No. 23-975

IN THE

Supreme Court of the United States

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

v.

EAGLE COUNTY, COLORADO and CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,
Respondents.

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

BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, THE LIQUID ENERGY PIPELINE ASSOCIATION, THE CENTER FOR LNG, THE NATURAL GAS SUPPLY ASSOCIATION, AND THE AMERICAN GAS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, THE LIQUID ENERGY PIPELINE ASSOCIATION, THE CENTER FOR LNG, THE NATURAL GAS SUPPLY ASSOCIATION, AND THE AMERICAN GAS ASSOCIATION IN SUPPORT OF PETITIONER

The Interstate Natural Gas Association of America, the Liquid Energy Pipeline Association, the Center for LNG, the Natural Gas Supply Association, and the American Gas Association respectfully submit this brief as *amici curiae* in support of petitioners Seven County Infrastructure Coalition and Uinta Basin Railway, LLC.[1]

INTEREST OF THE AMICI

American infrastructure is in peril. The holding in *Eagle County, Colorado v. Surface Transportation Board*, 82 F.4th 1152 (D.C. Cir. 2023) (*Eagle County*) threatens to greatly amplify the impediments to project development caused by an already cumbersome federal permitting process. This case is the improvident culmination of a line of cases beginning with *Sierra Club v. Federal Energy Regulatory Commission*, 867 F.3d 1357, 1363 (D.C. Cir. 2017) (*Sabal*

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Counsel for *amici curiae* provided timely notice of the intent to file this brief.

Trail), which caused a circuit split by abandoning the "legally relevant cause" standard by which this Court articulated the scope of mandatory environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347, when it decided *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) (*Public Citizen*).

While *Sabal Trail* and its immediate progeny have held that agencies are responsible for reviewing the downstream environmental effects that they have no authority to prevent, *Eagle County* completes the expansion of agencies' NEPA obligations by holding that NEPA review must also encompass similarly non-jurisdictional *upstream* environmental effects. *Sabal Trail*, 867 F.3d at 1374; *Eagle Cnty.*, 82 F.4th at 1179. *Eagle County* removes the last discernable limits on an agency's NEPA obligations, which now encompass every conceivable effect of a proposed action, no matter how remote, including those effects over which the agency has no jurisdiction.

The resulting circuit split is profoundly injurious to the development of critical energy infrastructure in the United States. The uncertainty as to which rule will apply on appeal, particularly since many agencies' appeal provisions allow a choice of venue, and the boundless scope of effects that must be considered under *Sabal Trail* and *Eagle County*, have left agencies (and project developers) unable to anticipate how extensive a NEPA review will be necessary to satisfy the courts on appeal. *See, e.g.*, 15 U.S.C. § 717r. Since NEPA documents are reviewed under the Administrative Procedure Act's (APA) arbitrary and capricious standard, the broader the NEPA review, the greater the likelihood an agency will fail to satisfy a

reviewing court that it sufficiently considered every potential subject. 5 U.S.C. § 706(2)(A).

For project developers, investors, and lenders, this makes the assessment of regulatory and litigation risk more challenging with the inevitable result that the availability of capital is reduced and the cost of capital increases. For permitting agencies, this means a greater likelihood of being overturned on appeal, with the inevitable result that they will resort to yet longer study times in the hopes of producing longer, more durable NEPA documents. *See* Alyson C. Flournoy et. al., *Harnessing the Power of Information to Protect Our Public Natural Resource Legacy*, 86 Tex. L. Rev. 1575, 1582–83 (2008) (noting that critics of NEPA procedures state that concerns over omissions "encourage agencies to gold-plate their EISs [(environmental impact statements)] by including every conceivably relevant piece of information to avoid reversal").

The *amici* are trade associations representing members that invest billions of dollars of private equity to develop and operate interstate natural gas and oil pipelines, natural gas distribution systems, liquified natural gas (LNG) facilities, and natural gas production. They submit this brief to offer the Court the benefit of hearing directly from those who have experienced the investment-chilling effects of expanded NEPA review. Without regulatory and legal certainty, highly regulated, capital-intensive industries cannot build infrastructure needed to meet our nation's energy demand. The effects of this uncertainty are already being felt. Despite seeing the greatest demand for natural gas in history, in the middle of a dramatic shift in the geographic regions from which it is

sourced, the last two years also saw the lowest quantity of interstate natural gas pipeline capacity added to the interstate natural gas pipeline system in three decades. U.S. Energy Information Administration, *Natural Gas Consumption by End Use*, https://www.eia.gov/dnav/ng/ng_cons_sum_dcu_nus_a.htm (release date Mar. 29, 2024).

During times of record demand and changing supply basins, more energy infrastructure is needed to ensure sufficient supply, and if that infrastructure cannot be built, the consequences can be dire. The transportation system relies upon oil pipelines. Millions of Americans, both at work and at home, are completely dependent upon natural gas for heating in the winter. The electric system relies upon natural gas pipelines. As long as this regulatory and legal uncertainty persists, the private sector companies upon whom we rely to develop our critical infrastructure will be hampered in their ability to invest in project development. Failure to invest will certainly lead to higher prices for fundamental commodities and cause attendant economic harms, but should the situation persist, the United States will ultimately face catastrophic shortages of pipeline capacity that could temporarily halt home heating and cause the electric system to fail. It must be remedied.

The Interstate Natural Gas Association of America (INGAA) is a trade association that represents the majority of interstate natural gas pipeline companies operating in North America. INGAA and its individual members have a substantial interest in infrastructure development and the predictable, consistent, rational, and fair law and policy that makes such development possible.

The Liquid Energy Pipeline Association (LEPA) is a trade association that represents the interests of liquid energy pipeline owners and operators. Together, LEPA's members operate pipelines carrying nearly 97 percent of the crude oil and petroleum products moved by pipeline in the United States.

The Natural Gas Supply Association (NGSA) represents integrated and independent energy companies that produce, transport and market domestic natural gas. NGSA is the only national trade association that solely focuses on producer-marketer issues related to the downstream natural gas industry. NGSA members transport and/or supply billions of cubic feet of natural gas per day on interstate pipelines, and trade, transact and invest in the U.S. natural gas market.

The Center for LNG (CLNG) advocates for public policies that advance the use of LNG in the United States, and its export internationally. A committee of the NGSA, CLNG represents the full value chain, including LNG producers, shippers, terminal operators, and developers.

The American Gas Association (AGA) represents national gas distribution companies that deliver natural gas to residences and businesses. AGA represents more than 200 local energy companies that deliver natural gas throughout the United States, supplying over 78 million residential, commercial, and industrial natural gas customers nationwide, of which 95 percent receive their gas from AGA members.

INGAA, LEPA, CLNG, NGSA, and AGA urge the Court to grant certiorari to address the circuit split created by *Sabal Trail* and expanded by *Eagle County* and to restore the Court's holding in *Public*

Citizen in order to return predictability and regulatory and legal certainty to the heavily-regulated and capital-intensive industries upon which we rely to develop needed infrastructure without which modern life is impossible.

SUMMARY OF THE ARGUMENT

Granting certiorari will afford this Court the opportunity to resolve a fundamental disagreement among the circuit courts regarding the implementation of this Court's decision in *Public Citizen*. This circuit split, which revolves around the required scope of an agency's NEPA analysis, began with *Sabal Trail* and culminated in this case, *Eagle County*. An agency's NEPA documents are usually the source of the greatest legal vulnerability to federal infrastructure permits. The uncertainty as to the required scope of NEPA review has resulted in paralyzing legal uncertainty among infrastructure developers, and their permitting agencies, neither of whom can now predict how wide-ranging their NEPA review must be to satisfy the courts on review. In the absence of *some* regulatory and legal predictability, it is impossible for project developers in capital-intensive industries to develop the infrastructure that is required for the continued welfare and prosperity of the United States.

In *Public Citizen*, this Court established sensible, administrable boundaries around the scope of an agency's required NEPA analysis. That case held that NEPA does not require agencies to evaluate environmental effects of a proposed action that they have no statutory authority to prevent and for which their action is not the "legally relevant cause." 541 U.S. at 767, 770. Most circuits follow the reasoning in *Public Citizen*. However, a line of cases in the D.C. and Ninth Circuits—beginning with *Sabal Trail* and culminating in *Eagle County*—have undermined *Public Citizen* by requiring agencies to evaluate in their NEPA documents both downstream (*Sabal Trail*) and upstream (*Eagle County*) environmental effects that the

agencies cannot prevent and are beyond their statutory authority. The result is a circuit split that encourages opponents of infrastructure development to forum shop and bring their NEPA challenges to the circuits with the broadest view of the scope of required environmental review. This incentive for forum shopping is particularly harmful because legal challenges under NEPA are overwhelmingly filed by infrastructure project opponents, which biases the development of further caselaw in favor of a more expansive view of NEPA.

Legal uncertainty regarding the scope of the required NEPA analysis magnifies litigation risks and presents a major impediment to infrastructure development. It has led to a sharp decline in the amount of additional pipeline capacity added to the interstate natural gas pipeline system. Between 2018 and 2023, there was a 93 percent decrease in new interstate natural gas pipeline capacity. And this decline is occurring at the worst possible time, as the need for, and supply of, oil and natural gas has never been greater. In fact, it is telling that the proportion of *intrastate* gas pipeline capacity—which is generally not subject to NEPA review—has dramatically increased over this same time period.

The timely development of oil and natural gas infrastructure is critical. Oil and natural gas provide domestic heating, are an essential input to industry and manufacturing, and are absolutely critical to maintaining the stable operation of the bulk electric system. As long as the legal uncertainty created by *Sabal Trail* and exacerbated by *Eagle County* persists, it is unlikely that the United States will be able to develop the critical infrastructure it urgently needs.

This Court should grant certiorari in order to reaffirm the holding of *Public Citizen* or, in the alternative, grant, vacate and remand, to allow consideration of a recent statutory change—the first amendment to NEPA since its enactment in 1969—that narrows the scope of required NEPA analysis. In June 2023—after *Eagle County* was argued but before the decision issued—Congress amended the NEPA provision most critical to this case. Section 102(C)(i) of NEPA originally provided that an agency's environmental analysis must include "the environmental impact of the proposed action." That language was changed to "*reasonably foreseeable* environmental effects of the proposed *agency* action." Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10, 38 (emphasis added). This amendment narrows the scope of mandatory NEPA review. By inserting the word "agency" before "action," Congress expressly tied the required analysis to actions by the agency itself—consistent with *Public Citizen*'s holding that an agency should not consider effects beyond its statutory authority. This Court presumes that "[w]hen Congress acts to amend a statute, . . . it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). This statutory amendment highlights the need for this Court to reaffirm *Public Citizen* and the sensible limit it imposed on the scope of required NEPA review.

Amici respectfully submit that this Court should grant certiorari to reaffirm *Public Citizen* or, in the alternative, grant, vacate, and remand to the lower court to consider its decision in light of recent statutory amendments to NEPA.

ARGUMENT

I. This Court Should Grant Certiorari to Resolve the Circuit Split Created by *Sabal Trail*.

Twenty years ago, this Court decided *Public Citizen*. That case addressed whether NEPA required the Federal Motor Carrier Safety Administration (FMCSA) to evaluate the environmental effects of the cross-border operation of trucks from Mexico when promulgating motor vehicle safety regulations. The FMCSA issued an environmental assessment (EA) focusing on the environmental consequences of increased road-side inspections (including driver safety, increased emissions, and noise). It found these effects to be minimal and remediable. Public Citizen successfully challenged that decision and when the case came before this Court, Public Citizen argued that NEPA required the FMCSA to evaluate the overall environmental consequences of increased cross-border trucking traffic from Mexico.

This Court rejected Public Citizen's argument. Because the FMCSA had no authority to prohibit trucks from entering the country, NEPA did not require it to evaluate the environmental effects of increased traffic from Mexico. This Court described Public Citizen's position as "a particularly unyielding variation of 'but for' causation, where an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect." *Public Citizen*, 541 U.S. at 767. This Court ruled that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be

considered a legally relevant 'cause' of the effect." *Id*. at 770.

In 2017, the D.C. Circuit decided *Sabal Trail*. There, FERC issued a certificate of public convenience and necessity for construction and operation of an interstate natural gas pipeline to serve gas-fired power plants in Florida. Sierra Club petitioned for review, arguing that FERC violated NEPA by failing to examine the environmental effects of emissions created by power plant combustion. In response, it was argued that, because FERC does not license or regulate power plants (that is a power reserved to the states), it could not be the legally relevant cause of power plant emissions and therefore, under *Public Citizen*, it had no obligation to consider them. The D.C. Circuit disagreed, finding *Public Citizen* to be inapplicable. "Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of the pipelines it approves." *Sabal Trail*, 867 F.3d at 1373. *Sabal Trail* established for the first time that downstream effects, which an agency had no authority to prevent, had to be considered in an agency's NEPA review.

In rapid succession, a number of cases in the D.C. Circuit and the Ninth Circuit either reaffirmed the holding in *Sabal Trail*, or expanded its application. *See, e.g.*, *Birckhead v. FERC*, 925 F.3d 510, 516 (D.C. Cir. 2019); *Food & Water Watch v. FERC*, 28 F.4th 277, 289 (D.C. Cir. 2022); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 737 (9th Cir. 2020); *Solar Energy Indus. Ass'n v. FERC*, 80 F.4th 956, 995 (9th Cir. 2023).

Eagle County builds on *Sabal Trail* and expands the explicit requirements of the cases above to include the mandatory evaluation of *upstream* environmental effects. While this may appear to be the logical consequence of the holding of *Sabal Trail*, until *Eagle County* specified that upstream effects had to be considered, it had yet to be announced by the courts.

Now, under *Sabal Trail* and *Eagle County*, all environmental effects, including upstream and downstream effects beyond an agency's statutory authority, are potentially within the compass of an agency's NEPA obligation. Agencies will now find it exceedingly difficult to anticipate the exact extent of NEPA review that will be required—a difficulty made worse, not better, by statements from the courts that there is no hard-and-fast rule, that every NEPA process is based on the facts at hand, and that every decision must be made on a case-by-case basis. *See, e.g., Birckhead*, 925 F.3d at 519 ("NEPA compels a case-by-case examination . . . of discrete factors." (citing *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971))). Under this paradigm, no principled limits to an agency's NEPA obligations can be ascertained with certainty. Agencies are not so much chasing a moving target, as aiming at a target with no defined dimensions.

Sabal Trail has resulted in a circuit split. While the majority of circuit courts still follow *Public Citizen*, the Ninth Circuit and D.C. Circuit mandate expanded NEPA review. The Eleventh Circuit has roundly rejected *Sabal Trail*, declaring its legal analysis "questionable at best" and incompatible with *Public Citizen*. *Ctr. for Biological Diversity v. U.S. Army*

Corps of Eng'rs, 941 F.3d 1288, 1300 (11th Cir. 2019). The Eleventh Circuit was unsparing in its criticism:

> It fails to take seriously the rule of reason announced in *Public Citizen* or to account for the untenable consequences of its decision. The *Sabal Trail* court narrowly focused on the reasonable foreseeability of the downstream effects, as understood colloquially, while breezing past other statutory limits and precedents—such as . . . *Public Citizen* . . . . Under the rule of reason, agencies are not required to consider effects that they lack the statutory authority categorically to prevent.

Id.

Agencies and project developers alike must now cross their fingers and hope that their case is assigned to the right circuit. Moreover, many agencies' organic statutes provide aggrieved parties a choice of venue to petition for review. *See, e.g.*, 15 U.S.C. § 717r(b) (providing for petitioners to obtain review before the D.C. Circuit or "any circuit wherein the natural-gas company . . . is located or has its principal place of business"). In regimes with such choice-of-venue provisions, forum shopping is all but inevitable. Because legal challenges under NEPA are necessarily brought against projects that have been approved, petitions for review are overwhelmingly filed by opponents of infrastructure, biasing the further development of this caselaw in favor of those courts advancing a more expansive view of NEPA. Even when losing at the appellate stage, most project developers are unlikely to seek certiorari, preferring instead to suffer the burden and expense of remand (particularly if unaccompanied by vacatur) in order to allow them to continue

developing their projects pending the agency's compliance with the Court's decision.

Given the muddle *Sabal Trail* has made of the law, the incentives created for forum shopping, and the inadministrability of *Sabal Trail's* boundless scope—which the Eleventh Circuit aptly called its "untenable consequences," *Ctr. for Biological Diversity*, 941 F.3d at 1300—the *amici* respectfully submit that this Court should grant certiorari to reaffirm *Public Citizen*.

II. This Court Should Grant Certiorari Because the Expanded Scope of NEPA and the *Sabal Trail* Circuit Split Impede Critical Infrastructure Development.

NEPA is the most litigated environmental statute in the United States, with well over 100 NEPA cases heard annually in federal courts. *See* Cong. Rsch. Serv., IF11932, National Environmental Policy Act: Judicial Review and Remedies 1 (Sept. 22, 2021), https://crsreports.congress.gov/product/pdf/IF/IF11932. About one quarter of final agency decisions on major infrastructure projects that required a NEPA document were challenged in court. *See* NEPA Litigation Surveys: 2001–2013, https://ceq.doe.gov/ceq-reports/litigation.html. No doubt that percentage has grown since 2013, the last year in which the NEPA litigation survey was conducted. At FERC, the agency that issued the order from which the *Sabal Trail* circuit split arose, NEPA challenges to energy infrastructure projects have become routine. *See* Michael Bennon & Devon Wilson, *NEPA Litigation Over Large Energy and Transport Infrastructure Projects*, Environmental Law Reporter, Oct. 2, 2023 at 1 (stating

that FERC-jurisdictional pipeline projects are challenged under NEPA at a rate of 50 percent).

As "a purely procedural statute," NEPA does not itself provide for judicial review. *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002). "NEPA challenges are reviewed under the Administrative Procedure Act . . . ." *Oregon Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 568 (9th Cir. 2016). Reviewing courts set aside an agency's NEPA determinations if they find them arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* Usually, the arbitrary and capricious standard of review "is exceedingly deferential" because a reviewing court "may not substitute its own judgment for that of the agency." *City of N. Miami v. Fed. Aviation Admin.*, 47 F.4th 1257, 1266 (11th Cir. 2022) (cleaned up). In NEPA cases, however, litigants challenge not only the agency's ultimate decision but also individual elements of the supporting NEPA document. If a litigant convinces a reviewing court that any part of the agency's inquiry under NEPA is insufficient, that case will be remanded and possibly vacated. Thus, every statement (or omission) in a NEPA document is a source of potential litigation risk.

In the 1970s, NEPA documents were short and rarely challenged in their own right. *See* Daniel A. Dreyfus, *NEPA: The Original Intent of the Law*, 109 J. Prof. Issues in Eng'g Educ. & Prac. 249, 253 (1983). As of 2018, the average length of an Environmental Impact Statement (EIS) was 575 pages, with appendices averaging over 1,000 pages. *See* Council on Environmental Quality, *Length of Environmental Impact Statements (2013–2018)* 1 (June 12, 2020), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_

Length_Report_2020-6-12.pdf. This expansion was foreseeable: to reduce litigation risk, agencies have sought to immunize their NEPA analyses by covering as much material as thoroughly as possible, adding new material with each adverse court decision. *See Harnessing the Power of Information*, 86 Tex. L. Rev. at 1582–83 (noting that critics of NEPA procedure state that concerns over omissions "encourage agencies to gold-plate their [environmental impact statements] by including every conceivably relevant piece of information to avoid reversal").

Longer documents take more time to complete. As of 2018, it took agencies on average four and a half years to complete an EIS and issue a Record of Decision. *See* Council on Environmental Quality, *Environmental Impact Statement Timelines* (2010–2018) (June 12, 2020), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf. This delay stifles infrastructure development. The prices of commodities, cost of materials and labor, all change over time. Longer permitting timelines require a greater assumption of up-front risk. This leads to higher costs to developers and less infrastructure being built. The economy can change a great deal in the course of four-and-a-half years.

Sabal Trail has increased litigation risk, which will lead to a corresponding increase in page length and duration of environmental reviews as it is now necessary to consider remote, downstream effects in the NEPA analysis. *Eagle County* has effectively doubled the scope of NEPA review, by requiring agencies to consider remote, *upstream* effects as well. Absent a reaffirmation of *Public Citizen,* which limits an agency's obligation to review only those effects for

which its action is the legal proximate cause, it will be nearly impossible for agencies to accurately predict the extent of their NEPA obligations, even in the courts that have announced a broader scope of NEPA review. This expansion of NEPA will also expand the predicates for litigation because it will encourage entrepreneurial project opponents to push the boundaries of cognizable effects that the agency did not know should have been reviewed in greater detail or reviewed at all.

This regulatory uncertainty creates impediments to energy infrastructure development. As litigation risk increases, regulatory certainty disappears. In capital-intensive industries—like the oil, natural gas, LNG, and gas production businesses—uncertainty chills investment and reduces the number of projects that are proposed, much less developed.

Since 2018, the quantity of additional pipeline capacity added to the interstate natural gas transportation system has declined sharply. In 2018, more than 13 Bcf per day of interstate natural gas pipeline capacity was added, but that figure dropped to below .900 Bcf per day in both 2022 and 2023—a 93 percent decrease in the course of five years. *See* U.S. Energy Information Administration, *Natural Gas Intrastate Pipeline Capacity Additions Outpaced Interstate Additions in 2023* (Mar. 20, 2024), https://www.eia.gov/todayinenergy/detail.php?%20id=61623 (hereinafter U.S. Energy Mar. 20, 2024). In fact, 2022 and 2023 saw the lowest incremental increase in pipeline capacity in at least three decades.

The reduction in added capacity is *not* due to a lack of demand. The need for, and supply of, oil and natural gas has never been greater. Last year saw the

highest total consumption of natural gas nation-wide since the EIA began tracking the statistics in 1994. U.S. Energy Information Administration, *What Are the Energy Impacts from the Port of Baltimore Closure?* (Mar. 28, 2024), https://www.eia.gov/todayinenergy/detail. php?id=61663. Last year also saw the United States produce the most crude oil in global history. *See* U.S. Energy Information Administration, *United States Produces More Crude Oil than Any Country Ever* (Mar. 11, 2024), https://www.eia.gov/todayinenergy/detail.php?id=61545.

Oil and natural gas are essential for residential heating, transportation, and industrial uses and it is absolutely critical to maintaining the stability of the bulk electric system. Absent sufficient access to supplies of natural gas and oil, the electric system will fail and widespread blackouts will follow. *See* NERC, 2021 Long-Term Reliability Assessment 5 (Dec. 2021), https://www.nerc.com/pa/RAPA/ra/Reliability% 20Assessments%20DL/NERC_LTRA_2021.pdf ("Natural gas is the reliability 'fuel that keeps the lights on,' and natural gas policy must reflect this reality."); FERC, *Winter Energy Market and Reliability Assessment 2021–2022*, at 19 (Oct. 21, 2021), https://www.ferc.gov/media/winter-energy-market-and-reliability-assessment-2021-2022-report ("ISO-NE has relied on oil-based dual-fuel [oil and natural gas] generation when extreme cold weather events have occurred . . . .").

Beyond the general economic effects of high prices, natural gas scarcity due to insufficient transportation infrastructure, when acute, leads to unheated houses and electric system failures at times of the greatest system strain (i.e., the winter), which can

have catastrophic results, including loss of life. Some regions are desperate for additional natural gas transportation capacity. New England, for example, has consumed more natural gas every year since at least 2001, but no significant new natural gas transportation capacity has been added since then. *See* U.S. Energy Information Administration, *Natural Gas Consumption by End Use*, https://www.eia.gov/dnav/ng/ng_cons_sum_dcu_nus_a.htm.

Uncertainty in the federal permitting process, particularly the litigation risk posed by NEPA, is a primary cause of declining incremental capacity in the interstate natural gas pipeline system. This is easily demonstrated: at the same time that interstate natural gas pipeline development has come to a virtual standstill, the proportion of additional capacity in the *intra*state natural gas pipeline system—which generally is not subject to NEPA review—has dramatically increased. *See* U.S. Energy Mar. 20, 2024 (showing that interstate pipeline capacity made up 14 percent of all additional pipeline capacity in 2023, a marked deviation from historical trends).

Potential investors in heavily regulated industries like LNG export terminals and interstate natural gas and oil pipelines cannot accurately assess development risk amidst regulatory uncertainty, and the credit required to develop capital-intensive projects becomes significantly more expensive for project developers. *See* Fitch Ratings, *US Pipeline Cancellation, Delays Underscore Regulatory Challenges*, Fitch Wire (July 31, 2020, 3:46 PM), https://www.fitchratings.com/research/corporate-finance/us-pipeline-cancellation-delays-underscore-regulatory-challenges-31-07-2020 (stating that "regulatory and legal risks"

facing pipeline developers have "broad implications to credit quality"). The Joint RTOs, a group of operators of FERC-jurisdictional electric markets serving the majority of Americans, recognized that "in certain regions, expanding natural gas infrastructure . . . is imperative to support reliability" and that "the natural gas industry faces formidable challenges" due to, among other things "permitting complexities." *See* Strategies for Enhanced Gas-Electric Coordination: A Blueprint for National Progress 5 (Feb. 20, 2024), https://www.iso-ne.com/static-assets/documents/100008/20240220_joint_rtos-gas-electric-coordination-white-paper.pdf; *see also* JPMorgan Chase & Co. Annual Report 2022, Jamie Dimon Letter to Shareholders, Apr. 4, 2023, https:// reports.jpmorganchase.com/investor-relations/2022/ar-ceo-letters.htm ("permitting reforms are desperately needed to allow investment to be done in any kind of timely way . . . we simply are not getting the adequate investments fast enough").

NEPA litigation is a primary source of this crippling regulatory risk. As long as the circuit split that began with *Sabal Trail*—and escalated in *Eagle County*— continues to sow uncertainty, investors will remain hesitant and the United States will be unable to build the energy infrastructure that is critical to the health, welfare, and prosperity of the American people. This Court should grant certiorari to reaffirm its holding in *Public Citizen* and return NEPA review to the rule of reason.

III. Certiorari Should be Granted Because *Eagle County* was Decided Contrary to Recently-Enacted Statute in Force at the Time of the Decision.

NEPA review has become so notorious an obstacle to infrastructure development that, last year, Congress amended the substantive provisions of NEPA for the first time since the statute's passage in 1969. On June 3, 2023, one month after *Eagle County* was heard at oral argument, and six weeks before the D.C. Circuit issued the underlying opinion, President Biden signed into law the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10 (FRA), section 321 of which amended NEPA.

Among other reforms, the FRA amended the NEPA provision most critical to this case, effective on the date of enactment. Section 102(2)(C) of NEPA establishes the obligation of "all agencies" to publish a "detailed statement" when undertaking a major federal action significantly affecting the human environment. NEPA § 102(2)(C). This "detailed statement" is what has come to be known as an Environmental Assessment (EA) or EIS. *See* 40 C.F.R. §§ 1501.5, 1502.1–1502.24. Prior to the FRA, NEPA's text directed agencies to include "the environmental impact of the proposed action" in the detailed statement. NEPA of 1969 § 102(2)(C)(i) (1970). The FRA amended that language so that agencies are now directed to provide a detailed statement including the "*reasonably foreseeable* environmental *effects* of the proposed *agency* action." NEPA § 102(2)(C)(i) (emphasis added).

"It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so

construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (cleaned up). It is a court's "duty to give effect, if possible, to every clause and word of a statute." *Id.* (cleaned up). The duty is that much greater when a statute has been amended clause by clause and word by word, just as NEPA was amended by the FRA. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone*, 514 U.S. at 397.

These amendments restrict the scope of NEPA review. Changing "proposed action" to "proposed *agency* action" expressly tethers the required NEPA analysis to actions of the agency itself. The only way to read the new phrase is for "agency" to limit the reach of the word "action." For example, consider a request for FERC to approve a natural gas pipeline that may transmit gas to gas-fired power plants. When FERC approves a pipeline, it makes a determination under its statutory authority whether the proposed pipeline is in the public convenience and necessity. *See* 15 U.S.C. § 717f(e). The "action" thus taken by FERC is that of weighing the public convenience and necessity and determining whether to issue a certificate to the project developer. The effect of FERC's action is that the project developer is allowed to construct and operate the pipeline. Even though the pipeline may serve gas-fired power plants, the effect of FERC's action is not to *also* regulate and license the power plants—the operation of which will release combustion emissions. *New England Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 285 (D.C. Cir. 2014) (stating that "states retain the right to regulate the facilities responsible for the generation of electric

energy"), *but see Sabal Trail*, 867 F.3d at 1374. The power plant emissions are outside the scope of effects of FERC's action, and thus beyond the scope of NEPA's required review.

This amendment extinguishes the judicially-mandated obligation imposed by *Sabal Trail* and now, *Eagle County*, to examine every but-for consequence of its action or to review consequences for which a third party is responsible. In short, the FRA codifies the very holding in *Public Citizen*.

The legislative history supports this reading. Congressman Westerman, a primary proponent of an earlier version of what became section 321 of the FRA, stated that the bill's "intent" is "to narrow the scope" of NEPA review "from 'any environmental impact,' which can be broadly construed, to only those 'environmental effects' that would be a 'reasonably foreseeable' result of 'the proposed agency action.'" 169 Cong. Rec. H2681, H2704 (daily ed. May 31, 2023). A House Report accompanying an earlier introduction of what later became the operative provision of the FRA[2] stated that one of its goals was "clarifying the scope of [NEPA] reviews." H.R. Rep. No. 118-28, pt 1, at 33 (2023). The original bill, upon its introduction, was contentious, with some Members of Congress either praising or condemning the bill as an attempt to codify

[2] In the press of business that attended the passage of FRA, Congress dispensed with many of the ordinary legislative procedures that are a matter of routine, including the preparation of committee and conference reports. Accordingly, we must rely on the next best thing: legislative history that accompanied prior versions of the bill (known in earlier form as the "Builder Act") that was ultimately passed (in modified form) as section 321 of the FRA.

the Trump Administration's NEPA regulations. *See id.* at 33, 80 ("The bill would also codify the Trump Administration's NEPA regulations . . . ."), ("H.R. 1335 would codify former President Trump's extreme 2020 NEPA implementing regulations . . . ."). They had a point. The Trump administration's implementing regulations *were* designed to bring the scope of NEPA review back in line with *Public Citizen*. The preamble to those regulations specifically stated that it sought to codify "a key holding of *Public Citizen* . . . to make it clear that effects do not include effects that the agency has no authority to prevent." Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,344 (July 16, 2020).

The FRA's NEPA amendments were in place at the time *Eagle County* was issued and, had this case been decided according to the amended version of NEPA, the outcome might well have been different. The Surface Transportation Board's (STB) decision to decline to review the speculative environmental consequences of possibly induced upstream oil well development and the downstream effects of oil refineries thousands of miles away (neither of which the STB as a rail regulator has the power to prevent), likely would have been found to be consistent with—if not required by—the amendments to NEPA.

Petitioners raised FRA's NEPA amendments both on rehearing *en banc* and again at certiorari, although they do not discuss the reading of the statute offered above. *See* petition for rehearing *en banc* at 18; Pet'r's Br. 26. Regardless, *amici* respectfully submit that the Court's decision to grant certiorari should be informed by the congressional intent demonstrated

by the FRA's recent amendments to NEPA which were in force at the time of the lower court's decision. Should the Court choose not to take this opportunity to reaffirm *Public Citizen*, amici respectfully submit that the Court instead grant, vacate and remand this proceeding to the D.C. Circuit for further proceedings to consider the proper scope of NEPA review in light of the FRA's NEPA amendments.

CONCLUSION

For the reasons stated above, *amici* urge this Court to grant the petition for a writ of certiorari or, in the alternative, to grant, vacate and remand to the lower court to consider its decision in light of the recent amendments to NEPA.

Respectfully submitted,

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