the agreement to build a railroad from the Uinta Basin to Carbon County Utah, including the Ute Indian Tribal Nation, political representatives from Uintah and Carbon Counties, the Utah Legislature, the Utah Seven-County Infrastructure Coalition, and the Utah AFL-CIO, just to name a few. All these parties care about the future of rural Utah and the need for growth and stimulus to help these communities recover from the prohibition on extracting fossil fuels and mining coal in their counties.

After years of dedication and hard work, all parties involved have diligently met all requirements to move this project forward. All permits and plans have been set into motion, the Board granted its approval, and the lower court’s decision has stopped a good project. Based upon the lower court’s reasoning, a myriad of subjective issues can and will be raised moving forward, and a worthwhile project will be lost.

Jeff Worthington and the Utah AFL-CIO urge the Court to carefully consider the difficulties imposed on this project and the many good projects that will follow, and how they can be arbitrarily delayed by hypothetical questions that cannot even be answered by the agency in question.

In this case, the advantages of constructing an 88-mile short line railroad from Helper, Utah to Vernal, Utah are many, and they met the Board's approval. This project would represent a positive environmental stride by removing hundreds, if not thousands, of semi-trucks from the hazardous two-lane highways in and out of the Uinta Basin. The project would decrease air pollution caused by the numerous semis on the roads and generate well-paying, long-term employment opportunities for Basin residents. This initiative has the potential to revitalize all industries, agriculture, and sectors of the regional economy, fostering growth and prosperity for the future of the Uinta Basin.

However, all such worthy projects will face an endless subjective cycle of review if the clarity of *Public Citizen* is not restored on this and other projects that will surely follow.

Respectfully submitted this 5th day of April 2024.

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