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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NINE OTHER BUSINESS TRADE ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*

Amici curiae the Chamber of Commerce of the United States of America; the Agricultural Retailers Association; the American Exploration and Production Council; the American Farm Bureau Federation; the American Gas Association; the American Road & Transportation Builders Association; Associated Builders and Contractors, Inc.; the Associated General Contractors of America, Inc.; the Fertilizer Institute; and the National Ocean Industries Association are ten business trade associations that represent sectors of the U.S. economy whose activities often involve federal actions that entail review under the National Environmental Policy Act ("NEPA").

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the business community.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

The Agricultural Retailers Association ("ARA") is a nationwide, not-for-profit association representing agricultural retailers and distributors of agronomic crop inputs with members covering all 50 states and representing over 70 percent of all crop input materials sold to America's farmers. ARA's mission is to advocate, influence, educate, and provide services to support its members in their quest to maintain a profitable business environment, adapt to a changing world, and preserve their freedom to operate. ARA's retail members provide their farmer customers with essential crop inputs like fertilizer, seed, pesticide, and equipment; application services; and crop consulting services, including conservation methodology.

The American Exploration and Production Council ("AXPC") is a national trade association representing 32 of the largest independent oil and natural gas exploration and production companies in the United States. AXPC companies are among leaders across the world in the cleanest and safest onshore production of oil and natural gas, while supporting millions of Americans in high-paying jobs and investing a wealth of resources in our communities. Dedicated to safety, science, and technological advancement, AXPC's members strive to deliver affordable, reliable energy while positively impacting the economy and the communities in which we live and operate. As part of this mission, AXPC members understand and promote the importance of ensuring positive environmental and public-welfare outcomes and responsible stewardship of the nation's

natural resources. It is important that regulatory policy enables AXPC to support continued progress on both fronts through innovation and collaboration.

The American Farm Bureau Federation ("AFBF"), headquartered in Washington, D.C., was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all 50 states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, AFBF regularly participates in litigation, including as *amicus curiae*.

The American Gas Association ("AGA"), founded in 1918, represents more than 200 local energy companies that deliver safe and reliable natural gas throughout the country. There are more than 78 million residential, commercial, and industrial natural gas customers in the United States, of which 95 percent—more than 74 million customers—receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today, natural gas meets more than one-third of United States energy needs. AGA and its members have long supported measures for protecting the environment, particularly best practices for reducing methane emissions from natural gas

infrastructure. The methane emissions strategies enacted by AGA members have helped to reduce methane emissions attributable to U.S. natural gas distribution systems by 70 percent from 1990 to 2022.

The American Road & Transportation Builders Association's ("ARTBA") membership includes private and public sector members that plan, design, build, and maintain the nation's roadways, waterways, bridges, ports, airports, rail, and transit systems. ARTBA's nearly 8,000 members generate more than $650 billion annually in U.S. economic activity, sustaining more than 4.4 million American jobs. Many ARTBA members are directly involved in projects that require compliance with NEPA, engaging in construction-related activities that necessitate thorough environmental review. ARTBA members are committed to balancing the goals of improving our nation's transportation infrastructure with the need to protect the environment. Consequently, ARTBA's members are directly impacted by NEPA regulations and rely on ARTBA for guidance and advocacy in navigating the federal environmental review process.

Associated Builders and Contractors, Inc. ("ABC") is a national construction industry trade association representing more than 23,000 members. Founded on the merit shop philosophy, ABC and its 67 Chapters help members develop people, win work, and deliver that work safely, ethically, and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in

the industrial and commercial sectors. ABC's members work on construction projects subject to environmental reviews that will be impacted by the outcome of this case.

The Associated General Contractors of America, Inc. ("AGC of America") is the nation's largest and most diverse trade association in the commercial construction industry, now representing more than 28,000 member companies that include general contractors, specialty contractors, and service providers and suppliers to the industry through a nationwide network of chapters in all 50 states, the District of Columbia, and Puerto Rico. AGC of America represents both union- and open-shop employers engaged in building, heavy, civil, industrial, utility, and other construction for both public and private property owners and developers. AGC of America works to ensure the continued success of the commercial construction industry by advocating for federal, state, and local measures that support the industry; providing education and training for member firms; and connecting member firms with resources needed to be successful businesses and responsible corporate citizens. NEPA comes into play on a significant number of critical construction projects that service the public and the environment.

The Fertilizer Institute ("TFI") represents companies engaged in all aspects of the United States' fertilizer supply chain. The industry is essential to ensuring farmers receive the nutrients needed to enrich soil and grow crops that feed our nation and the world. Fertilizer is critical to feeding a growing global

population, which is expected to surpass 9.5 billion people by 2050. Half of all grown food around the world today is made possible through the use of fertilizer production in the U.S. and foreign markets. The U.S. fertilizer sector is comprised of producers, importers, wholesalers, and retailers, and the industry supports 487,000 American jobs with annual wages in excess of $34 billion.

The National Ocean Industries Association ("NOIA") represents the interests of all segments of the offshore energy industry, including offshore oil and gas, offshore wind, offshore minerals, offshore carbon capture, use and sequestration ("CCUS"), and other emerging technologies. NOIA's membership includes energy project leaseholders and developers and the entire supply chain of companies that make up an innovative ecosystem contributing to the safe and responsible development and production of offshore energy. In addition, NOIA's members have invested significantly in the research, development, demonstration, and deployment of all types of low and zero carbon technologies. This includes wind, CCUS, hydrogen, geothermal, and more. The companies in the offshore energy industry will be key participants in building and integrating these technologies at scale. For the offshore energy sector, the federal government serves as the primary regulator, so NEPA reviews apply to most every investment for NOIA's member companies. NOIA and its members thus have a direct interest in the implementation of NEPA.

Amici's members operate in industries that depend on federal permits or other federal actions that

are subject to review under NEPA. These members have an interest in agencies adhering to NEPA's text and exercising their review obligations promptly and consistent with the statute. The decision below threatens to undermine Congress's will by vastly expanding the scope of NEPA reviews to include impacts not caused by the agencies themselves and over which they have no jurisdiction. If allowed to stand, the decision below will substantially hinder economic development without improving agency decisionmaking or delivering any meaningful environmental benefit—all to the detriment not only of *amici*'s members, but of building the infrastructure of the future.

INTRODUCTION AND SUMMARY OF ARGUMENT

Twenty years ago, in *Department of Transportation v. Public Citizen*, this Court interpreted NEPA to "requir[e] agencies to undertake analyses of the environmental impact of *their* proposals and actions." 541 U.S. 752, 756-57 (2004) (emphasis added). If "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" and need not consider that effect in its NEPA review. *Id.* at 770.

The decision below turns that settled law on its head, requiring the Surface Transportation Board ("Board") to consider "the environmental effects of increased oil drilling and refining"—activities over which the Board has no regulatory authority—as part of its NEPA analysis of a railway project that may transport oil, among other things. Pet. App. 36a. In addition to the reasons presented in Petitioners' brief, *amici* offer three reasons why the decision below should be reversed.

First, the decision below undermines the policy objectives that Congress sought to promote in NEPA. NEPA was enacted "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). NEPA's procedural requirements exist to ensure that a federal agency makes informed decisions about the environmental impacts of *its* actions. The decision below threatens to

upend that balance by requiring an agency to consider the impacts of actions that it has no authority to control or expertise to assess. That does not lead to "harmony"—it leads to gridlock and sclerosis.

Second, the decision below will impair economic development without any offsetting benefit. NEPA reviews are already too lengthy, costly, inefficient, and burdened by litigation. Requiring an agency to consider *any* remote effect of a project will lead to more onerous NEPA reviews, lengthier delays, and more litigation. And it will yield no offsetting benefits (environmental or otherwise) because NEPA does not dictate any particular agency outcomes. Investors may abandon potentially valuable projects altogether rather than tolerate the uncertainty that boundless NEPA review is sure to foster. *Amici* are aware of no material benefits that would justify those serious societal costs.

Third, the decision below raises serious concerns under the major questions doctrine. The decision below, if allowed to stand, would turn each agency into a "de facto environmental-policy czar." *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1299 (11th Cir. 2019). That is exactly the sort of "unheralded" and "transformative" allocation of power that requires "clear congressional authorization." *West Virginia v. EPA*, 597 U.S. 697, 722-24 (2022) (citations omitted). Yet nothing in NEPA supports this aggrandized view of agency power. The major questions doctrine is thus an additional basis to conclude that the decision below is unsound.

For these reasons and those set forth in Petitioners' brief, the decision of the D.C. Circuit should be reversed.

ARGUMENT

I. The Decision Below Undermines Congress's Policy Aims.

Congress enacted NEPA to ensure that federal agencies take into consideration the environmental impacts of their major actions. The decision below misunderstands that principle and instead mires federal agencies in obligations to consider impacts beyond their jurisdiction and outside of their expertise. In doing so, it stymies the balance that Congress sought to strike between economic development and environmental protection.

A. NEPA seeks to balance economic development with environmental protection.

At its core, NEPA ensures that federal agencies consider the significant environmental impacts of their decisions. When Congress passed NEPA in 1969, it noted the "critical importance of restoring and maintaining environmental quality to the overall welfare and development of man." 42 U.S.C. § 4331(a). And it announced a national policy "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." *Id.* NEPA thus sought to strike a "balance between population and resource use which will permit high standards of

living and a wide sharing of life's amenities." *Id.* § 4331(b)(5).

Crucially, "'NEPA itself does not mandate particular results' in order to accomplish these ends." *Public Citizen*, 541 U.S. at 756 (citation omitted). Rather, NEPA "is a procedural statute." *Protect Our Parks v. Buttigieg*, 39 F.4th 389, 397 (7th Cir. 2022). And NEPA imposes no substantive obligation to prioritize environmental protection over economic development, national security, or other national goals. *See id.* at 397-98. It instead demands only informed and reasoned decisionmaking. To that end, NEPA imposes procedural requirements to ensure agencies consider "the environmental impact of *their* proposals and actions." *Public Citizen*, 541 U.S. at 756-57 (emphasis added).

"At the heart of NEPA is a requirement that federal agencies" prepare environmental impact statements, *id.* at 757, for each "major Federal action[] significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C). But in requiring these statements, NEPA does not favor any particular outcome. So long as "the adverse environmental effects *of the proposed action* are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (emphasis added).

This Court twenty years ago interpreted NEPA in keeping with its focus on ensuring the government makes informed decisions about the impacts of its own

actions. As this Court held, "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" and thus does "not need to consider" the effect to comply with NEPA. *Public Citizen*, 541 U.S. at 770. In other words, NEPA covers only "decisions that [the relevant agency] has the authority to make." *Protect Our Parks*, 39 F.4th at 400. In light of that pronouncement, most courts to have addressed the issue have appropriately held that "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); *see also Protect Our Parks*, 39 F.4th at 399-400; *Ctr. for Biological Diversity*, 941 F.3d at 1299-1300; *N.J. Dep't of Env't Prot. v. U.S. Nuclear Reg. Comm'n*, 561 F.3d 132, 138-39 (3d Cir. 2009); *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196-97 (4th Cir. 2009).

B. The decision below upends that balance.

The D.C. Circuit below, however, broke from *Public Citizen* and held that NEPA requires agencies to analyze the varied consequences of the far-flung actions of private and other actors over whom the agency has no regulatory authority—so long as the agency's decisions might possibly prevent some of those consequences. Not only does that holding disregard the statutory language—*see* Pet. Br. at 19-

29—but it also undermines the careful balance Congress established in NEPA.

The facts of this dispute illustrate why the decision below is so destabilizing. At issue is a Surface Transportation Board approval of an 88-mile common carrier rail line in an isolated part of Utah. *See* Pet. App. 192a. The D.C. Circuit faulted the Board for failing to analyze the environmental impacts of oil that *might* be transported along the new rail line. This includes both upstream effects—such as "oil drilling"—and downstream effects—such as "oil refining" and "combustion." Pet. App. 31a, 35a, 36a. Thus, rather than isolating the environmental impacts of the government action over which the Board had regulatory authority—approval or disapproval of the construction of the rail line—the court held that the Board must analyze all hypothetical effects of goods and services (both upstream and downstream) that might make use of the line. Pet. App. 30a-37a.

This onerous demand stretches NEPA far beyond its intended operation. It disconnects agencies' analytical obligations from NEPA's purpose of improving agency decisions. And it converts a statute that ensures federal agencies make informed decisions about their own actions into a statute that paralyzes agencies with a requirement to analyze any and all potential effects even of private action, including those outside agency authority and expertise. That is not what NEPA was designed to do, and interpreting it that way will harm America's economic future.

II. Overbroad NEPA Review Impairs Economic Progress.

Bloated NEPA reviews profoundly affect industry and economic development. Whenever a federal action is required to approve or fund a major project—for example, a new building, highway, airport, transportation system, broadband network, offshore wind project, natural gas pipeline, renewable or conventional energy venture, or grazing lease—NEPA's procedural requirements are triggered. An overly broad reading of those requirements can significantly delay the federal projects, policies, permits, and authorizations that trigger them. This delay and the uncertainty it engenders can forestall or prevent valuable economic development that is fundamental to meeting America's energy and infrastructure needs.

A. NEPA review and attendant litigation is already lengthy and costly, and the decision below would exacerbate those burdens.

NEPA reviews and litigation already cause substantial delays to projects. Dramatically expanding the scope of impacts that agencies must consider pursuant to the D.C. Circuit's interpretation would lengthen reviews and litigation even further.

1. NEPA review already takes far longer than it should, and often longer than it takes to build a major project. The Council on Environmental Quality ("CEQ")—which was created by NEPA and is charged with overseeing and guiding NEPA's implementation,

see 42 U.S.C. § 4342—stated in its first regulations promulgated in 1978 that environmental impact statements "shall normally be less than 150 pages," with a maximum length of 300 pages for proposals of "unusual scope or complexity." *National Environmental Policy Act—Regulations*, 43 Fed. Reg. 55,978, 55,995 (Nov. 29, 1978). The regulations specified that such statements "shall be kept concise and shall be no longer than absolutely necessary." *Id.* at 55,994.[2]

In recent years, however, the average length for an environmental impact statement has grown to over 660 pages, and a quarter exceed 748 pages—plus an additional 1,000 pages of appendices. *See* CEQ, *Length of Environmental Impact Statements (2013-2018)* at 1, 3 (June 12, 2020), https://perma.cc/F8FL-M3YS. It takes federal agencies an average of four and a half

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[2] CEQ in 2020 maintained similar page limits for environmental impact statements. *See Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,304, 43,364 (July 16, 2020). With the Fiscal Responsibility Act of 2023, Congress amended NEPA to institute similar page limits. *See* 42 U.S.C. § 4336a(e)(1) (generally "an environmental impact statement shall not exceed 150 pages, not including any citations or appendices," but "[a]n environmental impact statement for a proposed agency action of extraordinary complexity shall not exceed 300 pages"). And CEQ updated its regulations to match this amendment earlier this year. *See National Environmental Policy Act Implementing Regulations Revisions Phase 2*, 89 Fed. Reg. 35,442, 35,564 (May 1, 2024) (codified at 40 C.F.R. § 1502.7).

years to complete the NEPA review process.[3] *See* CEQ, *Environmental Impact Statement Timelines (2010-2018)* at 1 (June 12, 2020), https://perma.cc/RL9L-7HDE. And the threat of litigation creates further delay, incentivizing agencies to prepare even lengthier environmental review documents to make them "litigation-proof." Rayan Sud et al., *How to Reform Federal Permitting to Accelerate Clean Energy Infrastructure: A Nonpartisan Way Forward* at 18, Brookings Inst. (Feb. 2023), https://perma.cc/JB9Q-9XRS.

Needless to say, this lengthy review process can be very expensive, ranging in cost from hundreds of thousands to millions of dollars. *See* Anne-Marie Fennell et al., GAO, GAO-14-369, National Environmental Policy Act: Little Information Exists on NEPA Analyses at 12 (Apr. 2014), https://perma.cc/2BNQ-KEWM ("According to DOE data, the average payment to a contractor to prepare an EIS from calendar year 2003 through calendar year 2012 was $6.6 million, with the range being a low of $60,000 and a high of $85 million.").

There is no reason to believe that this ballooning of NEPA review yields any incremental environmental benefit. As noted, NEPA is purely procedural. *See supra* p.11. It neither dictates nor

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[3] As of earlier this year, agencies must typically complete their "[e]nvironmental impact statements within 2 years." 89 Fed. Reg. at 35,560 (codified at 40 C.F.R. § 1501.10(b)(2)). However, those deadlines can be extended, *id.,* which would likely be needed more frequently if the reviews are extensively expanded pursuant to the decision below.

favors any particular outcome with respect to specific projects or environmental impacts. So long as agencies consider the environmental consequences of their own actions, they are free to proceed with such actions. The D.C. Circuit's decision here would add more obligations to analyze attenuated and sometimes speculative consequences over which the reviewing agencies may have neither jurisdiction nor expertise. This would entail more time, more expense, and more delay. But it would not require agencies to alter their final actions as a result. All it would do is increase the already substantial bureaucratic burdens that delay authorizations for critical infrastructure projects.

2. Litigation frequently compounds these costs and delays, including to the point of derailing projects altogether. It often takes years to litigate a NEPA challenge—on average, 4.2 years. *See* Nikki Chiappa et al., *Understanding NEPA Litigation: A Systematic Review of Recent NEPA-related Appellate Court Cases* at 5-6, Breakthrough Inst. (2024), https://perma.cc/FX4M-YPYA. And agencies ultimately prevail in about 80% of NEPA appeals. *See id.* at 6. This means that most NEPA lawsuits do not change the outcome of an agency's environmental review but serve only to delay the project at issue. That can happen both directly, when courts issue preliminary injunctions based on alleged NEPA violations, or indirectly, when agencies delay making decisions or implementing them in order to overcomply with NEPA and thereby mitigate litigation risk.

Project opponents have every incentive to maximize such delays. Take the Atlantic Coast Pipeline as an example. After nearly seven years of litigation over the approval of the pipeline, which culminated in a favorable ruling from this Court, *see U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604 (2020), the project was ultimately canceled due to legal uncertainty and delays affecting the project's costs, *see* News Release, Dominion Energy, Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline (July 5, 2020), https://perma.cc/7E78-A6WF.

When the road to a final decision is unpredictable, companies and their financiers simply may not tolerate that unpredictability. In this way, NEPA-based uncertainty spawns "an invisible graveyard of projects that were never built" and thus are never able to serve the needs of our growing public. Aidan Mackenzie, *How NEPA Will Tax Clean Energy*, Inst. for Progress (July 25, 2024), https://perma.cc/M4RU-RH3P.

By expanding the scope of effects required to be analyzed under NEPA, the D.C. Circuit's decision would pull NEPA's procedural requirements further away from Congress's goal of *improving* government action and closer to many challengers' goal of *preventing* government action. It would add another tool to the arsenal of those challengers who view NEPA as a mechanism for fomenting uncertainty, delay, and (ultimately) project derailment.

B. NEPA-related delays forestall, and often prevent, critical economic and developmental progress.

Such lengthy NEPA reviews and litigation can create real barriers to American progress.

1. Energy is one area in which such barriers inhibit development. As America continues to grow and attract investment, its demand for energy increases. *See* Ben Tracy, *How the Surging Demand for Energy and Rise of AI Is Straining the Power Grid in the U.S.*, CBS News (July 19, 2024), https://perma.cc/38VR-3H7N ("The surging demand for energy in the U.S. … is forecast to hit record highs both this year and next year.").

This increased demand is due to, among other things, the reshoring of semiconductor and other manufacturing; the increased electrification of vehicles, appliances, and buildings; increased European demand for natural gas; and the growth in data centers across the country to support artificial intelligence. *See* Letter from Marty Durbin, President, Global Energy Inst., U.S. Chamber of Com., to Senators Joe Manchin & John Barrasso at 1 (July 25, 2024), https://perma.cc/BX5H-29J6. Congress has recognized the need for increased energy investment and has provided nearly $2 trillion for investments in infrastructure, semiconductor manufacturing, and clean energy. *See* Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022); CHIPS and Science Act, Pub. L. No. 117-167, 136 Stat. 1366 (2022); Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

But NEPA-related delays limit industry's ability to build and deliver these benefits to the public promptly. NEPA proceedings have been used to challenge energy projects and initiatives ranging from wind farms[4] to solar farms[5] to geothermal power projects[6] to congestion pricing,[7] to name just a few examples. Expanding these procedural and bureaucratic obstacles, as required by the decision below, would impose real costs on our society.

2. America's need for mined resources is also increasing. Critical minerals serve as building blocks for many technologies, from common products like cellphones to the batteries that power electric vehicles.[8] Cellphones require germanium for, among other things, their displays and circuitry. *See A World of Minerals in Your Mobile Device*, USGS (Sept. 2016), https://perma.cc/CU5H-3BK6. And electric vehicles require lithium, cobalt, nickel, graphite, and manganese for their batteries. *See* Brandon S. Tracy, Cong. Rsch. Serv., R47227, Critical Minerals in

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[4] *See, e.g.*, Benjamin Storrow, *4 Lawsuits Threaten Vineyard Wind*, E&E News (Mar. 29, 2023), https://perma.cc/525K-F393.

[5] *See, e.g.*, Daria Sokolova, *Conservationists File Appeal to Stop Solar Project Near Pahrump*, Pahrump Valley Times (Dec. 8, 2020), https://perma.cc/EM2B-9GQY.

[6] *See, e.g.*, Arielle Paul, *Burning Man Becomes Latest Adversary in Geothermal Feud*, N.Y. Times (May 17, 2023), https://perma.cc/KR78-NLWB.

[7] *See, e.g.*, *Mulgrew v. Dep't of Transp.*, No. 23-CV-10365 (LJL), 2024 WL 3251732 (S.D.N.Y. June 20, 2024).

[8] *See What Are Critical Materials and Critical Minerals?*, DOE, https://perma.cc/7D4Z-7LLE (last visited Sept. 3, 2024).

Electric Vehicle Batteries at 10-16 (Aug. 29, 2022). Expanding renewable energy production will also be impossible without reliable access to critical minerals. *See, e.g.,* Kristin Vekasi, *Wind Power, Politics, and Magnets*, Epicenter (Nov. 18, 2022), https://perma.cc/NZ7A-LQXW (wind turbines use neodymium and cobalt); Chloe Taylor, *Surging Demand for Renewables Will Boost These 3 Metals, Analysts Predict*, CNBC (Aug. 11, 2021), https://perma.cc/C2SS-2Q82 (solar panels use aluminum and zinc).

Being able to mine critical minerals domestically is essential to securing supply chains. America has a vast mineral base. *See* Mohsen Bonakdarpour et al., *Mine Development Times: The US in Perspective* at 11, S&P Global (June 2024), https://perma.cc/YD7G-VUAR. But we have so far struggled to make use of that base because of lengthy permitting delays and uncertainty. *Id.* In the United States, it takes 29 years on average to fully develop a new mine—longer than any country in the world except Zambia. *Id.* at 19. These long lead times and the regulatory uncertainty they engender can lead investors to devote their mining investments to other countries. For example, as compared to the United States, mining exploration investment budgets have been 81% higher in Canada and 57% higher in Australia over the last 15 years. *Id.* at 6.

Although permit-related delays in the United States reduce the available domestic supply of critical minerals and other mined resources, they do not similarly reduce domestic demand for these resources.

The growing gap between our domestic supply of and demand for critical minerals means that these resources will be developed in countries with inferior environmental, health, and safety practices. *See id.* at 10, 13. China currently dominates the market for processing such minerals. *See, e.g.*, Alex Scott, *Challenging China's Dominance in the Lithium Market*, Chemical & Eng'g News (Oct. 29, 2022), https://perma.cc/8VJ5-DSH9. But China does not share our Nation's commitment to environmental protection and worker safety. In 2022, for example, there were 11 coal mining-related deaths in the United States versus 245 in China. *See Coal Fatalities for 1900 Through 2023*, DOL, https://perma.cc/9V7J-P6TU (last visited Sept. 3, 2024); *China Coal Mine Death Toll Rises to Six, 47 Missing*, Reuters (Feb. 24, 2023), https://perma.cc/DS7D-NUPX. Facilitating production of critical minerals in the United States would not only facilitate economic growth and stability, but would also foster better environmental and safety outcomes.

* * *

Put simply, America will struggle to meet its energy and infrastructure goals if each NEPA analysis must be expanded to assess *every* potential environmental impact from *every* potential actor that *might* be averted if the government simply refused to act—regardless of whether those impacts come from the relevant agency's own actions or actions beyond its control. This would prolong the already lengthy NEPA review process and invite even more NEPA-related litigation. Such delay and uncertainty would in turn

impair economic development to the detriment of America's growing population. That is not what Congress intended when it enacted NEPA "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).

III. The Major Questions Doctrine Provides an Additional Reason to Reverse the Judgment Below.

The major questions doctrine provides an additional basis for reversal here. As the Court has recognized, this doctrine prohibits the Executive Branch from wielding vast powers that Congress has not expressly conferred. Yet that is what the D.C. Circuit's decision effects here: a vast expansion of regulatory power without any clear congressional directive.

The major questions doctrine applies where the proposed interpretation of a statute gives an agency "highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia*, 597 U.S. at 724. The doctrine examines both (1) the *scope* of the claimed congressional delegation of authority to the agency and (2) the *consequences* of such delegation. An interpretation of a statute may trigger the doctrine when it would mark a "'transformative expansion in [an agency's] regulatory authority,'" when the agency purports to "'discover in a long-extant statute an unheralded power,'" or when the agency claims "power over 'a significant portion of the American economy.'" *Id.* at 722, 724 (citations

omitted). Any such exercises of agency authority require "clear congressional authorization." *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023) (citation omitted).

Clear authorization is absent here. Congress gave the Board power to approve or disapprove the rail line at issue. *See* 49 U.S.C. § 10901(c) ("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."). And through NEPA, it directed the Board to analyze the significant environmental consequences of doing so. *See* 42 U.S.C. § 4332.

Congress did not authorize the Board to make decisions about oil and gas development, agriculture and livestock production, mining, or the wisdom of any number of private and local government actions that might take advantage of the rail line. If Congress had wanted the Board to inject itself into those decisions and leverage its highly circumscribed permitting authority to essentially dictate activities over which the Board has no jurisdiction, authority, expertise, or control, Congress would have said so clearly. Congress would not silently have made the Board (or any other agency) a "de facto environmental-policy czar." *Ctr. for Biological Diversity*, 941 F.3d at 1299.

The D.C. Circuit's interpretation would convert NEPA into a statute that requires agencies to weigh the consequences of a wide range of possible private decisions over which they have no regulatory authority. Rather than consider the consequences of

their own actions, as Congress intended with NEPA, agencies would be required to consider whether actions far outside their authority—here, oil and gas development—are "really worth the cost." *Id*. That is a "transformative expansion" in power that Congress cannot reasonably be understood to have granted when it tasked the government with analyzing the environmental impacts of its major actions. *West Virginia*, 597 U.S. at 724 (citation omitted).

The better course is to conclude, consistent with *West Virginia*, that NEPA should not be read to confer the extraordinary power bestowed upon agencies by the court below.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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