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, *et al.*,
Respondents.

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

BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, THE ELECTRIC POWER SUPPLY ASSOCIATION, THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, THE MIDCONTINENT INDEPENDENT SYSTEM OPERATOR, INC., THE LIQUID ENERGY PIPELINE ASSOCIATION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The Interstate Natural Gas Association of America (INGAA), the Electric Power Supply Association (EPSA), the National Association of Regulatory Utility Commissioners (NARUC), the Midcontinent Independent System Operator, INC. (MISO), the Liquid Energy Pipeline Association (LEPA), the Industrial Energy Consumers of America (IECA), the Natural Gas Supply Association (NGSA), the Center for LNG (CLNG), the American Public Gas Association (APGA), and the Consumer Energy Alliance (CEA) (collectively, "Amici") respectfully submit this brief as *amici curiae* in support of petitioners Seven County Infrastructure Coalition and Uinta Basin Railway, LLC.[1]

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

INTEREST OF THE AMICI

America's energy system is in peril. Critical energy infrastructure has become increasingly difficult to permit, site, and construct. Even as America witnesses unprecedented growth in the demand for energy, desperately-needed energy infrastructure—projects which would have been built as a matter of routine mere decades ago—are now being delayed, abandoned mid-development, or never proposed in the first place.

This infrastructure is critical. It includes the high voltage transmission lines necessary for electric reliability, the oil pipelines that supply fuel for transportation, the electric generators that produce power, the pipelines that supply fuel to electric generators and fuel and feedstock to the manufacturing industry, the local gas distribution networks that provide fuel to heat houses in the winter, the LNG terminals that provide needed energy to our allies overseas, and the pipelines that fuel manufacturing, providing millions of jobs and contributing trillions of dollars to our economy.

More infrastructure is needed or the country could face energy scarcity, rising prices, and, ultimately, reliability failures. And yet the rate of energy infrastructure development has been slowing down precipitously. *See* U.S. Energy Info. Admin. (EIA), *Natural Gas Intrastate Pipeline Capacity Additions Outpaced Interstate Additions in 2023* (Mar. 20, 2024) [hereinafter EIA Report], https://www.eia.gov/todayinenergy/detail.php?%20id=61623. This, at a time when the electric markets are sounding the alarm over impending reliability shortfalls. *See, e.g.*, *Joint Comments of Electric Reliability Council of Texas,*

Inc.; Midcontinent Independent System Operator, Inc.; PJM Interconnection, L.L.C.; and Southwest Power Pool, Inc., Docket No. EPA-HQ-OAR-2023-0072, at 9 (Dec. 20, 2023) [hereinafter Joint Comments], ("[S]hortfalls in resource adequacy . . . cannot simply be addressed overnight and would require the development of new resources that can take considerable time to permit and build.").

So what has changed? Among the greatest contributors is environmental review. In the past several years, starting with the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) issuance of *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*), judicial fiat has expanded the scope of environmental review conducted under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347. This has caused delays, reduced regulatory certainty, increased costs, and impeded development of desperately needed infrastructure.

INGAA is a trade association that represents the majority of interstate natural gas pipeline companies operating in North America; EPSA is a trade association that represents the nation's competitive electric power generators; NARUC represents energy regulators in all 50 States and most US Territories who oversee industry—some of whom are included in this brief—to ensure the reliability and affordability of the utility services that provide the backbone for their respective state economies; MISO is an independent, non-profit, electric Regional Transmission Operator, facilitating one of the world's largest energy markets and coordinating regional transmission planning across its 15 U.S. states and the Canadian province of Manitoba; LEPA is a trade association that

represents the liquid energy pipeline owners shipping nearly 97 percent of the crude oil and petroleum products moved by pipeline in the United States; IECA is an association that represents the interests of a diverse array of industrial energy consumers including those that produce chemicals, plastics, steel, aluminum, food processing, fertilizer, insulation, glass, pharmaceuticals, building products, and cement; NGSA is a trade association that represents integrated and independent energy companies that produce, transport, and market billions of cubic feet of natural gas per day; CLNG, a committee of NGSA, advocates for the advancement of the use of LNG in the United States and its international export; APGA represents the nation's not-for-profit, community-owned natural gas local distribution systems; and CEA is an association of energy consumers and producers that advocates for energy and environmental policies to ensure all Americans benefit from access to affordable, reliable, and environmentally responsible energy.

Representing diverse components of the energy supply chains and markets, the Amici are united in their desire to see clear, rational, predictable environmental reviews under NEPA that support the ongoing development of reliable, affordable energy systems throughout the country. To avoid unnecessarily expansive environmental reviews that throw federal infrastructure permits into doubt, they urge the Court to reverse the D.C. Circuit's decision and reaffirm the core holding in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) (*Public Citizen*), that NEPA does not require review of environmental effects for which the agency is not the legally relevant cause.

SUMMARY OF THE ARGUMENT

NEPA is the most heavily litigated federal environmental statute. Kristen Hite, Cong. Rsch. Serv., IF11932, *National Environmental Policy Act: Judicial Review and Remedies* 1 (Sept. 22, 2021) (Judicial Review and Remedies). Though wholly procedural and informational, NEPA provides a liberally-employed backdoor by which litigants can challenge agencies' substantive decisions.

Agencies, in an attempt to bulletproof their NEPA issuances from reversal on appeal, gold-plate their environmental reviews, producing ever longer NEPA documents in the course of ever longer environmental reviews. The result is delay.

Because of the regulatory uncertainty caused by the delays from the threat of litigation and from the litigation itself, every type of infrastructure vital to the energy sector (generation, transmission, LNG terminals, and pipelines) has become more difficult and more expensive to permit and construct. This infrastructure is critical to the United States. Insufficient infrastructure means rising costs and, in cases of truly acute scarcity, the possibility of blackouts and reliability failures.

Eagle County, *Colorado v. STB*, 82 F.4th 1152 (D.C. Cir. 2023) (*Eagle County*), represents the culmination of a seven-year long, court-mandated expansion of the scope of NEPA review. This series of cases, which began with *Sabal Trail*, has ignored Congressionally-imposed jurisdictional limitations placed on agencies' substantive powers by requiring agencies to consider subjects in their substantive decision making that are either explicitly exempted in their enabling statutes or contrary to their statutes' purpose. *Sabal*

Trail's abandonment of the sensible proximate causation requirement established in *Public Citizen* has resulted in the treatment of agencies as the legally relevant cause of every effect for which their permits are a but-for cause—even when considering those effects, undermines the fundamental purpose of the statute (like requiring discrimination against particular categories of customer on common carrier railways).

The regime established by *Sabal Trail* is unworkable. Predictability is impossible when the scope of NEPA review is determined, as the Federal Respondents advocate, on an agency-by-agency, project-by-project basis. In order to restore the regulatory certainty necessary for investment in the energy infrastructure America desperately needs, the Court should reject the Federal Respondents' request for narrow relief, and instead reverse *Eagle County,* reaffirm *Public Citizen*, and instruct the lower courts that agencies cannot be required to conduct NEPA review on effects for which they are not the legally relevant cause.

ARGUMENT

I. Expanded NEPA Review Causes Profound Litigation Risk.

NEPA is the most heavily litigated federal environmental statute—the federal courts hear over one hundred NEPA challenges annually. *See* Judicial Review and Remedies at 1.

NEPA is everywhere. Every agency contemplating a "major Federal action[] significantly affecting the quality of the human environment" must prepare a "detailed statement" describing the environmental effects of that action. 42 U.S.C. § 4332(C). Federal agencies publish thousands of environmental assessments and hundreds of environmental impact statements each year. *See* CEQ, *A Citizen's Guide to the NEPA*, at 7 (Dec. 2007).

NEPA itself does not provide a private right of action,[2] but challenges can "be brought under the APA," *Karst Env't Educ. & Protection, Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007), and are reviewed under the arbitrary and capricious standard. *See Food & Water Watch v. FERC*, 28 F.4th 277, 285 (D.C. Cir. 2022) (*Food & Water Watch*). As that standard has come to be applied in NEPA litigation, any alleged deficiency in reasoning, any perceived oversight, any claimed failure to provide a sufficiently thorough examination of a potential effect, can serve as the

[2] Historically, NEPA provided no cause of action. As of the passage of the Builder Act, there is now a cause of action to enforce deadlines against agencies. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, Div. C, Tit. III, § 321(a)(3)(B), 137 Stat. 10, 38 (Builder Act). Challenges to the substance of a NEPA document must still be brought through the Administrative Procedure Act.

predicate for a judicial challenge, no matter how trivial. NEPA challenges have become the means by which to challenge agencies' substantive decisions.

Agencies have responded to this litigation risk by expanding the scope of their environmental reviews in an effort to bullet-proof their issuances on appeal. *See* Alyson C. Flournoy, *et al.*, *Harnessing the Power of Information to Protect Our Public Natural Resource Legacy*, 86 Tex. L. Rev. 1575, 1582–83 (2008) (noting that critics of NEPA procedure state that concerns over omissions "encourage agencies to gold-plate their [environmental impact statements (EIS)] by including every conceivably relevant piece of information to avoid reversal") (citation omitted).

As a result, NEPA documents have ballooned into encyclopedic reviews covering every imaginable potentially relevant subject. When NEPA was first enacted, EISs were short and concise. *See* Daniel A. Dreyfus, *NEPA: The Original Intent of the Law*, 109 J. Prof. Issues in Eng'g Educ. & Prac. 249, 253 (1983). Now, the average length of an EIS has swelled to 661 pages, with an average of over 1,000 pages of appendices. *See* CEQ, *Length of Environmental Impact Statements* (2013–2018), at 1, 3 (June 12, 2020).

Longer documents take longer to prepare. As of 2018, it took agencies an average of four and a half years of fact finding, analysis, drafting, and review to publish an EIS. CEQ, Environmental Impact Statement Timelines (2010-2018), 1 (June 12, 2020). Some take far longer.

Even relatively routine permit applications, like, for example, an application to build an 88-mile rail line in rural Utah, are subject to protracted and

exhaustive NEPA reviews. The permit at issue in this case was accompanied by an exhaustive 3,600-page EIS. Yet the fate of this rail line now hangs in the balance due to a challenge based, in part, upon the alleged insufficiency of the agency's examination of unpredictable and incalculable effects hundreds of miles away from the actual rail line.

The courts describe their role in reviewing NEPA as "not to 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor." *Birckhead v. FERC*, 925 F.3d 510, 515 (D.C. Cir. 2019) (citation omitted). Instead, the courts' role is purported to be limited to ensuring "that the agency has adequately considered and disclosed the environmental impact of its actions." *Id*. (citation omitted).

Experience with NEPA litigation has instructed the Amici otherwise. By way of recent example, a NEPA challenge was brought against Federal Energy Regulatory Commission (FERC) authorizations for two LNG export terminals and an associated natural gas pipeline. *See City of Port Isabel v. FERC*, No. 23-1174, *et al.*, 2024 WL 3659344 (D.C. Cir. Aug. 6, 2024). Together, these projects represent billions of dollars of geo-strategically critical infrastructure. LNG terminals provide allies with desperately needed natural gas at a time of growing demand, scarce supply, rising costs, and energy insecurity. Having identified deficiencies in the initial authorization order, the D.C. Circuit remanded to FERC. *See Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1325 (D.C. Cir. 2021).

On a second appeal, the D.C. Circuit again remanded, this time with vacatur, despite acknowledging that FERC's subsequent order on remand

incorporated "significantly expanded" analysis for each project and that the analysis was based, in part, on "several information requests to the developers," and that FERC "solicit[ed] public comment as to some of the data underlying" its new analysis. *City of Port Isabel*, 2024 WL 3659344, at *4, *7. The reason for remand? In part because, despite the remedied analysis, FERC failed to issue a supplemental EIS, thereby reopening the process for further comment. *See id.* at *8.

This, after FERC's initial EISs (including attachments) for the projects, which were prepared over the course of several years, together spanned over 3,000 pages, canvassing every conceivable topic including geological conditions, effects on soil, water, wetlands, vegetation, wildlife, endangered species, recreation, cultural resources, air quality, noise pollution, and safety. *See* FERC, *Final Environmental Impact Statement – Rio Grande LNG Project and Rio Bravo Pipeline Project* (Apr. 26, 2019); FERC, *Final Environmental Impact Statement – Texas LNG Project* (Mar. 15, 2019). FERC consulted and worked alongside numerous other federal agencies, took and responded to public comments on its draft documents, conducted scoping and public outreach, and reviewed the EIS before publication.

By anyone's estimation, this effort exceeds NEPA's modest requirement that agencies produce a "detailed statement" on a proposed action's environmental effects. 42 U.S.C. § 4332(C).

The lesson learned: almost no quantity of review is enough.

The court's remand and vacatur of these facilities' permits imperils the viability of all future projects. Regulatory uncertainty causes costs to rise, including the cost of capital, and sows doubt in the minds of potential investors. *See* NextDecade Corp., Quarterly Report (Form 10-Q), at 26 (Aug. 14, 2024) (explaining that "the D.C. Circuit['s] . . . [vacatur decision] could impact Rio Grande's ability to complete Phase 1 on the expected time frame or at all").

Boundless NEPA review has created grave legal vulnerabilities and it has directly harmed energy infrastructure development in the United States.

II. Permitting Delays Have Impeded Energy Infrastructure Development.

Energy infrastructure is capital intensive and permitting delays (and litigation risk) undermine the certainty necessary for private investment.

Time is money. The delays caused by regulatory review and litigation can drastically alter the assumptions upon which a project's finances were based. While agencies conduct years-long NEPA reviews in an effort to survive appeal, costs such as labor, construction materials, and commodity prices will change. *See, e.g.*, Trunkline Gas Co., LLC, *Costs Comparison Statement re the Pipeline Modifications Project*, FERC Docket No. CP14-119-000, at 1, Attach. (July 23, 2024) (explaining that with "the passage of time between the original estimates in 2015 and the actual dates of construction [of pipeline modifications], costs have risen substantially," with the original estimate of $53,956,745 increasing $107,155,160); *Mountain Valley Pipeline, LLC*, 185 FERC ¶ 61,193, at PP 5–6 (2023) (estimating a cost increase from

$3,707,568,813 to $6,648,000,000 due to "permitting delays caused by ongoing legal challenges to the project"); *Nat'l Grid LNG, LLC*, 179 FERC ¶ 61,205, at PP 5–7 (2022) (explaining that, due to the delay in obtaining a permit, costs increased from $180,256,679 to $390,829,000).

Delay kills projects. In some cases, the costs caused by permitting and litigation delay prove insurmountable. Needed, otherwise viable infrastructure projects are not infrequently withdrawn as a result of delay. The Atlantic Coast Pipeline, which had already received its FERC permit, was withdrawn due to "ongoing delays and increasing cost uncertainty which threaten[ed] the economic viability of the project." *See* Duke Energy, *Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline* (July 5, 2020), https://news.duke-energy.com/releases/dominion-energy-and-duke-energy-cancel-the-atlantic-coast-pipeline. The project sponsors specifically cited the three-and-a-half-year delay caused by "legal challenges to the project's federal and state permits" which caused the costs of the project to almost double from about $4.5 billion to $8 billion. *Id*.

Every project delayed, every project subject to cost overruns, every project cancelled, increases the cost of financing for other projects. As the evidence of regulatory uncertainty accumulates, the risk premium added to any infrastructure project grows as the capital markets price delay and regulatory failure into their risk models. This makes financing over the life of the project more expensive, the investment less attractive, and the pool of available capital smaller—and at higher rates. This results in fewer projects developed. In the past five years, from 2017 to 2023, the

additional interstate natural gas pipeline capacity added annually has dropped from approximately 11 Bcf per day to under 0.9—a startling reduction. *See* EIA Report.

So great is the burden posed by NEPA review, its delays and attendant litigation risk, that pipeline investment has fled interstate pipelines and sought safe harbor with *intra*state pipelines because federal jurisdiction only extends to transportation in interstate commerce, so intrastate pipelines are not subject to NEPA. *See* 15 U.S.C. § 717(b). The last five years have shown a marked increase in the proportion of intrastate pipelines as a share of added capacity, reaching 86 percent in 2023. *See* EIA Report. Though the NGA was passed to encourage development of interstate pipelines, the regulatory burden of NEPA has driven capital to state-jurisdictional investments.

In addition to increasing project costs and sending risk signals to the broader market, delays caused by unnecessary process and litigation deprive the consumer and ratepayer of the energy services they need. If a project cannot enter into service, ratepayers will not get the benefit of diversified sources of supply (needed now, more than ever, given growing demand) and the lower associated costs. *See, e.g.*, Roanoke Gas, *Comments in Support of Mountain Valley Pipeline Project*, FERC Docket Nos. CP16-10-000, *et al.*, at 3 (July 8, 2022) (explaining "that access to the Appalachian Basin via Mountain Valley Pipeline would lower the average Roanoke Gas customer's gas cost by at least 20%"). *Cf.* Transcontinental Gas Pipe Line Co., Quarterly Report (Form 10-Q), at 16 (Aug. 5, 2024) (explaining that the D.C. Circuit recently vacated the FERC authorization for a project where "half of the

project [was placed] into service in the fourth quarter of 2023" and stating that it "will take the necessary legal and regulatory actions to ensure that the project capacity continues to be available to serve the needs of [its] customers without interruption").

Permitting Delays also threaten electric reliability and drive up electricity ratepayers' costs. Electric utilities depend upon energy infrastructure to maintain system reliability and to ensure diversity of supply. Without natural gas and oil pipelines to provide fuel, and without transmission to move power, utilities cannot ensure that they will have adequate supplies of electric power when they need it and will be unable to keep prices low by dispatching the lowest cost power from among the generators across a large footprint. Failure to build needed energy infrastructure results in scarcity—and that, at a minimum, means higher prices. *Cf.* PJM Interconnection L.L.C. (PJM), *PJM Capacity Auction Procures Sufficient Resources to Meet RTO Reliability Requirement*, at 1 (July 30, 2024) [hereinafter PJM Auction Results] (explaining that for the 2025/2026 delivery year in PJM, "[a]uction prices were significantly higher across the RTO due to decreased electricity supply caused primarily by a large number of generator retirements, combined with increased electricity demand and implementation of FERC-approved market reforms"). Should the scarcity be acute, it could mean reliability failures.

Both generation and transmission are desperately needed. The demand for electricity in many regions is growing more quickly than at any time in the past decade due to economic growth, rise in manufacturing, the deployment of data centers, and the

retirement of large quantities of dispatchable generation. *See* NERC, *2023 Long-Term Reliability Assessment*, at 10 (Dec. 2023); MISO, *MISO's Response to the Reliability Imperative*, at 9 (Feb. 2024) [hereinafter MISO's Response], https://www.misoenergy.org/meet-miso/MISO_Strategy/reliability-imperative/.

Even in the face of rapid load growth, it is extremely difficult to build sufficient generation to meet demand. As a group of electric market operators explained in a recent Environmental Protection Agency proceeding, "shortfalls in resource adequacy as a result of retirements cannot simply be addressed overnight and would require the development of new resources that can take considerable time to permit and build." Joint Comments at 9; *cf.* MISO's Response at 10 ("As of late 2023, about 25 GW . . . had missed their in-service deadlines by an average of 650 days, with developers citing supply chain and permitting issues as the two biggest reasons for the delays."); PJM Auction Results at 2 ("PJM remains concerned with the slow pace of new generation construction. Approximately 38,000 MW of resources . . . have not been built due to external challenges, including financing, supply chain and siting/permitting issues.").

It is similarly difficult to build transmission. MISO warned that "the real risk is in a scenario where we have underbuilt the [transmission] system." MISO's Response at 18. A sobering comment in light of MISO's recent approval of 700 miles of transmission development at a cost $9 billion to "address[] aging infrastructure, new load and added generation due to retiring traditional resources." MISO, *MISO Board Approves $9 Billion Transmission Portfolio* (Dec. 8, 2023), https://www.misoenergy.org/meet-miso/media-

center/miso-matters/miso-board-approves-$9-billion-transmission-portfolio/.

Delays are costly. In the face of delayed infrastructure development, prices rise and reliability is threatened. If generation development is delayed, prices rise due to scarcity; if transmission development is delayed, prices rise because of congestion. *See* PJM, *Transmission Congestion Can Increase Costs*, at 1 (Jan. 3, 2024), https://www.pjm.com/-/media/about-pjm/newsroom/fact-sheets/congestion-fact-sheet.ashx ("Heavy use of the electricity grid can result in congestion—a condition where the lowest-priced electricity can't flow freely to a specific area—and higher-priced power is needed to keep the lights on").

This threat to transmission development is not speculative. The Clean Energy Connect project, designed to bring 1.2 GW of hydroelectric power from Quebec to New England, a region that is suffering debilitating fuel scarcity, is currently being challenged under NEPA, in part, on a procedural argument that the authorizing agencies improperly segmented their environmental reviews and a challenge to the treatment of upstream combustion emissions based on the plaintiff's concern that backup fossil fuel generation *might* be required in the event of a shortfall of hydroelectric power. *See* Plaintiffs' Motion for Summary Judgment and Memorandum in Support at 15–17, 21-25, *Sierra Club v. U.S. Army Corps of Engineers*, No. 2:20-cv-00396-LEW (D. Me. Mar. 29, 2024), ECF No. 177.

There can be absolutely no doubt that this project is needed. "[A] persistent concern [in New England] is whether there will be sufficient fuel available to satisfy electrical energy and operating reserve

demands during an extended cold spell." NERC, *2023 Long-Term Reliability Assessment*, *supra*, at 8. Blackouts in New England in the winter threaten not just high electric costs due to scarcity, but the lives of New Englanders. Needed though it is, this project hangs in the balance based upon alleged deficiencies in the NEPA review of, at most, a minimal portion of the entire project. The Federal Defendants in that case stated that "[o]nly 1.9% of the 8,600 acres of total land associated with the Project would impact federally regulated wetlands"; the remaining 98 percent of the project's land would not be subject to the Corps' jurisdiction. *See* Federal Defendants' Motion for Summary Judgment and Response in Opposition to Plaintiffs' Motion for Summary Judgment, with Incorporated Memorandum of Law at 12, *Sierra Club v. U.S. Army Corps of Engineers*, No. 2:20-cv-00396-LEW (D. Me. June 4, 2024), ECF No. 180.

Eagle County is particularly threatening to transmission development. The D.C. Circuit, quoting *Sabal Trail*, held that the STB must "either quantify and consider the project's upstream impacts or explain in more detail why it cannot do so." *Eagle County,* 82 F.4th at 1179 (cleaned up) (citation omitted). This holding expands the scope of NEPA review to potentially encompass every conceivable activity induced by a federal action. Read for all it is worth, the NEPA analysis for a proposed transmission line would have to account, one way or another, for all of the development and economic activity caused by the lower electric rates and higher reliability afforded by the project as well as the effects of the new generation that will be able to connect to the transmission system due to lower congestion. Such effects are simply impossible to predict—let alone quantify. Such analysis

would impute to the transmission project the negative environmental consequences of everything from new industry being developed to increased population as a result of general economic prosperity caused by the transmission line. NEPA reviews under this holding will create profound risk to the projects.

Rising prices hurt ratepayers because demand for domestic fuel and electricity use are relatively inelastic. People *will* heat their houses in the winter and *will* use lights at night. When energy prices rise, ratepayers feel the impact directly. *See* Erick Garcia Luna, Fed. Reserve Bank of Minneapolis, *Rising Household Energy Costs Affect Lower-Income and Non-White Residents Most* (Mar. 1, 2023), https://www.minneapolisfed.org/article/2023/rising-household-energy-costs-affect-lower-income-and-non-white-residents-most; FERC, *Energy Markets Primer*, at 5 (Dec. 2023) ("In the short term, residential and commercial natural gas use tends to be inelastic—consumers use what they need, regardless of the price.").

Rising energy costs due to infrastructure delays also harm the economy more broadly because energy, both fuel and electricity, are primary inputs to all manner of industry and commerce. The economic harm comes in two waves. First, people are required to spend a larger proportion of their income on higher energy costs, consequently reducing their spending on other goods and services. Second, as higher energy prices are absorbed by manufacturing and industry, those costs are passed through to consumers, and the price of goods and services rise. *See* Caroline Nakhle, Geopolitical Intelligence Services AG, *Energy Prices and Inflation: Politics Trump the Economics* (Dec. 7, 2022), https://www.gisreportsonline.com/r/energy-

prices/. The result is a dampened economy, lower employment, and economic distress.

New England is a case study in infrastructure scarcity's effects on the price of energy and its consequences for the economy. New England routinely suffers idiosyncratically high fuel and electricity prices because of insufficient infrastructure. *See* EIA, *New England Utility Closes Import-Dependent Gas-Fired Power Plant, Keeps LNG Import Option* (June 24, 2024), https://www.eia.gov/todayinenergy/detail.php?id=62404. This phenomenon is well known and widely recognized. ISO New England, Inc., the region's wholesale electric market operator, cites infrastructure constraints as the primary driver of both higher fuel and electricity costs: in 2022, "periods of sustained cold weather led to increased demand on a constrained pipeline system . . . result[ing] in very high gas and electricity prices." ISO New England Inc., *2022 Annual Markets Report*, at 6 (June 5, 2023). In 2022, day-ahead electricity prices were "$86 per MWh . . . almost 90% higher than [the previous] year." *Id*. Unless more transmission and pipeline capacity is built, high prices will continue in New England. *See* ISO New England Inc., *Draft ISO/EDC/LDC Problem Statement and Call to Action on LNG and Energy Adequacy Federal Energy Regulatory Commission New England Winter Gas-Electric Forum, Sept. 8, 2022*, at 1 (Aug. 29, 2022), https://isonewswire.com/wp-content/uploads/2022/08/Draft-FERCTechConferenceEverettandEnergyAdequacy-ProblemStatement-8.29-final.pdf ("The natural gas pipelines that serve New England operate at maximum capacity during the winter.").

Industry and manufacturing are directly exposed to higher prices and insufficient supply which forces industry to reduce production or shut down operations at great cost. On the East Coast, the winter can see fuel prices that are up to 500 percent higher than in unconstrained areas. *See* Indus. Energy Consumers of Am. (IECA), *Letter to Governors re: Manufacturing Companies Face Growing Natural Gas Scarcity Along the Entire Eastern Seaboard*, at 2 (Dec. 13, 2022), https://www.ieca-us.com/wp-content/uploads/12.13.22_Transco-Governors-Letter.pdf (stating that in 2021 "manufacturers paid over $20 per MMBtu" for natural gas compared to "$3.84 per MMBtu" at Henry Hub). It is difficult for a business to remain competitive when its primary input's costs are five times those of its competitors.

Industry is a critical component of the economy. On the Eastern seaboard, it accounted for almost three and a half million jobs and $638 billion in GDP. *See* IECA, *Comments for the Record on the "American Energy Expansion: Strengthening Economic, Environmental, and National Security" Hearing*, at 1–2 (Jan. 30, 2023), https://www.ieca-us.com/wp-content/uploads/01.30.23_Comments-for-the-Record_American-Energy-Expansion-Hearing.pdf. High energy prices and curtailments due to insufficient infrastructure threaten the long-term viability of manufacturing throughout infrastructure-constrained regions.

Ordinarily, the cure for high prices is high prices. In a permitting regime that was not beset by delay and legal risk, the profit motive of infrastructure developers would induce them to develop the transmission and pipeline projects that could satisfy the urgent demand for electricity and fuel. But

confronted with an obstructive permitting regime, driven in large measure by the delay and litigation caused by NEPA, uncertainty will continue to drive up risk premiums, increase the cost of capital, and impede infrastructure development.

III. *Sabal Trail* has Undermined *Public Citizen* and Undermined Agencies' Organic Statutes.

Although the instant case arose from an order of the STB, the following discussion concentrates on the cases upon which *Eagle County* was based, a series of appeals arising from FERC orders. Beginning with *Sabal Trail*, the court issued a number of opinions which expanded the scope of NEPA review, undermined agencies' enabling statutes and impeded the development of energy infrastructure.

A. NEPA is a Procedural Statute.

NEPA "imposes only procedural requirements . . . requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Public Citizen*, 541 U.S. at 756–57. Accordingly, "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citations omitted). "NEPA was designed" to create processes that would "alert[] governmental actors to the effect of their proposed actions on the physical environment." *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983) (*Metropolitan).* Because its purpose is to inform decision makers, NEPA's "rule of reason" allows agencies to determine "whether and to what extent to prepare an EIS based on the usefulness of any new potential

information on the decisionmaking process." *Public Citizen*, 541 U.S. at 754.

As a procedural statute, NEPA cannot add to an agency's jurisdiction beyond that conferred by Congress in its organic statute, nor does NEPA "repeal by implication any other statute." *Aberdeen & Rockfish R.R. Co. v. S.C.R.A.P.*, 422 U.S. 289, 319 (1975); *see also* 42 U.S.C. § 4335 ("The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies"); H.R. Rep. No. 91-765, at 10 (1969) (Conf. Rep.) (explaining that NEPA "does not repeal existing law," but instead requires compliance "unless to do so would clearly violate their existing statutory authorizations").

Agencies are still bound by their statutes and are not required to "elevate environmental concerns over other appropriate considerations," *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980), and when courts sit in review of an agency's NEPA analysis, their only role "is to insure that the agency has [considered the] environmental consequences; [a reviewing court] cannot 'interject itself within the area of discretion . . . as to the choice of the action to be taken.'" *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (citation omitted).

In light of NEPA's role as an "action-forcing" statute, *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979), this court held in *Metropolitan* and again in *Public Citizen*, that agencies are not responsible for effects based on strict "'but for' causation" especially "when the agency has no authority to prevent the effect." *Public Citizen*, 541 U.S. at 754 (citing *Metropolitan*, 460 U.S. at 774). Instead, there must be a "reasonably close causal relationship" between the

agency's action and the effect, "akin to proximate cause in tort law," in order to find an agency to be the legally relevant cause of an effect. *Id*.

B. *Sabal Trail* has Encouraged the Unlawful Expansion of Agency Jurisdiction and Threatens Agencies' Organic Statutes.

Public Citizen was the prevailing framework for determining whether an agency was the legally relevant cause of an environmental effect until *Sabal Trail*.[3] In *Sabal Trail*, the court found FERC the "legally relevant cause" of the effects of natural gas combustion from power plants "[b]ecause FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment." *Sabal Trail*, 867 F.3d at 1373 (citation omitted).

The court's assignment of responsibility to FERC for the emissions of electric generators rests upon a false predicate. FERC has no jurisdiction over electric generators. The Federal Power Act (FPA) explicitly reserves that authority to the states alone. *See* 16 U.S.C. § 824(b)(1) ("The Commission . . . shall not have jurisdiction . . . over facilities used for the generation of electric energy . . . ."); *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154 (2016) ("The States' reserved authority includes control over in-state 'facilities used for the generation of electric energy.'" (quoting 16 U.S.C. § 824(b)(1)). In a word, FERC does not

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[3] Although *Sabal Trail* was decided in the D.C. Circuit and does not apply in every circuit, because so many agencies' enabling statutes provide venue in the D.C. Circuit, agencies frequently conduct their NEPA review in anticipation of a challenge there, thus *Sabal Trail's* broad influence.

have the power to stop power plant emissions. Even were it to deny an application for a pipeline intended to deliver natural gas to an electric generator, the generator can still operate with fuel obtained elsewhere, for example, from non-FERC jurisdictional intrastate pipelines. Whether it operates is a decision left entirely to the states.

The court repeated its error in *Food and Water Watch* when it required FERC to review the environmental effects caused by local distribution companies that supply commercial and residential customers because they were to receive their natural gas from the FERC-jurisdictional pipeline under review. *See Food & Water Watch*, 28 F.4th at 288. But FERC *cannot* be the legally relevant cause of those effects under *Public Citizen* because, like generators under the FPA, the NGA specifically exempts local distribution from FERC's jurisdiction. *See* 15 U.S.C. § 717(b) (stating that the NGA "shall not apply to . . . the local distribution of natural gas").

The instant case is the culmination of the case law that began with *Sabal Trail* and, given its holding, it was perhaps inevitable that the STB's decision to forego review of upstream and downstream effects would have resulted in the reversal of its order. As long as an agency has the ability to deny a permit, so the logic of *Sabal Trail* goes, it is the legally relevant cause of the permitted activities' effects. This, of course, amounts to the very but-for causation that was specifically eschewed in *Metropolitan* and *Public Citizen*.

Worse than flouting Supreme Court precedent, the holding in *Sabal Trail* all but requires agencies to *violate their own statutes*. Railroads, as common

carriers, must provide "service on reasonable request" and cannot refuse service merely because they dislike the effects of the commodity being transported. 49 U.S.C. § 11101(a). Congress has commanded the STB to indifference as to the cargo shipped on the rail lines it authorizes, yet *Eagle County*, by declaring the STB the legally relevant cause of downstream emissions, encourages the STB to violate its statute in favor of discrimination.

This was the original sin of *Sabal Trail*. Declaring FERC the legally relevant cause of the effects of generator combustion encouraged FERC to violate *its* statute by considering matters that its enabling statute explicitly placed outside its jurisdiction. FERC is prohibited from regulating indirectly what it cannot regulate directly. *See, e.g.*, *Nat'l Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990) (citing *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 152 (1960); *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978)); *see also Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1510 (D.C. Cir. 1990) ("[T]he Commission may not use its § 7 conditioning power to do indirectly . . . things that it cannot do at all.").

Having placed these subjects outside FERC's jurisdiction, FERC should not include them in its substantive considerations under its authorizing statute.

These limits on agency power are necessary. "[T]he . . . words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare." *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976) (*NAACP*). Instead, the inquiry must be conducted in accordance with the "purposes of the regulatory legislation." *Id.* The purpose of the NGA,

for example, is to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *Id*. at 669-70. When Congress exempts a subject from FERC's jurisdiction, that subject is no longer a legitimate consideration in FERC's deliberations. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . .").

The Federal Respondents' brief argues for a broad reading of NEPA's requirement that "all agencies of the Federal Government" comply to "the fullest extent possible," 42 U.S.C. § 4332, hinting in the direction of the "broad license to promote the general public welfare" rejected in *NAACP*. 425 U.S. at 669. The most cursory inspection of the legislative history demonstrates that, far from expanding agencies' jurisdiction, that language was include in clear-eyed recognition that agencies will have limits imposed by their enabling statutes, and that those limits were to be observed. *See* H.R. Rep. No. 91-765, at 9 (stating that compliance is required unless "existing law . . . expressly prohibits or makes full compliance . . . impossible").

C. Federal Respondents Argue—Unconvincingly—for Judicial Inaction.

Federal Respondents argue demurely for judicial restraint. It is the place of Congress, not the courts, they argue, to make policy decisions. This Court, they say, cannot "impose new limits on NEPA's established framework." Fed. Resp'ts Br. 38. But *Sabal Trail* and its successor cases, culminating with *Eagle County*, abandoned the framework that this

Court established in *Metropolitan* and subsequently reaffirmed in *Public Citizen*. The Federal Respondents' clever entreaty to judicial circumspection amounts to an invitation to forbear disturbing the lower court's obstruction of long-standing precedent. They ask this Court to leave in place *Sabal Trail's* new regime imposing an expansive, unpredictable, and atextual implementation of NEPA. Fed. Resp'ts Br. 29. This Court should decline the Federal Respondents' invitation to inaction.

As to the Federal Respondents' statement that Congress is the institution that should rearrange NEPA, the Amici could not agree more. And Congress has done just that.

The Federal Respondents, in arguing that Congress is perfectly capable of amending NEPA when and should it choose to, offer a list of various new provisions passed as part of the Builder Act. *See* Fed. Resp'ts Br. 38. The Federal Respondents should have dwelt more upon the most important amendment to the sole operative provision in the statute, section 102. 42 U.S.C. § 4332(C)(i). There, Congress took pains not just to codify reasonable foreseeability into the scope of NEPA analysis, but also to surgically amend the cause of the effects that were to be considered, changing the requirement from reviewing the "environmental impact of the proposed action," id. § 4332(C)(i) (1970), to the "reasonably foreseeable environmental effects of the proposed *agency* action." *Id.* § 4332(C)(i) (2023) (emphasis added); Builder Act § 321(a)(3)(B) (emphasis added).

As this court has said, "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v.*

INS, 514 U.S. 386, 397 (1995) (citations omitted). When interpreting that language, "a court should give effect, if possible, to every clause or word of a statute." *Moskal v. United States*, 498 U.S. 103, 104 (1990). This language of these amendments is best read as a limitation. Agencies are not to review *all* of the environmental impacts, just the *reasonably foreseeable* ones. They are not to consider all of the consequences of the proposed action, just those caused by the action of the *agency*. Agencies are not required to review effects that are so speculative as to be unforeseeable, nor must they review effects for which they are not properly considered the legally relevant cause. In other words, the amendments codified the very limitations articulated in *Metropolitan* and *Public Citizen*.

The legislative history, if needed given the obvious intent, supports no other conclusion. A House Report accompanying an earlier version of what became this provision of the Builder Act stated that its purpose was to "clarify[] the scope of [NEPA] reviews." H.R. Rep. No. 118-28, pt 1, at 33 (2023). A proponent of the bill that was later to become the Builder Act, Congressman Westerman, stated that the "intent" of this section was "to narrow the scope" "from 'any environmental impact' . . . to only those 'environmental effects' that would be a 'reasonably foreseeable' result of 'the proposed agency action." 169 Cong. Rec. H2681, H2704 (daily ed. May 31, 2023).

Federal Respondents assertion that "Congress did not choose to make any changes that would dramatically limit NEPA's reach," Fed. Resp'ts Br. 38, flies in the face of these narrow and purposeful amendments plainly intended to circumscribe NEPA review.

The Federal Respondents are arguing that the scheme established by the D.C. Circuit under *Sabal Trail*, which gave rise to the absurd result in this case should remain in place. There is no problem with the *Sabal Trail* regime, they effectively argue, there is merely a problem with the application of that regime in this particular instance.

The Federal Respondents advocate for the narrowest possible relief—maintain the status quo, just reverse this one case. What they argue for is unworkable. Federal Respondents rest their faith in the prerogative of agencies to draw reasonable, "context-specific" lines to bound their NEPA inquiries that depend upon "the nature of the decision before the agency and its assessment of the facts on the ground. Fed. Resp'ts Br. 29. In other words, as much discretion to the agency as possible.

This is an invitation to chaos.

Worse, under the Federal Respondents' regime that provides no "bright-line limits," Fed. Resp'ts Br. 18, the scope of NEPA review would vary among agencies and even among projects reviewed under the same statute, as agencies labor to establish *some* principled limits to their obligations based on "the nature of the decision" they are called to make and their "assessment of the facts on the ground." *Id*. at 29.

D. The Court Should Adopt—and Impose—the Holding in *Sierra Club*.

In order to limit the damage caused by *Sabal Trail*, *Food & Water Watch*, and *Eagle County*, the Court should, at a minimum, reaffirm *Public Citizen*.

The D.C. Circuit has repeatedly, and correctly, held that because FERC does not have jurisdiction

over the export of natural gas, it could not be the legally relevant cause of the effects caused by export and therefore it need not consider those effects because it has no statutory authority to prohibit them. *See Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016); *see also Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1185 (D.C. Cir. 2023) (explaining that "FERC is forbidden to rely on the effects of gas exports as a justification for denying" a permit and that "FERC's lack of jurisdiction over export approvals also means it has no NEPA obligation stemming from the effects of export-bound gas") (cleaned up) (citations omitted); *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 951–52 (D.C. Cir. 2016).

Sabal Trail itself, however, sets forth a confused justification for FERC's designation as the legally relevant cause for the generators' effects, citing *Public Citizen* as it did so. The court reasoned that, because FERC reviews LNG terminal applications pursuant to a narrow delegation of authority from the Department of Energy (DOE), it was not authorized by the DOE to consider the effects of exports, the approval of which was a power the DOE reserved to itself. *See Sabal Trail*, 867 F.3d at 1373. The court found that, in contrast, FERC reviews pipeline applications under section 7 of the NGA which requires FERC to make a broader inquiry—whether the project is in "the public convenience and necessity." *Id*. Accordingly, the court went on, FERC can deny an application for environmental reasons and is therefore the legally relevant cause of the effects. *See id*.

This reasoning must be in error. If a narrow delegation from the DOE that excludes export

licensing authority is a sufficient basis to prohibit FERC from considering export effects, then the complete exemption of electric generation from FERC's jurisdiction in the plain text of its organic statute must present an even greater obstacle. *See* 16 U.S.C. § 824(b)(1). If the argument is that DOE exclusively regulates exports and so FERC cannot consider those effects, then it logically follows that, since States exclusively regulate generation, FERC cannot consider the effects attributable to the generators.

The court's distinction in *Sabal Trail* between the review under delegated authority and the broader considerations under the public convenience and necessity inquiry cannot overcome these jurisdictional limitations. *See Sabal Trail*, 867 F.3d at 1373. In reviewing a FERC order that found a natural gas pipeline project serving an LNG export facility to be in the public convenience and necessity, the D.C. Circuit itself recently said (notwithstanding the broader public convenience and necessity inquiry under NGA section 7) that because "Congress gave export authorization to the [DOE]—not FERC," "FERC did not err when it declined to consider the environmental effects of exported gas." *Ala. Mun. Distribs. Grp. v. FERC*, 100 F.4th 207, 214 (D.C. Cir. 2024).

When an agency cannot deny a permit based upon an effect because the agency's enabling statute exempts the source of that effect from the agency's jurisdiction, then the agency cannot be the legally relevant cause of that effect. The Court should clarify the scope of *Public Citizen's* limitation on agencies' obligation to examine effects statutorily exempted from the agency's jurisdiction, and thereby obviate *Sabal Trail*.

CONCLUSION

For the reasons stated above, the Amici respectfully request that the Court vacate the D.C. Circuit's decision in *Eagle County*, reaffirm its precedent in *Public Citizen*, and hold that when an agency's enabling statute places the cause of an effect outside the agency's jurisdiction, the agency's action cannot be the legally relevant cause of that effect and further, that only when an agency's action is the legally relevant cause of an effect does the agency have an obligation to review that effect under NEPA.

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