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

BRIEF OF *AMICUS CURIAE* AMERICAN FOREST RESOURCE COUNCIL IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTION PRESENTED

As said by Petitioners, 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.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The American Forest Resource Council (AFRC) is an Oregon-based nonprofit and a regional trade association whose purpose is to advocate for sustained-yield timber harvests on public timberlands and to enhance forest health and resistance to fire, insects, and disease throughout the West. AFRC represents more than 50 forest product businesses and forest landowners throughout Oregon, Washington, California, Nevada, Idaho and Montana. It promotes active management to attain productive public forests, protect the value and integrity of adjoining private forests, and support the economic and social foundations of local communities. And it works to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands.

This case crystallizes an issue that has frustrated AFRC and its members for years. AFRC and its members understand that in the National Environmental Policy Act (NEPA), Congress required federal regulators to *pause* and think critically about what effects the regulators' decisions would have on

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[1] Per Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. And as required by Rule 37.2, *amicus*'s counsel notified counsel of record for all parties of *amicus*'s intention to file this brief at least 10 days prior to the due date for the brief.

the "human environment," specifically "to create and maintain conditions under which man and nature can exist in *productive* harmony, and fulfill *the social, economic*, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added); *see also id.* § 4332(C) (clarifying that the focus is *not* on the "environment" for the environment's own sake, but on the "human environment").

Congress has required federal regulators "to take environmental consequences into account in their decisionmaking . . . eliminating the excuse . . . offered by bureaucrats that their statutory authority did not authorize consideration of such factors in their policy decisions." *Scenic Hudson Pres. Conf. v. Fed. Power Comm'n*, 407 U.S. 926, 927 (1972) (Douglas, J., dissenting from denial of certiorari).

AFRC and its members know, just as the Surface Transportation Board clearly knows, that the Board and other federal regulators must take environmental consequences into account when making decisions. They also know that Congress required *proof* that the federal regulators paused to consider and explain what environmental consequences they had considered, and how they had done so. 42 U.S.C. § 4332(C).

But that is all Congress demanded. Yet as the lone dissenter at the Board and the lower court here have shown, many judges reviewing federal regulators' actions have evidently considered Congress's requirement as a ***point of departure***—

preferring instead to read their own environmental-policy preferences into their duties to assess whether federal regulators considered and explained the environmental consequences of their actions.

Take what has happened here: Congress has created a presumption that constructing rail lines is in the public interest; the Surface Transportation Board received an application to construct a rail line that would be in the public interest—including the interest of communities that have been and would otherwise continue to be left behind by successive Presidential Administrations; and then the Board spent years and many pages examining and explaining the potential environmental consequences of constructing and operating the rail line. In this case, the federal regulators did what Congress required.

But for decades, the lower federal courts have let "anti-use" groups who disregard Congress's role in expressing the public interest—like the plaintiffs who sued here—use NEPA as a *weapon* to prevent any federal approvals of projects that would "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a). Rather than be satisfied that the federal regulators have done their jobs and the public interest can be realized, these groups and the federal courts that enable them now "flyspeck" environmental explanations, inventing supposed errors so they can promote their preferred outcomes.

Congress does not allow the anti-use groups and lower courts to do that—the courts' task is not to "flyspeck an agency's environmental analysis, looking for any deficiency no matter how minor." *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006). The courts can only "apply a rule of reason standard (essentially an abuse of discretion standard) in deciding whether claimed deficiencies in [an environmental-consequences explanation] are merely flyspecks, or are significant enough to defeat the goals of informed decisionmaking and informed public comment." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002). An agency like the Board must be *reasonable* in considering and explaining the environmental consequences of approving construction of a rail line that is in the public interest; the federal regulators do not have to be perfect. *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021); *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 377 (1989).

The way the lower courts and other unelected persons have weaponized NEPA as an "anti-use" authority ignores—or rejects—the public interest. And that practice is detrimental to AFRC and its members. As an analogy to the rail line at issue here, Congress has declared in multiple statutes, such as the Federal Land Policy and Management Act, that active forest management, including *timber harvesting*, is in the public interest. Yet when federal regulators approve timber-harvesting and related projects and examine and explain the environmental consequences of those approvals, the anti-use groups and many lower courts have weaponized NEPA to

flyspeck the regulators' explanations and promote their own substantive results, which are often to cancel or at least greatly delay projects. That is what the plaintiffs, the lone dissenter at the Board, and the lower court did here. But it must stop.

AFRC is determined to stop this practice. AFRC has publicly commented that the NEPA process has "unnecessarily slowed forest management and fire prevention projects on public lands [because] the lengthy timeframes required to complete an EIS and issue a Record of Decision [now] average . . . 4.5 years, and one quarter of EISs took more than 6 years." *See* AFRC CEQ Comment 4.[2] The ever-growing urgency to address forest health shows how the misguided—and unlawful—weaponization of NEPA continues to harm groups across many industries and the Country by preventing the realization of the public interest.

Which begs the question in the light as AFRC sees it: how will the public's interest in active forest management be realized in the face of the "thousands of NEPA lawsuits, many of which delay or kill federal projects" like the rail line in this case? *See* AFRC CEQ Comment 4. Unfortunately, the anti-use groups like

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[2] AFRC submitted the cited comment in response to the Council on Environmental Quality's notice of proposed rulemaking to revise NEPA regulations, which was published in the *Federal Register* at 86 Fed. Reg. 55,757 (Oct. 7, 2021), and which had the docket number CEQ-2021-0002.

AFRC's comment is located in the regulatory docket at docket-identification number CEQ-2021-0002-39296, and it can be accessed online at https://www.regulations.gov/comment/CEQ-2021-0002-39296 (last visited Apr. 4, 2024).

the plaintiffs here, the lone dissenter at the Board, and the lower court have decided that *their* interests are superior to the *public* interest, and they have no problem leaving the rest of the Country behind.

AFRC's members are no strangers to being "left behind" by federal actors even though Congress has given clear instructions about the public interest. *See generally American Forest Resource Council v. United States*, 77 F.4th 787 (D.C. Cir. 2023), *cert. denied*, 2024 WL 1241466 (U.S. Mar. 25, 2024) ("Justice Gorsuch and Justice Kavanaugh would grant the petitions for writs of certiorari."); *accord Murphy Co. v. Biden*, 65 F.4th 1122, 1143 (9th Cir. 2023) (Tallman, J., dissenting in part), *cert. denied*, 2024 WL 1241467 (U.S. Mar. 25, 2024) (describing how the President had "left behind" the people of southern Oregon when he used the Antiquities Act to take away their ability to engage in active forest management). AFRC and its members stand for the public interest and work to realize it, just like the people who live and work in the Uinta Basin and the counties who proposed the rail line represent the public interest. Nevertheless, the lower courts have wandered.

Here, the federal agency—the Surface Transportation Board—did what Congress asked it to do. It evaluated the potential environmental consequences potentially related to authorizing construction and operation of a rail line. It explained all those issues in a *detailed statement*. Yet the lower court ignored Congress and imposed its own priorities as superior to the public interest.

This madness of requiring more—weaponizing NEPA—to prevent any uses of public lands must end. And AFRC respectfully submits this brief asking the Court to step in, review this case, and correct the undemocratic, unlawful path that many federal regulators and lower courts have taken.

SUMMARY OF THE ARGUMENT

When it comes to building rail lines, Congress has been clear about the public interest: there is a rebuttable presumption that building a rail line *is* in the public interest as long as the federal agency reviewing the proposal to build the line—the Surface Transportation Board—takes a "hard look" at the potential environmental consequences of building it. That's what the Board did here.

In contrast, the court below and the lone dissenter at the Board would reverse the order, supposedly because their shared idea of "what is in the public interest" is superior to Congress's clear statement of that interest. The lone dissenter went further, asserting that he alone knows that "***Decarbonization is national policy***" and *that* is the public interest, Pet.App.146a (emphasis in original)—never mind what Congress says.

There is a troubling trend in which the lower courts are using NEPA to put their interests or other anti-use groups' interests over the public interest. But at least with respect to building rail lines, two

circuit courts have been clear that *building them* is presumptively in the public interest. The fact that the lower court here got the public's interest backward, in conflict with other circuit courts, is sufficient reason for this Court to review the lower court's decision. *See* Rule 10(a).

To make the matter worse, the lower court disregarded this Court's explanation in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), of how an agency takes a "hard look" at the potential environmental consequences of an action when the agency cannot directly regulate those environmental consequences, further justifying the Court's review of the lower court's decision. *See* Rule 10(c).

The lower court prevented construction of a much-needed rail line based on an overreaching conclusion that the Surface Transportation Board did not perform an adequate analysis of the environmental consequences that building and operating the rail line might, potentially, *maybe* could have, and even though the Board could do nothing to regulate those consequences. But the lower court went so far down the path of looking for things to criticize that it lost the forest for the trees.

The lower court's confusion (or, less charitably, its desire to prevent the rail line) misses the point: the Board followed NEPA because it made the *detailed statement* that Congress required it to make about environmental consequences. The Board acted reasonably and otherwise lawfully. The lower court's

contrary approach to NEPA hurts not only those relying on the rail line but also AFRC and its members who are trying to realize the public's interest in active forest management.

ARGUMENT

I. Congress has decided that building rail lines is in the public interest.

Congress has spoken clearly: the presumption is that building rail lines is in the public interest, and the Surface Transportation Board should approve such construction accordingly. As Congress said it, "The Board ***shall*** issue a certificate authorizing activities for which such authority is requested in an application . . . unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions . . . the Board finds necessary in the public interest." 49 U.S.C. § 10901(c) (emphasis added).

At least two circuit courts agree that "there is a statutory presumption that rail construction ***is*** *to be approved*." *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 552 (8th Cir. 2003) (emphasis added); *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1092 (9th Cir. 2011); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383–84 (1995) ("Congress established Amtrak in order to avert the threatened extinction of passenger trains in the United States. The statute that created

it begins with the congressional finding, redolent of provisions of the Interstate Commerce Act, see, *e.g.*, 49 U.S.C. §§ 10901, 10903, 10922 . . . that 'the public convenience and necessity require the continuance and improvement' of railroad passenger service.").

This congressional preference is important to AFRC because Congress has *also* spoken clearly that active forest management, which includes timber harvesting and is vital to AFRC's members, is in the public interest. For example, we know from Congress that it is in the public interest that federal agencies manage "public lands" "in a manner which recognizes the Nation's ***need*** for domestic sources of . . . timber . . . from the public lands." 43 U.S.C. § 1701(a)(12) (emphasis added). And Congress emphasized that federal agencies must explain themselves *to Congress* when they try to eliminate "timber production" from federal lands. 43 U.S.C. §§ 1702(*l*) ("timber production" is a "principal or major use" of federal lands), 1712(e)(1)–(2) (heightened scrutiny given to federal management decisions that eliminate a "principal or major use" of federal lands).

Along similar lines, Congress has required detailed planning for and protection of timber harvesting "[i]n recognition of ***the vital importance*** of America's renewable resources of the forest . . . to the Nation's social and economic well-being." 16 U.S.C. § 1601(a) (emphasis added).[3] So AFRC is

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[3] And when Congress created a multiple-use policy for the national forests, it *included* timber harvesting as an important use, rather than exclude timber harvesting in favor of anti-use (or, pristine preservation) purposes. 16 U.S.C. §§ 528, 531.

very troubled by the approach that the Surface Transportation Board's lone dissenter and the lower court took in this case. At best, they disregarded the public interest in favor of their own goals. Worse, they used NEPA as a weapon *against* the public interest. But that is not what Congress intended in NEPA.

II. Congress conditioned the public interest on a requirement to take a "hard look" at potential environmental consequences.

In NEPA, Congress did not contemplate that a federal court or an unelected bureaucrat would be able to cancel (either directly or by indefinite delay) federal approvals of the projects that serve the public interest. Instead, when a federal agency decides that its proposed action—here, approving construction of a rail line—will "significantly affect[] the quality of the human environment," then it must describe in detail the "environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(C)(i)–(ii).

The role for the court is to ensure that the agency has taken a "hard look" at the environmental consequences. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). A court cannot interject itself within the agency's discretion as to the choice of the action. *Id.* *At most*, Congress put the courts in the position of deciding whether agency actions are "reasonable and reasonably explained." *Prometheus Radio Project*, 592 U.S. at 423.

That is where the lower court went wrong here. It took the question of "what is reasonable," and it used that question as a point of departure. To its credit, the lower court did mention the point that when an agency—here, the Surface Transportation Board—is trying to look at and explain environmental consequences of a proposed action, then "***reasonable***" is "the operative word." Pet.App.32a. But then the lower court got off-track.

The concept of what is "reasonable" is one that comes up often and which this Court has addressed in many contexts, including in cases arising (ultimately, as this one does) under the Administrative Procedure Act.[4] *E.g.*, *Prometheus Radio Project*, 592 U.S. at 427–28 ("In light of the sparse record on minority and female ownership and the FCC's findings with respect to competition, localism, and viewpoint diversity, we cannot say that the agency's decision to repeal or modify the ownership rules fell outside the zone of reasonableness for purposes of the APA."). But the lower courts are not listening to this Court. On the surface, they acknowledge that "reasonable" is the requirement, but then they go way further so that they can prevent projects that they do not like.

Using this case as an example, the lower court acknowledged "reasonable" as its lodestar, *see* Pet.App.32a, but then the court went off the rails.

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[4] *Prometheus Radio Project* might be especially on point for its role in working through a case about what is reasonable for an agency to do when Congress has *explained* what is in the public interest. *See id.*

a. The lower court misapplied *Public Citizen*'s "proximate cause" analysis.

There are many ways the lower court could have found some outer limit of what would have been "reasonable" for the Surface Transportation Board to do in this case. Petitioners have focused on one, Pet. 14, and that one is sufficient for the Court's review of this case.

In *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004), the Court rejected "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." As particularly relevant to this case, the Court examined whether NEPA required a federal agency to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers, where the agency's promulgation of certain regulations *would allow* such cross-border operations to occur. *Id.* at 756.

The answer was "no," NEPA did not require the agency to evaluate those effects because they were out of the agency's control, even though the agency's action "***would allow***" the activities that could result in environmental consequences. *Id.* at 756, 767–68 (emphasis added). Why? Because lacking the ability to directly regulate the activities—less speculative there than in this case—that would have environmental consequences, the agency properly realized that those consequences simply were not

relevant to its decision whether to act. The agency "simply lack[ed] the power to act on whatever information" it allegedly should have considered and explained to the public. *Id.* at 768.[5]

The same principle applies here: lacking the ability to directly regulate any future "upstream" oil and gas production from federal, private, or state minerals in the Uinta Basin and lacking the ability to directly regulate any future "downstream" processing of oil and gas at refineries (whether in any of various regions of the Country or, potentially, somewhere else in the world), the Surface Transportation Board properly realized that those entirely speculative environmental consequences were not relevant to its decision whether to approve construction of the rail line—even, as was true in *Public Citizen*, if the

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[5] *Contra Mid States Coal. for Progress*, 345 F.3d at 548–51 (8th Cir. 2003)—while AFRC agrees with the circuit court's explanation in *Mid States Coal. for Progress* that rail construction presumptively is in the public interest, *supra* p. 9, AFRC disagrees with the court's conclusion that the Surface Transportation Board erred in that case by refusing to speculate whether construction of the rail line might, potentially, *maybe* lead to increased demand for coal (or supply of coal) and even more speculative increases in air pollutants.

As the circuit court acknowledged, "the Board did a highly commendable and professional job in evaluating an enormously complex proposal." *Id.* at 556. Yet the court disregarded the public interest, instead demanding that the Board document its guesses about non-existent environmental consequences. The circuit court *there* also got the analysis wrong. A similar thing happened in *N. Plains Res. Council, Inc.*, 668 F.3d at 1077–79.

The circuit courts are completely backward on NEPA when Congress has spoken about the public interest, emphasizing the point that the Court here should accept *this* case.

Board's approval *would allow* such future oil and gas production and such future refining to occur. *See* Pet.App.107a–109a, 112a; *Public Citizen*, 541 U.S. at 767–68. The Board's decision was fully consistent with *Public Citizen*.

The lower court brushed off the Court's *Public Citizen* analysis, Pet.App.36a; but the lower court's explanation shows that the court got lost in the woods. The lower court could not get past the point that the Board's approval might, potentially, *maybe* could result in future "upstream" and "downstream" air pollution. Pet.App.33a–37a. The lower court suggests that distinguishes this case from *Public Citizen*, *see* Pet.App.36a, but not so.

The agency action in *Public Citizen* was much more "proximate" to the threatened environmental consequences than the complete *guesswork* that the Board faced in this case. And *Public Citizen* established the point that the Board did not have to engage in or explain such attenuated guesswork about what might happen "upstream" and "downstream" as a "but for" cause of allowing construction and operation of a rail line in the Uinta Basin. *See Public Citizen*, 541 U.S. at 767–68.

The lower court either misunderstood or otherwise misapplied *Public Citizen*, Pet.App.36a, and either way the lower court's decision conflicts with this Court's relevant decision. Under Rule 10(c), that is among "the character of the reasons" making the lower court's decision suitable for review.

b. *Public Citizen* reinforces that federal regulators and courts should not put their interests above the public interest.

The lower court's application of *Public Citizen* deserves deeper treatment specifically addressing how the lower courts have used (or, misused) NEPA to defy the public interest.

To start with a basic premise: "NEPA itself does not mandate particular results in order to accomplish [its] ends. Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Public Citizen*, 541 U.S. at 756–57 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

The thrust of *Public Citizen* was that we should expect agencies to be reasonable in considering the environmental consequences of the actions they took to serve the public interest, but nothing more than that. *See* 541 U.S. at 764–70. Agencies must be reasonable about considering and explaining environmental consequences of their actions where there is "a reasonably close causal relationship between the environmental effect and the alleged cause." *Id.* at 767. And as in common law, there are circumstances that cut off what is "reasonable" in context, such as whether the agency could directly regulate the actions that would have known environmental consequences. *See id.* at 768.

Here, as the Board and Petitioners explained, the Board's inability to do anything *either way* about future oil and gas drilling in the Uinta Basin or processing of Uinta Basin oil wherever that oil ended up was a sufficient reason for the Board to not go *beyond* its detailed statement of the environmental consequences of approving the construction of the rail line. *See Public Citizen*, 541 U.S. at 756–57.

But to AFRC, this case means more than about whether the Board could pick which refinery the oil would go to—the lower court's approach to NEPA is backward, and that hurts AFRC and its members. The Board gave a detailed statement about all the potential environmental consequences; it discussed them in detail, including a discussion about *how* and *why* it would have to at some point cut off its analysis. *See, e.g.*, Pet.App.107a–112a. That is enough.

After this explanation, the Board did not reach the substantive conclusion (rejecting construction of the rail line) that the plaintiffs, the lone dissenter at the Board, or the lower court wanted. Of course they want more explanation! They want to force the Board to explain and explain for years and years until they get an explanation *against* building the rail line.

But that results-focused approach does not serve NEPA's "informational purpose." *See Public Citizen*, 541 U.S. at 768–69. The Board "indeed considered environmental concerns in its decisionmaking process," *see id.*, and that is all the Board had to do.

The importance of review in this case is that, like Petitioners, AFRC and its members need the Court to step forward and tell the lower courts and the federal regulators that ***Congress did not codify NEPA to subvert the public interest***. But if the Court decides not to review this case, then that is the message the Court will send to those who think their priorities are superior to the public interest.

III. The Court can stop lower courts elevating their priorities over the public interest, and that would help AFRC's members.

The phenomenon shown by the lower court in this case goes beyond questions of shipping fossil fuels in pipelines and on trains. As AFRC and its members know well, courts and federal regulators have often elevated their substantive anti-use priorities *over* the public's interest in active forest management, including timber harvesting, resulting in devastated communities.

Take, for example, the "Black Ram" project, which is currently at a circuit court.[6] There, the Forest Service spent many years analyzing a project that would involve vegetation management including commercial timber harvest and other fire-mitigation measures. The whole point of the project was to promote the public's interests in resilient vegetation, healthy watersheds, big-game ranges, forage opportunities, recreational opportunities, reducing

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[6] *See Ctr. for Biological Diversity v. U.S. Forest Serv.*, 2023 WL 5310633 (D. Mont. Aug. 17, 2023). The Ninth Circuit Court of Appeals has docketed the appeal as No. 23-2886.

high-intensity wildfires, *and* supplying forest products that contribute to the sustainable supply of timber products. These are things that Congress has said are in the public interest. *See, e.g.*, 16 U.S.C. §§ 528, 531.

The Forest Service began developing the project in 2017 and spent five years analyzing the environmental consequences of the project before approving it. The agency prepared a 435-page environmental assessment. And among many topics, the Forest Service considered and explained environmental consequences on grizzly bears, and ultimately approved a version of the project.

In particular, the Forest Service went to great lengths to calculate and otherwise estimate the "baseline" number of bears that lived in the 95,000-acre project-area so that it could explain the potential environmental consequences of the project on those bears. The Forest Service went way beyond what was reasonable to figure out the potential environmental consequences on bears, and it explained its process and conclusions at length. But never mind the public's interest in realizing all of the public-interest purposes that the Black Ram project would promote; a few persons and a federal court did not like the potential substantive result of the project on grizzly bears, and they used NEPA as weapon to defeat the public in favor of their own interests. *See Ctr. for Biological Diversity*, 2023 WL 5310633, at *3–7.

Why did these few know better about the public interest than the public knew? Well, as they tell it,

because all those purposes that would serve the public interest could not measure up to a difference of opinion between the Forest Service and the plaintiffs as to exactly *how* to estimate the "baseline" population of grizzly bears in the 95,000-acre area. It did not matter what was reasonable; it did not matter whether the few were "flyspecking"; it did not matter whether the Forest Service gave a "hard look" to environmental consequences. The district court decided that *answering* the question whether there were 60 bears in the area—or a few more bears or a few fewer bears—**served *NEPA*** without regard to the public interest.

Put another way, the district court decided that its desire to know how many grizzly bears lived in the project area was more important than all the public purposes that the project would serve. And it did so despite the many pages and years—recited at length by the district court—devoted to examining and *explaining* the environmental consequences of the proposed project. In the context of the Black Ram project, *Public Citizen* is important for the limit to "but-for causation" on what is reasonable, but it is even more important for explaining that such myopic, self-serving motivations that harm the public interest are both unlawful (by the regulators) and wrong (by the lower courts).

And the district court went further, turning its sight on the types of environmental consequences the Surface Transportation Board's lone dissenter focused on in the case at this Court. *See id.* at *8–11. With respect to "climate impacts," the district court went

way beyond what Congress and even regulators require. *Id.* at *8 ("Although NEPA's implementing regulations *somewhat cabin* broader environmental analyses[.]") (emphasis added). The main "climate" issue was whether potential forest management—including timber harvesting—would have meaningful "climate impacts" because the act of harvesting a tree (of course, without consideration of the benefits of active forest management) might result in one less way to remove carbon from ambient air. *Id.* at *9–10.

The district court then went through analyses, including qualitative and quantitative analyses, and concluded, "Federal Defendants and the Tribe counter that the USFS properly analyzed environmental impacts in a manner proportionate to their significance, which they insist are localized, infinitesimal, and minor. Ultimately, Plaintiffs are correct because although the USFS took steps to explain how the Project could impact carbon emissions, it did so only in general terms, which does not meet NEPA's 'hard look' standard." *Id.* at *10.

The district court had quantitative analyses in front of it. For example: "The Project Carbon Report notes that the Project would decrease these potential threats by increasing the long-term productivity of the forest, leading to higher future carbon sequestration. FS-020743. And it further notes that: 'The total carbon stored on the Kootenai National Forest is approximately 174 Tg, or about thirty-nine one hundredths of one percent (0.0039) of approximately 44,931 Tg of carbon stored in forests of the coterminous United States.' FS-020743. *Although it*

does not provide hard numbers explaining how much carbon would be released if the Project were implemented . . . ." (emphasis added). *Id.* at *9. In the court's logic, if you do not like the result of a federal action, then you can keep demanding more and more explanation taking years and years until you get the substantive result you want. The district court was determined to find a NEPA violation despite the public interest, no matter how "localized, infinitesimal, [or] minor," *see id.* at *10, the alleged lack-of-explanation was.

Here, by agreeing to review the lower court's decision and erroneous elevation of NEPA above the public interest, the Court would be able to send a message to lower courts that, for example, they should not set aside a Forest Service project that would support many purposes that are in the public interest just because a few people want more clarity on exactly how many grizzly bears live in a 95,000-acre area. Those people and that judge do not get to decide what is in the public interest.

For AFRC and its members, there are many examples of lower courts wielding NEPA as a weapon to defeat the public interest, including the public interest in active forest management. In *this* case, the lower court recognized that elevating its desired substantive anti-use outcomes *over* the public interest would harm the people of the Uinta Basin, a roughly 12,000-square-mile area in the West that is generally cut off from the rest of the world. *See* Pet.App.7a; Pet. 9. The Tribe members and others who rely on the Basin, including their ***elected*** representatives, spoke

out to the Surface Transportation Board, urging approval of this helpful project. *See, e.g.*, Pet.App.78a n.2; Pet.App.194a. Congress was not alone in professing that construction of the rail line was in the public interest, *the public* said so too. *Id.*

The lower court and the lone dissenter at the Board decided they knew better about the public interest than the public did. But as Judge Tallman of the Ninth Circuit recently warned, "the unfortunate back-end cost" of that approach "is that small, local communities reliant on the cultivation of natural resources to generate revenue to sustain them are often left behind." *Murphy Co. v. Biden*, 65 F.4th 1122, 1143 (9th Cir. 2023) (Tallman, J., dissenting in part), *cert. denied*, 2024 WL 1241467 (U.S. Mar. 25, 2024) ("Justice Gorsuch and Justice Kavanaugh would grant the petitions for writs of certiorari.").

Unfortunately, the lower court—like the lone dissenter at the Board—decided that it knew better about the public interest than did Congress and the public itself. Congress did not intend for NEPA to be "weaponized" in this way, creating a platform for "anti-use" initiatives to succeed *despite* the public interest.

Accordingly, for the sake of Petitioners in this case, the people who live in or rely on the Uinta Basin, and AFRC and its members, AFRC respectfully asks the Court to review this case and ultimately rule in the Petitioners' favor.

CONCLUSION

For the foregoing reasons, AFRC respectfully asks this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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