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 AMICI CURIAE OF UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION AND WESTERN STATES AND TRIBAL NATIONS NATURAL GAS INITIATIVE IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICI CURIAE[1]

The Ute Indian Tribe of the Uintah and Ouray Reservation (the Ute Indian Tribe) is a sovereign federally recognized Indian Tribe composed of three bands of the greater Ute Tribe—the Uintah Band, the White River Band, and the Uncompahgre Band—who today live on the Uintah and Ouray Reservation in northeastern Utah. *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1093 (D. Utah 1981).

The Uintah and Ouray Reservation is in the Uintah Basin, the area which would be serviced by the common carrier rail line that is at issue in this case. The Uintah and Ouray Reservation includes lands in Uintah, Duchesne, Carbon, Wasatch, and Summit Counties in Utah. "Cattle raising and mining of oil and natural gas is big business on the reservation." About the Utes, *available at* utetribe.com.

Western States and Tribal Nations Natural Gas Initiative is a state, county and tribal government-led 501(c)(4) initiative working to facilitate economic development and tribal sovereignty through the

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[1] Pursuant to this Court's Rule 37.6, counsel for amici curiae certify that no person or entity other than amici curiae and their counsel authored this brief in whole or in part. No person other than amici curiae or their counsel made a monetary contribution to its preparation or submission of the brief. The parties were timely notified of the intention of amici curiae to file as required by Rule 37.2.

development of domestic and global markets for natural gas produced in the Western United States.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari presents an open conflict between the Circuits on an important issue of law under the National Environmental Protection Act (NEPA). Unlike most of the petitions for writ of certiorari this Court receives, the Court need not rely upon arguments of counsel to determine that this conflict exists: the circuits themselves acknowledge that they are in conflict. *E.g.*, *Ctr. for Biol. Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1299-1300 (11th Cir. 2019) (discussing the conflict).

The United States Court of Appeals for the District of Columbia Circuit has adopted the minority position on this conflict. *Id.* (noting that the D.C. Circuit is an "outlier"). The Eleventh Circuit further noted that the "legal analysis [of the two-judge majority in the D.C. Circuit decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017)] is questionable at best. It fails to take seriously the rule of reason announced in *Public Citizen* or to account for the untenable consequences of its decision." *Id.* at 1300. The Eleventh Circuit agreed with the strong dissent in *Sierra Club*. *Id.* at 1300.

Here, Petitioners applied for authorization of a spur railroad line into the Uintah Basin in Utah. That railroad would dramatically improve the economy and

the lives of the Ute Indian Tribe and others who live in the Uintah Basis. The application was submitted to the Surface Transportation Board (STB), and the STB did "take seriously" this Court's holding in *Public Citizen*. The STB properly limited its NEPA analysis to its important but narrow role within the federal government. Its decision was proper under *Public Citizen* and would be proper in the majority of the circuits which have reached the issue. But the D.C. Circuit held the STB should have gone much further, far afield from the STB's limited role in the federal government, invading the province of other federal and state agencies and invading the province of the legislative branch regarding national energy policy.

Because a large percentage of NEPA cases can be filed in the District of Columbia, the D.C. Circuit's erroneous decision is the de facto rule that agencies now must follow throughout the United States.

This Court should grant the petition and determine whether the D.C. Circuit's minority position is correct.

ARGUMENT

I. Legal and factual background

The Ute Indian Tribe seeks to provide governmental services for its members and for its large but sparsely populated reservation. It seeks to provide health care, education, housing, and other services. *See*

generally Utetribe.com (listing and describing tribal programs and services). Unlike other governments, it cannot effectively pay for services through tax receipts. Even if it wanted to, its lands are too sparsely populated to provide much income from tourism, gaming, or similar activities.

What it does have, by fate or good luck, is substantial quantities of superior waxy crude oil. But by fate or bad luck, it does not have the same access to markets as other oil fields in the United States. Gaining that access would improve the income of the Tribe and its members. As discussed below, the Tribe would have gained that access under the court decisions in the majority of the circuits which have reached the issues.

The three Bands that make up the Ute Indian Tribe of the Uintah and Ouray Reservation (the Uintah, White River, and Uncompahgre Bands) originally occupied the land between present day Denver and Salt Lake. The Uintah Band occupied land in present day Utah, including land in the Uintah Basin in northeastern Utah. The White River and Uncompahgre Bands occupied northwestern and central western Colorado (including all the land now in Eagle County, Colorado).

Following the Meeker Incident in 1879, the non-Indian Coloradans, led by Colorado Governor Frederick Pitkin adopted the rallying cry "The Utes Must Go!,"[2] asserting the United States should forcibly

[2] Governor Pitkin did not care whether "go" meant "go by force from Colorado" or whether it meant extermination. *E.g.*,

remove the Uncompahgre and White River Bands from Colorado. Peter R. Decker, *"The Utes Must Go!": American Expansion and the Removal of a People*, ch. 6 (2004).

One reason Coloradans wanted the White River and Uncompahgre Bands removed or exterminated was to open land for the main line east-to-west railroad relevant to this case—the railroad through Eagle County Colorado. Pitkin to Jay Gould (Oct. 23, 1879) (quoted in "*The Utes Must Go!*", 149). Eagle County Colorado and the coalition of environmental groups aligned with them now have the audacity and shamelessness to assert that permitting oil, agricultural products, or anything else that a common carrier railroad might transport from present-day Ute lands to pass over that very same rail line is a great ill which must be prevented.

The Executive Branch, in defiance of the Act of June 15, 1880,[3] 21 Stat. 199, forcibly marched the Bands from Colorado to the Uintah Valley Reservation in Utah and an adjoining replacement Reservation for

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Pitkin to Carl Schurtz (Oct. 12, 1879) (quoted in "*The Utes Must Go!*", 147).

[3] In the Act of June 15, 1880, Congress took the Tribe's "permanent" reservation, created just more than a decade earlier, and directed the Executive Branch to create a replacement reservation for the Uncompahgre Band around the present-day location of Grand Junction, Colorado if land in that area was cultivable. There was and is such cultivable lands in that area, but the Executive Branch, at the urging of Colorado, created the replacement reservation on non-cultivable lands in Utah.

the Uncompahgre Band in Utah. *Ute Indian Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015).

The area from which the non-Indians forced the Utes now contains common carrier rail lines, interstate roadways, commercial airports, cities, oil and hard mineral producing lands, fertile agricultural lands, etc. It contains substantial oil fields and agricultural lands that *are* connected to the United States rail infrastructure. It is firmly tied to the United States economic and transportation infrastructure.

All of Eagle County, Colorado was originally Ute lands. The unemployment rate in Eagle County is under 3%.[4] Eagle County includes Vail, Colorado, where average home prices are over $2,000,000.[5] It also includes Minturn, named after the vice president of the railroad company that brought a rail line to that town and others in the area.[6]

In contrast, the Uintah Basin has to date proven too remote and too difficult to access. It has one two lane road from east to west, an airport with only two small commercial flights per day, no rail access, no ski resorts or chalets for the rich and famous. From some parts of the Uintah Basin, it is a three-hour drive, in good weather, to the nearest four lane road.

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[4] https://vailvalleymeansbusiness.com/data-center/d (last visited April 2, 2024).

[5] https://www.redfin.com/city/20103/CO/Vail/housing-market (last visited April 2, 2024).

[6] https://www.minturn.org/historic-preservation/pages/timelines (last visited April 2, 2024).

The United States and Colorado knew that much of the Uintah Basin was and would remain a remote high desert. Before the United States permitted a reservation to be established in the Uintah Basin,[7] the Utah Territorial Indian Superintendent dispatched a survey term to determine whether the proposed reservation lands would be suitable for non-Indian settlement. The team's "unanimous and firm" verdict was that the proposed reservation lands were "one vast 'contiguity of waste,' and measurably valueless, except for nomadic purposes, hunting grounds for Indians and to hold the world together." *Report of Utah Expedition*, *printed in* Deseret News, Sept. 25, 1961, *quoted in* Charles Wilkinson, *Fire on the Plateau*, 150 (Island Press 2004). *See also* U.S. Department of the Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1886*, 225 ("The Uncompahgre Reserve is a desert. Of the 1,933,440 acres embraced therein not one can be relied on to produce a crop without irrigation, and not more than 3 per cent of the whole is susceptible of being made productive by process of irrigation.").

The Tribe's Uncompahgre Reservation remains one of the least populated areas in the United States. The Uncompahgre Reservation is substantially larger

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[7] The Uintah and Ouray Reservation started as two separate reservations: the Uintah Valley Reservation (for the Uintah and later also the White River Bands) and the Uncompahgre Reservation (for the Uncompahgre Bands). Because the Uncompahgre Reservation is virtually uninhabitable, the Reservations were eventually combined and a single government for the three Bands was created.

than the State of Delaware. There is only one census area on the Uncompahgre Reservation, and in the most recent decennial census that census area, Bonanza, dropped from a population of one in the 2010 census to a population of zero. Emily Harris, *First Insights—2020 Census Utah Counties and Communities* (Univ. Utah 2021).

Respondents Eagle County, Colorado and its aligned NGOs want to keep it that way.

Unbeknownst to Coloradans or the United States when the White River and Uncompahgre Bands were forcible removed from their Reservations in Colorado to land in Utah, the Uintah Valley Reservation and the Uncompahgre Reservation in Utah contained valuable mineral resources. First, the United States found that the lands contained Gilsonite, and Congress took that land from the Tribe. Act of May 24, 1888, ch. 310, 25 Stat. 157. Later, the United States discovered the Reservation contained one of the largest and best oil fields in the United States. By the time the United States realized the land contained oil, Congress did not have the audacity to take that land.[8]

The United States owns most of the land on the Tribe's Reservation. Similarly, the United States owns much of the land on all Indian Reservations and the United States owns about half of the land west of the Rocky Mountains. Nearly anything occurring on that federally owned land involves federal permitting,

[8] The Executive Branch did, and currently still does, have that audacity, but that is a case for a later date.

leasing, or other federal actions, and therefore requires NEPA review. 42 U.S.C. § 4332(C). The Tribe is not complaining about NEPA review. But, as will be discussed below, the D.C. Circuit decision would provide Respondents with multiple bites at the same apple and would require agencies to conduct the expansive consideration and issue their own decision, even when they have no authority, jurisdiction, or expertise.

Because so much of what occurs on the Tribe's Reservation and more generally on land west of the Rocky Mountains involves federal action by multiple federal agencies, the D.C. Circuit's decision would have an inordinate detrimental impact for the Tribe and others living west of the Rocky Mountains.

Since the early 1900s, there have been efforts to build a railroad that would connect the Uintah Valley to American's railway infrastructure. *E.g.*, Robert Athearn, *Rebel of the Rockies: The Denver and Rio Grand Western Railroad* (1962) (discussing plans for a railroad from Denver to Salt Lake via the Uintah Basin); Utah Dep't Transp., *Uintah Basin Railroad Feasibility Study Summary Report* (Jan. 9, 2015) (hereinafter *2015 Report*) (discussing a prior feasibility study for the "Isolated Empire rail line" in 2001). None of those efforts succeeded.

The most recent effort to connect the "Isolated Empire" to the United States rail infrastructure began in 2013. *2015 Report* § 1.0.

II. Surface Transportation Board duties and proceedings.

The Surface Transportation Board is an independent federal agency with a multi-member Board. There are approximately eighty independent federal agencies, and there are approximately seventy federal agencies with multi-member boards. Admin. Conf. of the U.S., *Sourcebook of United States Executive Agencies*, tables 3, 4 (2d ed. 2018).

The STB has a five-member Board. The Board is appointed by the President with the advice and consent of the Senate. 49 U.S.C. § 1301(a), (b). It is "charged with the economic regulation of various modes of surface transportation, primarily freight rail." stb.gov/about-stb/. Because of that limited function, its members must have experience in transportation, economic regulation, or business. 49 U.S.C. § 1301(b)(2).

Petitioner submitted a petition for a certificate authorizing Petitioner to construct a common carrier spur rail line from a mainline common carrier railroad into the Uintah Basin. Federal statutes provide that upon receipt of a petition to construct a common carrier line, the STB "shall issue a certificate authorizing [construction] unless the Board finds that such activities are inconsistent with the public convenience and necessity." 49 U.S.C. § 10901(a), (c).

Under long established federal law and policy, a common carrier has a statutory duty to carry any products. *E.g.*, 49 U.S.C. § 11101. The STB therefore does not and cannot determine what products—or whose

products—a common carrier line will carry. The products—on both the proposed spur line and on the main line—are determined by the market. Based upon federal policy codified into statute, any person who is willing to pay to have goods carried is treated on an equal basis by the common carrier.

Congress provided further guidance to the STB in 49 U.S.C. § 10101, which defines, through 15 paragraphs, the United States' "rail transportation policy." Paragraph 4 states that the United States policy is "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense."

The State of Utah completed a preliminary feasibility study for the current proposal in 2015. *2015 Report*.

The STB initiated environmental review of the Uintah Basin Railway proposal in June 2019, and Petitioners formally petitioned for a certificate authorizing construction in May 2020. *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1165 (D.C. Cir. 2023). The STB issued its final decision in December 2021. *Seven Cnty. Infrastructure Coal.—Rail Constr. & Operation Exemption—in Utah, Carbon, Duchesne, & Uintah Cntys.*, S.T.B. Fin. Dec., Dkt. FD36284, 2021 WL 5960905 (STB served Dec. 15, 2021). Pet. App. C.[9]

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[9] In contrast to the lengthy process for the 88-mile spur line, the 1900-mile transcontinental railroad from Council Bluffs, Iowa

The STB provided a substantial discussion of potential environmental effects from the proposed rail line. But, consistent with its limited role—freight rail and related surface transportation—it properly rejected Respondents' assertions that the Board should enforce Respondent NGOs' desired energy policy under the guise of NEPA review or Respondent Eagle County's attempt to prevent the common carrier railroad passing through Eagle County from carrying more crude oil.

Quoting and correctly applying this Court's holding from *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 767-68 (1989), the STB concluded that because the STB does not regulate, and in fact does not even have "authority or jurisdiction over development of oil and gas in the Basin," any conjectured future changes to that development of oil and gas were not under its environmental review authority. Pet. App. 108a. Instead, any such development was for some other agency or agencies to consider.

The STB similarly concluded that because authorization of construction of a common carrier railroad in Utah does not dictate where crude oil will ultimately be refined, conjectured effect of refinement on communities in the Gulf Coast was also not within its authority.

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to the West Coast was approved by Congress in 1862, 12 Stat. 489, construction began in 1863, and the line was completed and the golden spike driven on May 10, 1869.

III. The Circuit Courts are in conflict.

Petitioner provides a thorough and correct discussion of the split between the D.C. Circuit and Ninth Circuit on one side and the Third, Fourth, Sixth, Seventh, and Eleventh Circuits on the other side. Pet. 14-20.

As Petitioner shows, the split is over how far down the line (non-literally[10]) an agency *must* look. Amicus curiae believe *Public Citizen* provided a clear and easily applied answer to that question. The majority of the circuits hold that an agency meets the procedural requirements for NEPA analysis, and a Court therefore cannot vacate and remand to the agency, if the agency has adequately considered the environmental consequences which are within its regulatory authority. [11]

If the majority circuit position is correct (and it is, unless this Court is going to overrule its prior unanimous decision in *Public Citizen*), then the agency was permitted to limit its NEPA analysis to the "effects proximately caused by the actions over which they

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[10] The D.C. Circuit held that the agency had to consider alleged possible effects long after products that could be hauled on the spur line left that spur line, and even long after they left other rail lines 1500 or more miles away, Pet. App. 36a, and yet further when they were ultimately used by consumers, Pet. App. 35a-36a.

[11] The thornier issue which *Public Citizen* did not answer, and which is not presented by the current case, is: can an agency consider effects which are not within its regulatory jurisdiction, and if so, when can it do so and when can it not do so. That thornier question would require the Court to determine when the courts should bar one agency from invading the province of some other state, tribal, or federal agency.

have regulatory responsibility," and its decision to so limit its analysis cannot be vacated by a court.

Applying its very different standard, the Court below held that the agency was required to engage in a wide-ranging analysis of activities that are not within the STB's regulatory responsibilities, but which are within the regulatory responsibilities of other agencies. Moreover, the Court below requires the STB to consider or re-consider possible effects which have been or will be reviewed when those other agencies conduct NEPA review of proposed federal actions within those agencies' responsibilities.

For example, the D.C. Circuit chastises the agency for not reviewing how the building of the spur line into the Uintah Valley will impact areas around refineries on the Gulf Coast. That is not the STB's realm. Either those existing refineries already have approved capacity to refine that oil, or they would need to obtain that approval. In either case, proper NEPA review of the refineries will be conducted by an agency with *direct* responsibility and familiarity. If the existing refineries already have capacity to refine more crude oil, then the environmental effects of increasing production up to that already existing capacity has *already* been analyzed and authorized. And if those existing refineries were to need to expand at some point in the future (whether because of increased oil from the Uintah Basin or from other existing large oil fields in Colorado, Texas, Oklahoma, North Dakota, Wyoming, foreign countries, etc.), then the effects would be studied at that time.

Similarly, if the new rail line were to result in increased applications of permits to drill or other oil production-related federal permits, NEPA review of those actions would be evaluated at that time.

The Center for Biological Diversity made the same substantive argument in the current case as it made as Appellants in the Eleventh Circuit. It prevailed in the current case, but it lost in the Eleventh Circuit. As the Eleventh Circuit held in rejecting the Center for Biological Diversity's argument:

> To take an alternative, unbounded view of the public-interest review would be to appoint the Corps de facto environmental-policy czar. Rather than consider whether the Corps' own action is in the public interest, that broader view would have the Corps consider whether fertilizer production and use is really worth the cost. And that could be just the beginning. The next time the Corps is asked to approve a section of a gas pipeline running through a wetland, would the Corps be required to consider whether the country's reliance on fossil fuels is really in the public interest?

Ctr. for Biological Diversity, 941 F.3d at 1299.

The split between the circuits is directly at issue in this case. In the quote above, the Eleventh Circuit thought it was asking a softball question or rhetorical question to show the error of the D.C. Circuit's prior decisions, but the D.C. Circuit has yet again answered "yes" to the question. Under its decision, each of 70 federal boards not only can, but must, act as if it is the

czar over federal energy policy, pesticide use, fertilizer production, etc.

Having 70 different unelected czars is, of course, undemocratic. Setting these policies is for Congress, not for three or four unelected members who constitute the majority on one of the many federal boards. It is also unworkable. For example, as discussed above, if an existing refinery were to seek to expand its refining capacity, it would have to engage in the lengthy NEPA review for that expansion, and the agency with direct authority over that request could conclude that expansion is proper under NEPA. Yet, under the duties forced upon it by the D.C. Circuit, the STB should deny a permit if they conclude that the approved refinery is harmful. There are about 70 other three or four member majorities of boards which will have similar powers to set policy.

The split between the circuits is not going to go away until this Court resolves the issue. The D.C. Circuit has been on its divergent path since at least 2017, when it issued its decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). The Ninth Circuit adopted the D.C. Circuit's analysis in *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020). As the current case illustrates, even though it is in the minority, the D.C. Circuit is not backing down from its minority position.

For the reasons discussed above, the split needs to be resolved. The STB cited and correctly applied the scope of its review under the majority standard, but its

decision was then reviewed and vacated under the minority standard. For current purposes—a petition for a writ of certiorari—whether the majority or the minority position is correct is of less importance. The important point is that the conflict needs to be resolved. This Court should resolve which standard applies.

CONCLUSION

For all of the above reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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