No. 23-

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 Courts of Appeals
for the District of Columbia Circuit

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

In *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004), this Court held that when an agency cannot prevent an environmental effect "due to its limited statutory authority over the relevant actions," the National Environmental Policy Act does not require it to study that effect. This holding has divided the courts of appeals. Five circuits read *Public Citizen* to mean that an agency's environmental review can stop where its regulatory authority stops. Two circuits disagree and require review of any impact that can be called reasonably foreseeable.

Here, the Surface Transportation Board relied on *Public Citizen* to cabin its environmental review of a new rail line in Utah. But the D.C. Circuit rejected that approach, ruling that the Board "cannot avoid" environmental review "on the ground that it lacks authority to prevent, control, or mitigate" distant environmental effects. As a result, it ordered the Board to study the local effects of oil wells and refineries that lie outside the Board's regulatory authority.

The question presented is:

Whether the National Environmental Policy Act requires an agency to study environmental impacts beyond the proximate effects of the action over which the agency has regulatory authority.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

This petition seeks review of two cases that were consolidated by the D.C. Circuit Court of Appeals. In this Court, Petitioners are the Seven County Infrastructure Coalition and Uinta Basin Railway, LLC. Respondents in this Court who were petitioners in the court of appeals are Eagle County, Colorado, the Center for Biological Diversity, Living Rivers, Sierra Club, Utah Physicians for a Healthy Environment, and WildEarth Guardians. Respondents in this Court who were respondents in the court of appeals are the Surface Transportation Board, the United States of America, and the U.S. Fish and Wildlife Service.

Petitioner Seven County Infrastructure Coalition is an independent political subdivision of the State of Utah. Its member counties are Carbon, Daggett, Duchesne, Emery, San Juan, Sevier, and Uintah. It has no parent corporation, nor does it issue shares held by any publicly traded company.

Petitioner Uinta Basin Railway, LLC is a limited liability company organized and existing in the state of Delaware. It is a wholly owned subsidiary of Uinta Basin Railway Holdings, LLC, which is an affiliate of DHIP Group, LP. Neither Uinta Basin Railway Holdings, LLC nor DHIP Group, LP issues securities to the public, and no publicly held company has a 10% or greater ownership interest in either Uinta Basin Railway Holdings, LLC or DHIP Group, LP.

## RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Eagle County, Colorado v. Surface Transportation Board*, Nos. 22-1019 & 22-1020 (consolidated) (D.C. Cir.), petition for rehearing en banc denied on December 4, 2023
- *Seven County Infrastructure Coalition – Rail Construction & Operation Exemption – In Utah, Carbon, Duchesne, and Uintah Counties, Utah*, Docket No. FD 36284 (Surface Transportation Board), final decision issued on December 15, 2021

No other proceedings in state or federal trial or appellate courts, or in this Court, directly relate to this case under this Court's Rule 14.1(b)(iii).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Seven County Infrastructure Coalition and Uinta Basin Railway, LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit.

## OPINIONS BELOW

The court of appeals' opinion is reported at 82 F.4th 1152. Pet.App.1a–71a. The court of appeals' order denying rehearing en banc is unreported but available at Pet.App.72a–73a. The Surface Transportation Board's decision is unreported but available at 2021 WL 5960905. Pet.App.74a–189a.

## JURISDICTION

The court of appeals issued its decision on August 18, 2023. Petitioners sought en banc rehearing of that decision, which the court denied on December 4, 2023. Pet.App.72a–73a. This Court has jurisdiction under 28 U.S.C. § 1254.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 4332(C) (2019) provides:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided in section 552 of title 5, and shall accompany the proposal through the existing agency review processes[.]

40 C.F.R. § 1508.8 (2019) provides:

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use,

population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems) aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative). Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

## INTRODUCTION

This case presents a circuit split over the meaning of *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). That decision held that "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." *Id.* at 770. Hence, the agency need not study that effect in its National Environmental Policy Act review. *Id.*

Most circuits see *Public Citizen* as tying the scope of an agency's NEPA review to the limits of that agency's regulatory authority. As the Sixth Circuit put it, "agencies may reasonably limit their NEPA review to only those effects proximately caused by the actions over which they have regulatory responsibility." *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 710 (6th Cir. 2014). Thus, the "line between those causal changes that may make an actor responsible for an effect and those that do not" will "approximate the limits of an agency's area of control." *N.J. Dep't of Env't Protection v. U.S. Nuclear Reg. Comm'n*, 561 F.3d 132, 139 (3d Cir. 2009). In other words, an "agency is on the hook" under *Public Citizen* "only for the decisions that it has the authority to make." *Protect Our Parks v. Buttigieg*, 39 F.4th 389, 400 (7th Cir. 2022).

But the D.C. Circuit takes a conflicting view. It reads *Public Citizen* as turning "not on the question 'What activities does [the agency] regulate,'" but on the agency's power to block a project that "would be too harmful to the environment." *Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357, 1373 (D.C. Cir. 2017). On this view, agencies must consider even those distant environmental effects that are another agency's

responsibility: "[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.

The Eleventh Circuit has expressly rejected the D.C. Circuit's "outlier" view, criticizing its sister circuit for "failing to take seriously the rule in *Public Citizen*" and ignoring "the untenable consequences of its decision." *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1299–1300 (11th Cir. 2019). Like the Third, Fourth, Sixth, and Seventh Circuits, the Eleventh Circuit holds 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 also rejected the D.C. Circuit's NEPA-based dismissal of other agencies' oversight, holding instead that an environmental review may exclude "distantly caused effects" that are subject to "independent regulatory schemes." *Id.* at 1292.

The decision here shows why the D.C. Circuit is on the wrong side of this conflict. Petitioners want to build a new 88-mile common carrier rail line that would link an isolated part of Utah to the national rail network. They sought and received the Surface Transportation Board's approval to do so. But when opponents of Petitioners' project challenged it in the D.C. Circuit, they said nothing about the proximate effects of the 88-mile line that the Board had approved. Instead, they argued that the Board should have done more to study the distant effects of the main commodity that the rail line would carry—waxy crude oil.

In approving the rail line, the Board had explained that 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. Thus, the Board reasoned, those impacts were not indirect effects of the rail line under *Public Citizen*. Pet.App.108a. The D.C. Circuit held otherwise: "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." Pet.App.36a. Under this rule, the Board had to consider not only the effects of the new rail line it was permitting in Utah, but also the hypothetical, localized effects of processing the oil carried on the line at separately regulated Gulf Coast refineries a thousand miles away. Pet.App.36a–37a.

By requiring an agency to consider any environmental effect that it has the power to prevent, no matter the limits of its regulatory authority, the D.C. Circuit's rule turns each agency into a "de facto environmental-policy czar." *Ctr. for Biological Diversity*, 941 F.3d at 1299. To avoid that outcome, the last administration adopted new NEPA rules that relied on *Public Citizen* to limit the scope of agency environmental review. *See* 85 Fed. Reg. 43304, 43344 (July 16, 2020). But just two years later, a new administration reversed course, abandoned the majority reading of *Public Citizen*, and reinstated the old NEPA rules. *See* 87 Fed. Reg. 23453, 23464 (Apr. 20, 2022). These dueling White House interpretations of *Public Citizen* underscore the reasons for review here. Agencies need a manageable line to guide their NEPA studies, and this Court is now the only place to find one.

## STATEMENT OF THE CASE

The National Environmental Policy Act makes "a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). To fulfill that commitment, NEPA requires agencies to prepare a report that "take[s] a 'hard look' at the environmental consequences" of their actions. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983). But "NEPA itself does not mandate particular results," only "the necessary process" for considering the environmental effects of agency action. *Robertson*, 490 U.S. at 350. Because this environmental review process can become an end in itself, the Court from time-to-time has had to step in to draw "[c]ommon sense" boundaries. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 551 (1978). This case should be another one of those times.

### A. Legal Background

*Public Citizen* illustrates how this Court has imposed common sense on the NEPA process. The Court's decision started by emphasizing that NEPA's "procedural requirements" have "a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." 541 U.S. at 756–57. The Court then turned to the facts before it, which involved the President's decision to lift a longstanding moratorium on Mexican motor carriers operating in the United States. *Id*. 759. Before that decision could take effect, the Federal Motor Carrier Safety Administration had to promulgate new safety rules for the Mexican carriers. *Id*. at 760. But that was all FMCSA could do. It had "no statutory authority to impose or enforce emissions controls or to establish

environmental requirements unrelated to motor carrier safety." *Id.* at 759.

Because FMCSA's role was limited to enforcing motor carrier safety, its NEPA review "did not consider any environmental impact that might be caused by the increased presence of Mexican trucks within the United States." *Id.* at 761. Yet when FMCSA's safety rules were challenged, the court of appeals found that the agency's NEPA review had "failed to give adequate consideration to the overall environmental impact of lifting the moratorium" on Mexican trucks. *Id.* at 762.

This Court unanimously reversed. In so doing, the Court recognized that it would be "impossible" for Mexican trucks to operate in the United States until FMCSA issued its rules. *Id.* at 765. Still, it found that those rules were not the "cause" of the trucks' overall impact. *Id.* at 765–67. The Court based this finding on the principle that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause." *Id.* at 767 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). "But for" causation was not enough. *Id.* And since FMCSA lacked the "ability categorically to prevent" trucks from entering the country, it did not cause the environmental effects of those trucks' "cross-border operations." *Id.* at 768. The Court summarized its holding this way: "[W]here 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 the legally relevant 'cause' of the effect." *Id.* at 770.

### B. Factual Background

*Public Citizen* was central to the Surface Transportation Board's decision to authorize construction and operation of the new rail line here—the Uinta Basin Railway. That railway will serve the Uinta Basin, a 12,000-square-mile area in northeast Utah and northwest Colorado that is isolated by the mountain ranges and plateaus of the western Rockies. Though the basin is about the same size as Maryland, the only way to reach it today is over two-lane roads that cross high mountain passes. This inaccessibility makes it hard for people living in the basin to participate in the broader economy.

If the basin were less isolated, it would change people's lives. The basin is filled with untapped natural resources, including valuable minerals, natural gas, and waxy crude oil. The basin's farmers and ranchers grow alfalfa, corn, and cattle. But without better infrastructure, these products can never reach the rest of the country. At the same time, products from the rest of the country cannot easily reach the people living in the basin. These chokepoints raise costs for everyone, blocking diverse trade and throttling the basin's economy.

The Uinta Basin Railway could unlock the basin's potential. By building 88 miles of railroad track from the heart of the basin to a new connection with the national rail network, the project would bridge the transportation gap that stops farmers, ranchers, manufacturers, and oil producers from selling to wider markets. This railway would carry diverse commodities, improving lives by boosting the basin's economy. But its initial success depends on its ability to transport the basin's environmentally superior waxy crude oil to refineries in other parts of the country.

Of course, success is not guaranteed. The Uinta Basin Railway is an economic development project sponsored by a unit of state government, Petitioner Seven County Infrastructure Coalition. To facilitate the Surface Transportation Board's environmental review of its project, Seven County made high and low estimates of the oil production that the project could support, and thus the number of trains that might travel on the new rail line. It also told the Board about refineries around the country where that oil could be delivered, displacing oil from other sources. But Seven County did not have contracts with any of those downstream refineries or with any upstream oil developers. So it had no way of knowing which shippers would use the new rail line, much less where the oil would go.

### C. Administrative and Judicial Proceedings

The Surface Transportation Board started its environmental review of the Uinta Basin Railway in June 2019. After more than a year of study, the Board published a draft environmental impact statement describing the environmental effects of three alternative rail alignments. The Board then revised that draft based on public and agency input, leading to a 3,600-page final statement in August 2021—more than two years after the review began.

The Board's environmental review confirmed the separateness of any oil development. New oil wells would involve "projects that have not yet been proposed or planned," and which could occur on private, state, tribal, or federal land, where they would be studied and regulated by the appropriate agencies. JA1238. The Board similarly found that "it is not possible to identify specific refineries"—also separately regulated—"that would receive shipments" of oil from the Uinta Basin. Pet.App.111a. Some of those

refineries could be in Louisiana; others could be in Texas, Kentucky, Oklahoma, or Washington. JA1189. As for the effects of transporting Uinta Basin oil after it leaves the new 88-mile rail line, the Board found that the Uinta Basin Railway would connect with Union Pacific's line. Pet.App.77a. Safety on those lines is regulated by the Federal Railroad Administration, not the Board. *See* 49 C.F.R. Parts 200–299 (FRA safety rules).

While the Board prepared its environmental review, Petitioner Seven County sought an exemption from the Board's usual regulatory requirements for new rail construction. *See* 49 U.S.C. § 10502 (describing the exemption process). Since the environmental review had by then been underway for nearly a year, Seven County also asked the Board to preliminarily address the transportation merits of the new rail line. In January 2021, the Board agreed that the Uinta Basin Railway qualified for an exemption, subject to completion of the still-ongoing environmental review. Pet.App.206a–210a.

Once the environmental review was done, the Board made a final decision approving the project. The bulk of that decision was devoted to an analysis of the new rail line's environmental effects. As part of that analysis, the Board explained that under *Public Citizen*, "when 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 the legally relevant 'cause' of the effect' for NEPA purposes." Pet.App.107a–108a (quoting *Public Citizen*, 541 U.S. at 767–68). Because the Board had "no 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," it

concluded that the effects of oil and gas development were not indirect effects of the new rail line. Pet.App.108a. Similarly, because the Board lacked power to "regulate or mitigate impacts caused by" other rail carriers' operations in other states, it declined to treat those carriers' operations as indirect effects of the new rail line in the Uinta Basin. Pet.App.112a.

Having concluded that its environmental review met NEPA's requirements under *Public Citizen* and otherwise, the Board approved construction and operation of the new rail line. Pet.App.122a. Board Chairman Oberman dissented. Pet.App.123a–147a.

Respondents—Eagle County, Colorado and a collection of environmental groups led by the Center for Biological Diversity—separately petitioned for review of the Board's decision in the D.C. Circuit, which had jurisdiction under 28 U.S.C. §§ 2342(5) and 2321(a). Petitioners Seven County Infrastructure Coalition and proposed rail line operator Uinta Basin Railway, LLC intervened in both cases to defend the Board's decision. Since the two petitions raised some of the same issues, the court consolidated them. After briefing and argument, the court vacated and remanded the Board's decision.

The D.C. Circuit recognized that the Board had relied on *Public Citizen* to set the scope of its environmental review. Pet.App.36a. But the court rejected the Board's reading of that case. It explained that 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." Pet.App.36a. To the contrary, the court held, the Board's mere "authority to deny" a new

rail project "on the ground that the railway's anticipated environmental and other costs outweigh its expected benefits" meant that "the Board's argument that it need not consider effects it cannot prevent is simply inapplicable." Pet.App.36a–37a (citing *Sabal Trail*, 867 F.3d at 1373).

The D.C. Circuit's decision also found inadequate the Board's review under the Endangered Species Act and its analysis under the ICC Termination Act. And it affirmed some aspects of the Board's environmental review. None of those holdings is at issue here. The court of appeals remanded this case to the Board "for further proceedings," Pet.App.71a, and the Board must prepare a new NEPA document before it can address any other issue.

Petitioners timely sought en banc rehearing of the D.C. Circuit's decision. The court denied their petition on December 4, 2023. Pet.App.72a–73a.

## REASONS FOR GRANTING THE PETITION

Faced with NEPA's general requirement to report on the environmental effects of major federal actions, 42 U.S.C. § 4332(C), agencies need a "manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Public Citizen*, 541 U.S. at 767 (quoting *Metro. Edison*, 460 U.S. at 774 n.7). This Court tried to draw such a line in *Public Citizen* when it held that an agency's "limited statutory authority" over an action could break the causal chain. Most circuits have embraced this line. But the two circuits that handle the most NEPA cases—the D.C. Circuit and the Ninth Circuit—have not. This case squarely presents the D.C. Circuit's parsimonious reading of *Public Citizen*, which the Eleventh Circuit has expressly rejected, and which four other circuits reject in principle. By hearing the case, the Court can make sure that the line it drew in *Public Citizen* stays manageable.

### I. The circuits are split over what *Public Citizen*'s "limited statutory authority" holding means.

#### A. Five circuits hold that agencies need not study environmental effects that they do not regulate.

The Eleventh Circuit's decision in *Center for Biological Diversity* dives deepest into the meaning of *Public Citizen*. In that case, the Corps of Engineers was permitting wetland discharges required for the expansion of a phosphate mine in Florida. *Ctr. for Biological Diversity*, 941 F.3d at 1292. The Corps' NEPA review addressed the direct and indirect effects of those discharges. *Id.* at 1293. But the Corps did not study the effects of refining the phosphate ore into

fertilizer or the effects of storing a radioactive refining byproduct called phosphogypsum—even though the processing and waste storage would be done by the same company in the same state. *Id.* at 1293–94.

Relying on *Public Citizen*, the Eleventh Circuit upheld the Corps' focused environmental review. The court began by pointing out that "[t]he Corps did not issue a mining permit, nor a permit to produce fertilizer or store phosphogypsum—it has no jurisdiction to regulate or authorize any of that." *Id.* at 1294. It went on to note that "EPA and the [Florida Department of Environmental Protection]—not the Corps—directly regulate fertilizer plants and phosphogypsum." *Id.* at 1295. "[I]t was sensible," the court explained, "for the Corps to draw the line at the reaches of its own jurisdiction, leaving the effects of phosphogypsum to phosphogypsum's regulators" and "respecting the jurisdictional boundaries set by Congress and inherent in state-federal cooperation." *Id.* at 1295–96. Any other reading of *Public Citizen* would turn the Corps into a "de facto environmental-policy czar" that could deny a permit based on "its dislike of the applicant's business or downstream effects not sufficiently caused by" the activity the Corps was permitting. *Id.* at 1296, 1299.

The Sixth Circuit has likewise read *Public Citizen* as limiting an agency's environmental review obligations to actions over which the agency has regulatory authority. *Kentuckians*, 746 F.3d at 706, 708–10. That case involved a coal mine that was permitted by the state, but which also required a permit from the Corps of Engineers. *Id.* at 701–02. Despite public comments urging it to weigh the significant health effects of mining, the Corps concluded that its permit to fill streams

with spoil from the mine—once mitigated—would not significantly affect the environment. *Id.* at 704 & n.1.

The Sixth Circuit agreed with the Corps' decision not to study the broader effects of the mine. Citing *Public Citizen*, it held that "in the context of a complete regulatory scheme, agencies may reasonably limit their NEPA review to only those effects proximately caused by the actions over which they have regulatory responsibility." *Id.* at 710. The "complete regulatory scheme" at issue in *Kentuckians* was the Surface Mining Control and Reclamation Act, which allowed states that met federal minimum standards to regulate coal mining. *Id.* at 701–02. And as the court pointed out, "[t]here are good reasons" for Congress to avoid "a regulatory system in which each regulatory actor involved in a large operation, even in a comparatively minor way, is required to consider all of the effects of the overall project." *Id.* at 709.

Both the Eleventh and the Sixth Circuits' decisions drew on the Fourth Circuit's opinion in *Ohio Valley Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009). *Ohio Valley* also involved a Corps of Engineers permit issued in connection with a state-permitted coal mine. *Id.* at 189–91. But the mine opponents' argument in *Ohio Valley* was narrower. They asked only that the Corps consider the effects of spoil disposal outside jurisdictional waters, not that it study the entire mine. *Id.* 188, 193. Still, the court of appeals ruled against them. Noting that "the Corps has no legal authority to prevent the placement of fill material in areas outside of the waters of the United States," the court held that under *Public Citizen*, the Corps did not have to study effects over which it lacked "control and responsibility." *Id.* at 196–97. And, like the Eleventh and Sixth Circuits, the Fourth Circuit pointed out

that any other NEPA rule would render the state's regulatory scheme "at best duplicative, and, at worst, meaningless." *Id.* at 196.

The Corps of Engineers is far from the only agency to have faced these issues. In a Third Circuit case, project opponents questioned the Nuclear Regulatory Commission's decision not to study the potential effects of an airborne terrorist attack on a New Jersey nuclear power plant. *N.J. Dep't of Env't Protection*, 561 F.3d at 135. The court of appeals responded by looking to *Public Citizen*. Following this Court's direction to "draw a manageable line" to assess causation, the Third Circuit concluded that "this line appears to approximate the limits of an agency's area of control." *Id.* at 139. Because the Nuclear Regulatory Commission had "no authority over the airspace above its facilities," it did not have to study the potential environmental effects of an airplane crashing into a nuclear power plant. *Id.*

Finally and most recently, the Seventh Circuit relied on *Public Citizen* in rejecting a NEPA challenge to the Obama Presidential Center. It explained that NEPA "does not require agencies to waste time and resources evaluating environmental effects that those agencies neither caused nor have the authority to change." *Protect Our Parks*, 39 F.4th at 393. And while building the center at the preferred site required National Park Service approval, the Service lacked control over the site-selection process. *Id.* 399. Because *Public Citizen* put the Service "on the hook only for the decisions that it has the authority to make," the Service could "confine" its NEPA analysis "to the portions of the project that are subject to federal review." *Id.* at 399–400.

### B. Two Circuits require agencies to review effects they do not regulate, despite *Public Citizen*.

The D.C. Circuit takes a starkly different view of *Public Citizen*. That view emerged in the court's *Sabal Trail* decision, which held that the Federal Energy Regulatory Commission's environmental review of a natural gas pipeline should have considered the effects of burning the gas in power plants. 867 F.3d at 1371–72. To reach that holding, the court limited *Public Citizen* to cases in which an agency was barred from even considering the relevant environmental effects when making its decision. *See id.* at 1373. By narrowing *Public Citizen*, the D.C. Circuit expanded agencies' environmental review duties to cover any effect "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Id.* at 1371 (brackets omitted). In this way, the D.C. Circuit dropped *Public Citizen*'s focus on an agency's regulatory authority in favor of an agency's capacity to speculate about foreseeable effects.

The D.C. Circuit in *Sabal Trail* seemed to know that it was departing from other circuits' reading of *Public Citizen*. Without citing those other circuits' decisions, *Sabal Trail* expressly rejected the idea that *Public Citizen* turned "on the question 'What activities does FERC regulate?'" (*id.* at 1373)—exactly the idea that the Third, Fourth, and Sixth Circuits had already endorsed. The D.C. Circuit also held that "the existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis." *Id.* at 1375. Again, the Third, Fourth, and Sixth Circuits had held the opposite.

The Eleventh Circuit saw this conflict. And while it pointed out some superficial factual differences between *Sabal Trail* and the situation it was facing in *Center for Biological Diversity*, it emphasized that "the legal analysis in *Sabal Trail* is questionable at best." 941 F.3d at 1300. That analysis, the Eleventh Circuit said, "fails to take seriously the rule of reason announced in *Public Citizen* or to account for the untenable consequences of [the court's] decision." *Id.*

The Ninth Circuit, unlike the Eleventh, has relied on *Sabal Trail*'s analysis. In *Center for Biological Diversity v. Bernhardt*, the Ninth Circuit repeatedly cited *Sabal Trail* in holding that the Bureau of Ocean Energy Management should have estimated emissions from foreign oil consumption when preparing its NEPA review for an offshore oil drilling and production facility. 982 F.3d 723, 731, 736–40 (9th Cir. 2020). Like the D.C. Circuit in *Sabal Trail*, the Ninth Circuit reached this conclusion despite the Bureau's inability to regulate—or even estimate the change in—foreign nations' oil consumption. *Id.* at 738. *Public Citizen*, meanwhile, appears only as a "*cf.*" cite after the penultimate sentence in the Ninth Circuit's analysis.

That leaves the court of appeals in this case. The Surface Transportation Board here approved an 88-mile rail line that links the Uinta Basin with the national rail network. That new rail line would carry crude oil, but the Board reasoned that *Public Citizen* did not require it to study the distant effects of the oil's extraction, transportation on other rail lines, or refinement—effects over which it had "no authority or jurisdiction." Pet.App.108a. The D.C. Circuit, citing *Sabal Trail*, called the Board's logic "simply inapplicable." Pet.App.37a. In the court of appeals' view, the Board's lack of "authority to prevent, control, or

mitigate" distant effects did not "excuse[]" it from studying them under NEPA. Pet.App.36a–37a.

Finally, it does not matter that the "public convenience and necessity" permitting standard that applied here and in *Sabal Trail* differs from the Corps of Engineers' permitting standard. NEPA addresses the environmental effects of agency actions, not the agency's permitting standard. In any case, as the Sixth Circuit noted in *Kentuckians*, the Corps' rules require "a public interest review for all permit decisions." 746 F.3d at 712 (citing 33 C.F.R. § 320.4(a)). Such a public interest review gave the Corps just as much power to deny the permits in *Center for Biological Diversity*, *Kentuckians*, and *Ohio Valley* as FERC had in *Sabal Trail* or the Surface Transportation Board had here. Thus, the agencies' substantive decision-making rules cannot account for the circuits' conflicting interpretations of *Public Citizen*.

* * *

The sharp split between the D.C. Circuit's reading of *Public Citizen* and the reading employed by the Third, Fourth, Sixth, Seventh, and Eleventh Circuits is ready for this Court to resolve. As a legal matter, the D.C. Circuit's approach "fails to take seriously" the logic of *Public Citizen*. *Ctr. for Biological Diversity*, 941 F.3d at 1300. As a practical matter, the two approaches cannot be reconciled. It makes no sense that a Corps permit essential to a coal mine does not trigger a study of the mine's effects, while a rail line that merely carries crude oil requires a study of oil extraction and refinement. *Compare Kentuckians*, 746 F.3d at 708–10 *with* Pet.App.36a–37a. And the 5–2 split among the circuits (with the Ninth Circuit mimicking the D.C. Circuit's approach) is deep enough to warrant this Court's immediate attention.

## II. The D.C. Circuit's cramped reading of *Public Citizen* is not just wrong; it turns agencies into environmental-policy czars.

The D.C. Circuit's approach to *Public Citizen* not only diverges from the path followed by five other circuits, it undercuts *Public Citizen* itself.

In *Public Citizen*, the Court saw that the argument for broadly scoped NEPA review rested "on 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." 541 U.S. at 767. The key question here is what the Court meant by "no authority to prevent the effect." The answer hinges on the Court's observation that it was "impossible for any Mexican motor carrier to receive authorization to operate within the United States until FMCSA issued" its new rules. *Id*. at 765. In that sense, the agency did have the "authority"—i.e., the raw power—"to prevent" Mexican trucks from entering the country. What it lacked was any *regulatory* authority over the effects of those trucks' entry. So when the Court said that FMCSA had "no authority to prevent the effect[s]" of Mexican trucks entering the country, it was talking about the agency's lack of regulatory authority.

The D.C. Circuit "breez[es] past" this Court's reasoning, as the Eleventh Circuit has pointed out, focusing instead on the "reasonable foreseeability" of distant effects, "as understood colloquially." *Ctr. for Biological Diversity*, 941 F.3d at 1300. This misguided focus is clear in *Sabal Trail*. The D.C. Circuit's analysis in that case started from the premise that "[t]he phrase 'reasonably foreseeable' is the key here." *Sabal Trail*, 867 F.3d at 1371. The court then required a review of distant environmental effects that are

regulated by other agencies because they were reasonably foreseeable. *Id.* at 1372. Only after finding the effects reasonably foreseeable did the court in *Sabal Trail* confront *Public Citizen*. That analysis is backwards. Instead of first considering the scope of the agency's regulatory authority, *Sabal Trail* simply asked whether the agency had "legal power to prevent" an effect. *Id.* (emphasis omitted). Because that question goes to "but for" causation, not regulatory authority, it misses *Public Citizen*'s point.

The court of appeals made the same mistake here. Expressly relying on *Sabal Trail*, the court focused on reasonable foreseeability, ultimately concluding that the Surface Transportation Board should have "engage[d] in 'reasonable forecasting and speculation'" to "quantify the environmental effects" of oil wells located somewhere in the 12,000-square mile Uinta Basin. Pet.App.32a, 34a. Similarly, the court held that the Board should have "estimate[d] the emissions or other environmental impacts" of refining oil a thousand miles away from the new rail line's endpoint. Pet.App.34a. As in *Sabal Trail*, the court waited to address *Public Citizen*, then rejected the Board's use of that decision as an effort to "avoid its responsibility under NEPA . . . on the ground that it lacks authority to prevent, control, or mitigate" distant environmental effects. Pet.App.36a. This approach effectively confines *Public Citizen* to its facts and requires agencies to study any environmental effect that their decisions can "prevent." Pet.App.37a. Such repackaging of the "but for" causation analysis that *Public Citizen* rejected cannot be reconciled with this Court's ruling.

The D.C. Circuit's cramped reading of *Public Citizen* has another, bigger problem that the Eleventh Circuit also flagged. If NEPA required agencies to

assess distant effects over which they have no regulatory responsibility, it would turn those agencies into "environmental-policy czar[s]." *Ctr. for Biological Diversity*, 941 F.3d at 1299. Such czars, rather than focusing on the effects of their own actions, could deny permits based on issues that lie outside both their authority and their expertise. *See id.* And that is just what the D.C. Circuit asked the agency here to do.

The court of appeals was right that the Surface Transportation Board had "exclusive jurisdiction over the construction and operation of" the Uinta Basin Railway, and that the Board could decline the project "if the environmental harm caused by the railway outweigh[ed] its transportation benefits." Pet.App.36a. But it did not follow that the Board's NEPA analysis had to cover all "reasonably foreseeable environmental harms"—including a cradle-to-grave review of the oil that the new rail line would carry from the basin to the national rail network. Pet.App.37a. The Board does not set oil extraction and refining policy. Nor is it positioned to judge whether the local effects of refining oil in Louisiana—or any other state—are more important than the benefits of a new rail line in Utah. The Board authorizes the construction and operation of new rail lines, and *Public Citizen* wisely confines its environmental review to the proximate effects of that action. 541 U.S. at 767. The court of appeals' contrary decision was wrong.

## III. The scope of NEPA review is a vital issue for agencies, project proponents, and the public.

### A. Recent, conflicting changes to the NEPA rules highlight the active dispute over *Public Citizen*.

The courts of appeals are not the only forum for disagreement over *Public Citizen*'s "limited statutory authority" holding. The White House Council on Environmental Quality, in amending the rules that implement NEPA, has also taken conflicting positions on *Public Citizen*. In 2020, CEQ published a rule meant to "codify a key holding of *Public Citizen*" and "make clear that effects" under NEPA "do not include effects that the agency has no authority to prevent . . . ." 85 Fed. Reg. 43304, 43344 (July 16, 2020). That rule matched the circuit-majority rule. *See, e.g.*, *Kentuckians*, 746 F.3d at 710 (holding that "agencies may reasonably limit their NEPA review to only those effects proximately caused by the actions over which they have regulatory responsibility").

But a new Presidential administration interpreted *Public Citizen* differently. So CEQ proposed a new rule in 2021 that explicitly rejected the 2020 rule's attempt "to exclude 'effects that the agency had no ability to prevent due to its limited statutory authority'" over the relevant actions. 86 Fed. Reg. 55757, 55766 (Oct. 7, 2021) (quoting 40 C.F.R. § 1508.1(g)(2) (2020) (defining "effects" under NEPA)). The new administration's proposed rule said that a narrower definition of effects "unduly limit[ed] agency discretion." *Id.* And, to defend its reversal, the proposed rule offered a conflicting take on *Public Citizen*. *See id.*

When the new administration finalized its NEPA rules, its Federal Register notice devoted an entire section to the debate over *Public Citizen*. *See* 87 Fed. Reg. 23453, 23464–65 (Apr. 20, 2022) (addressing "Comments on Department of Transportation v. Public Citizen"). That section claimed that CEQ had "reexamined its interpretation of and reliance on the *Public Citizen* decision in the 2020 rule." *Id.* at 23464. But its reading of *Public Citizen* was policy-driven. The 2020 rule, CEQ argued, was "not compelled by the opinion itself" and did not "comport with" the new administration's "view of the proper scope of effects analysis . . . ." *Id.* Instead, CEQ—like the D.C. Circuit—elevated the "principle of reasonable foreseeability" above *Public Citizen*'s definition of effect. *Id.* at 23465.

### B. The reasonable foreseeability standard is an unmanageable line.

CEQ's rival readings of *Public Citizen* have one thing in common: They rest on a consensus that NEPA review too often creates more burdens than benefits. *See* 85 Fed. Reg. 1684, 1691 (Jan. 10, 2020) (noting that "numerous commenters" wanted rule changes to "reduce unnecessary burdens and costs"); 86 Fed. Reg. at 55759 (describing the new administration's review of the 2020 rules as ensuring a "sound and efficient" NEPA process). That imbalance is why policymakers for decades have been trying to streamline NEPA. *See* Tripp, J. & Alley, N., Streamlining NEPA's Env't Review Process: Suggestions for Agency Reform, 12 N.Y.U. Env't L.J. 74, 77–78 (2003). In practice, NEPA encourages agencies to "cover every bullet point in [their] plan with a paper shield," leading to "an unwieldy document that is of little help in practical planning because useful details become lost amid the clutter." *Id.* at 87. Yet CEQ's 2022 rule reinstated the

same definition of effects that had applied since 1978. *See* 86 Fed. Reg. at 55766.

NEPA's inefficiency has also been the subject of recent legislative action. Recognizing that the environmental impact statement process takes an average of 4.5 years, Exec. Office of the Pres., Council on Env't Quality, Env't Impact Statement Timelines (2010–2018) (June 12, 2020), Congress amended NEPA to impose time and page limits. *See* Pub. L. 118-5 § 321. After those changes, agencies must complete an environmental impact statement within two years and in fewer than 150 pages (or 300 pages for actions "of extraordinary complexity"). *Id.* § 321(b).

But these statutory changes do not alter the scope of an agency's environmental review. On that front, the new legislation merely codifies the old NEPA rules: Agencies must study any "*reasonably foreseeable* adverse environmental effects which cannot be avoided should the proposal be implemented." *Id.* § 321(a) (emphasis added); *see* 40 C.F.R. § 1508.8(b) (2019) (defining "indirect effects" to include effects that are "reasonably foreseeable"). Thus, NEPA still does not address the problem presented by this case. An agency following the D.C. Circuit's reasonable foreseeability rule will find it hard—if not impossible—to write an impact statement in two years and 150 pages. The scope of its review is just too broad.

That this burdensome NEPA review rule applies in the Ninth and D.C. Circuits creates special problems. The bulk of all NEPA litigation plays out in those two circuits. *See* Nat'l Ass'n of Env't Professionals, 2022 Annual NEPA Report 26 (July 2022) (showing that the Ninth and D.C. Circuit Courts of Appeals have

decided more than 65% of NEPA cases since 2006).[1] And because many agencies make their policy decisions at D.C.-based headquarters, projects from around the country may be challenged in the D.C. Circuit. *See Aracely v. Nielson*, 319 F. Supp. 3d 110, 128–29 (D.D.C. 2019) (finding that "application of a purported policy that supposedly emanated from an agency located in the District of Columbia" favored venue in D.C.). This jurisdictional rule makes NEPA-based forum-shopping inevitable.

Boundless NEPA review hurts project proponents and the public too. The time and expense of environmental review is a barrier to all kinds of new projects—including clean energy projects—that prevents some of them from ever getting off the ground. *See* Mackenzie, A. & Ruiz, S., No, NEPA Really Is a Problem for Clean Energy, Institute for Progress (Aug. 17, 2023).[2] More subtly, a costly environmental review process gives existing businesses "a competitive advantage," thereby "undermin[ing] innovation" and leaving in place "existing facilities that have more significant adverse environmental impacts." J. Wood, Speeding Up Environmental Reviews Is Good for the Economy and the Environment, The Hill (Feb. 6 2020). These costs hurt the public as much as they do the project proponent trying to win agency approval for a new idea.

In the end, the only way to stop runaway scoping from overwhelming the NEPA process is to consistently apply this Court's holding in *Public Citizen*.

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[1] Available at https://naep.memberclicks.net/assets/annual-report/NEPA_Annual_Report_2022.pdf.

[2] Available at https://ifp.org/no-nepa-really-is-a-problem-for-clean-energy/.

Under that holding, each agency must consider the proximate effects of the actions over which it has regulatory authority. 541 U.S. at 767, 770. The mere ability to prevent an effect—"but for" causation—is not enough to expand the scope of the agency's NEPA review. *Id*. at 767. Because the D.C. Circuit's decision erases this vital "manageable line," *id*. at 767, this Court's review is needed now.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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