

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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SEVEN COUNTY INFRASTRUCTURE)
COALITION, ET AL.,)
 Petitioners,)
 v.) No. 23-975
EAGLE COUNTY, COLORADO, ET AL.,)
 Respondents.)
- - - - -

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Washington, D.C.
Tuesday, December 10, 2024

The above-entitled matter came on for
oral argument before the Supreme Court of the
United States at 10:09 a.m.

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9 of Respondents Eagle County, et al.
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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 23-975, Seven County Infrastructure Coalition versus Eagle County, Colorado.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT
ON BEHALF OF THE PETITIONERS

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

NEPA is a self-described procedural statute. It is designed to inform government decision-making, not paralyze it. Nonetheless, it has become the single most litigated environmental statute. The decision below helps explain why.

Despite an environmental impact statement spanning 3600 pages, including 20 appendices, that addressed major impacts, minor impacts, downline impacts, and cumulative impacts, the D.C. Circuit demanded more. It insisted that the Board study the future project developments in the entire basin, the prospect of accidents in train lines hundreds of miles

1 away, and the effect on refineries in Gulf
2 communities thousands of miles away.

3 All of that is not just remote in time
4 and space but falls well outside the STB's
5 limited remand -- remit, and it falls within the
6 jurisdiction of other agencies that can address
7 those issues comprehensively and concretely if
8 and when they arise. And the EIS here addressed
9 almost all of those issues or at least
10 identified them.

11 But, in classic "no good deed goes
12 unpunished" fashion, the D.C. Circuit held that
13 because the agency identified the issue or
14 flagged the issue, it was therefore foreseeable
15 and they had to do more.

16 That's a recipe for turning a
17 procedural statute into a substantive roadblock.
18 After all, infrastructure requires investment,
19 and, for investors, time is money. Project
20 opponents, by contrast, know that time is on
21 their side and a remand just for a little more
22 process can kill a project.

23 The combined effect of proximate cause
24 and the rule of reason should have made this a
25 straightforward case. The Board was not

1 heedless of environmental effects here. It
2 consulted with dozens of agencies, considered
3 every proximate effect, and ordered 91
4 mitigation measures. Eighty-eight miles of
5 track should not require more than 3600 pages of
6 environmental analysis.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Mr. Clement, to the
9 extent that some of these issues fall in the
10 jurisdiction of other agencies, what role would
11 Public Citizen play in disposing of those?

12 MR. CLEMENT: So Public Citizen, I
13 think, instructs that when these age -- when
14 these issues are both remote in time and effect
15 and within the jurisdiction of other agencies,
16 then the agency that approves this EIS is not
17 the legally relevant cause, to use the phrase
18 from Public Citizen, of any of the environmental
19 effects.

20 I think it's important to contrast the
21 role of other agencies when it comes to things
22 that are outside the scope of the project
23 because, if other agencies have a partial role
24 in issues that are within the scope of the
25 project -- here, for example, the Forest Service

1 had to approve a right-of-way for the train --
2 that is all taken care of in the consultation
3 process. And, here, there was consultation to a
4 fare-thee-well. There were five other
5 cooperative agencies. There were 27 agencies
6 that were consulted.

7 But it never occurred to the Board
8 that they should consult with Port Arthur,
9 Texas. And those issues that are far outside
10 the proximate effects of the -- of the project,
11 if other agencies have those within their
12 jurisdictions, then they're going to be the
13 legally relevant cause of upstream development
14 in the basin if it takes place 10 years from
15 now. If there's an accident in Colorado on the
16 train tracks, that's an FRA issue, not an STB
17 issue.

18 And, obviously, what's going on in the
19 Gulf communities is issues for Port Arthur,
20 Texas, or maybe the EPA.

21 JUSTICE SOTOMAYOR: I don't know how
22 to articulate your rule in writing. The NEPA
23 itself says that -- requires agencies to
24 "consult with any federal agency that has
25 jurisdiction by law or special expertise with

1 respect to any environmental impact involved."

2 So we can't write and say you don't
3 have to think about things that other agencies
4 have jurisdiction over because the NEPA says
5 that's what you got to do. And I don't think
6 you're saying that if the Department of
7 Transportation wants to authorize a highway
8 running near a wetland, that NEPA wouldn't
9 require the DOT to consider the environmental
10 effect on the wetlands, even though a different
11 agency has primary jurisdiction over wetlands.

12 So it's -- your generalized rule, I
13 don't have to think about it if another agency
14 has jurisdiction, doesn't make much sense in
15 this statutory scheme.

16 MR. CLEMENT: Well --

17 JUSTICE SOTOMAYOR: It has to be
18 something more nuanced.

19 MR. CLEMENT: I -- I -- I agree. And
20 that's why my favored rule is not just, if it's
21 another agency's jurisdiction, you don't have to
22 look at it. But what I tried to articulate in
23 answering Justice Thomas's question is if the
24 effect's already remote in time or space and in
25 the jurisdiction of another agency.

1 JUSTICE SOTOMAYOR: I don't even know
2 what that means, because most environmental
3 effects, like effects on wetlands, are going to
4 be sometimes remote in time and geography. And
5 even the Restatement says on the issue of
6 proximate cause -- Restatement Third basically
7 says time and geography are not at issue.

8 If you've got a -- if you put a car in
9 the stream of -- of -- of commerce where you
10 know after a thousand miles it's going to blow
11 up, it could go a thousand miles and 40 states
12 away and blow up. That's a reasonably
13 foreseeable consequence that is remote in
14 geography and time.

15 These rules -- these absolute rules or
16 how we explain them really depend on each
17 individual case, so why don't we go back to this
18 case for a moment, okay?

19 I think your basic proposition and the
20 one that Justice Thomas was saying, how is this
21 similar to power? And I see it as similar to
22 power because I think what you're trying to say
23 is this agency's charged with putting a railroad
24 in place. Its obligation is to carry passengers
25 and cargo. The nature of that obligation may

1 downstream have an effect, but it doesn't affect
2 the actual decision this agency is making about
3 where to site that railroad. So it is a
4 different agency that has to decide whether the
5 extra production of oil somewhere else is going
6 to affect the environment.

7 And that's much closer to the power
8 situation because that decision is not going to
9 directly affect the agency's decision about
10 where to site this railroad.

11 MR. CLEMENT: So, I mean, I don't
12 disagree with where you ended that -- that
13 question, which is to say --

14 JUSTICE SOTOMAYOR: I hope not. I was
15 trying to help you.

16 (Laughter.)

17 MR. CLEMENT: No, no. I -- well, at
18 the end, I think you were trying to help me. I
19 think, along the way, you may have done some
20 damage to the position that --

21 JUSTICE SOTOMAYOR: Sure --

22 MR. CLEMENT: Because I think the --

23 JUSTICE SOTOMAYOR: -- because you
24 want absolute rules that make no sense.

25 MR. CLEMENT: With respect, I -- I --

1 I guess you'll decide whether they make sense,
2 but I think the lower courts are in desperate
3 need of some guidance here. And simply to
4 repeat Public Citizen to the D.C. Circuit that
5 thinks Public Citizen means that the STB has to
6 study the output of refineries in Port Arthur,
7 Texas, and Shreveport, Louisiana, I don't think
8 is going to be good enough. And I think the
9 guidance you need to give them is to start with
10 the project at hand, which is where you ended.

11 This is 88 miles of track in
12 northeastern Utah. And with respect to those 88
13 miles of track, there are consultation
14 obligations, and they were done here to a
15 fare-thee-well. And, when you're talking about
16 something that the agency actually controls,
17 they can really use NEPA to -- in a very
18 granular way.

19 So, in this case, they have a
20 mitigation measure that's designed to protect
21 six residents from noise pollution from the
22 tracks.

23 But, when you lose sight of the
24 project itself and you start thinking about,
25 okay, well, you know, this is going to lead to

1 this and it's going to lead to this and might
2 lead to this and this thing, then it takes you
3 way outside the lane of this agency and you make
4 them consider things that are just not their job
5 at all.

6 And, from the very beginning, the CEQ
7 has been concerned that if these environmental
8 impact statements balloon and become thousands
9 of pages long, they become useless ease -- even
10 for the things that the agency can control. So
11 I think the test is saying if it's remote in
12 time and space and it's in another agency's
13 jurisdiction, I think is the right test.

14 But another way of looking at it would
15 be to start with what's really before the
16 agency. They're supposed to consider
17 alternative routes and they're supposed to
18 consider mitigation measures.

19 JUSTICE JACKSON: So, Mr. --

20 MR. CLEMENT: So --

21 JUSTICE JACKSON: Sorry, Mr. Clement.
22 Keep going if you're not finished.

23 MR. CLEMENT: Well, I'll just finish
24 the thought --

25 JUSTICE JACKSON: Yeah.

1 MR. CLEMENT: -- which is, you know,
2 if the environmental impact statement is focused
3 on the project, it will inform -- you can pick
4 one route versus another or you can -- the
5 agency itself can impose mitigation measures.
6 But, if you have to look at everything under the
7 sun, that's outside the ambit of the agency.

8 I'm sorry, Justice.

9 JUSTICE JACKSON: Yeah. No, I just
10 was wondering whether we need a new test or
11 whether the law in terms of what we have already
12 said is supposed to be happening here is enough.
13 And -- and I thought curious the fact that your
14 brief and your argument didn't rely on what this
15 Court has said about deference to the agency's
16 own determinations regarding the scope of its
17 authority.

18 I mean, I understood that an EIS,
19 based on what even Public Citizen said, is about
20 the usefulness of any new potential information
21 to the decision-making process, and the agency
22 is making a determination about that.

23 And so, in Kleppe, we said that NEPA
24 analysis requires a high level of expertise and
25 is properly left to the informed discretion of

1 responsible federal agencies.

2 So I was just curious as to your
3 decision to sort of propose a new test outside
4 of this deference framework, as opposed to just
5 saying the problem here is that the D.C. Circuit
6 did not give the agency sufficient deference, as
7 we have said they're supposed to do.

8 MR. CLEMENT: So I think what's needed
9 is a new test plus deference. And, of course,
10 you know, there was a little bit of division of
11 labor here, and I think Mr. Kneedler's going to
12 come to the podium and talk a lot about
13 deference.

14 And I suppose it is maybe true that if
15 you restated Public Citizen, reaffirmed the rule
16 of reason, reemphasized arbitrary and capricious
17 review, and reminded the D.C. Circuit that the
18 APA itself builds in harmless error review, you
19 might make the world a better place.

20 But I guess the problem from my
21 standpoint and the standpoint of people that are
22 trying to invest in these projects is all of
23 that's on the books and yet the D.C. Circuit and
24 the Ninth Circuit hasn't gotten the message.

25 And the agencies are kind of in this

1 position where they don't really have a choice.
2 They have to lard up these environmental impact
3 statements to become thousands of pages because
4 they know the challenge is coming. And it's not
5 going to come in the Eleventh Circuit. The
6 challenge is going to come in the D.C. Circuit,
7 where all these agencies are based and any EIS
8 challenge can be brought.

9 JUSTICE BARRETT: Mr. Clement, what --

10 JUSTICE KAGAN: So, if I understood --

11 JUSTICE BARRETT: Go ahead. Go ahead,
12 it's fine.

13 JUSTICE KAGAN: If I understood your
14 test, it's like remote in time and effect. Is
15 that -- is that the --

16 MR. CLEMENT: Plus outside the
17 jurisdiction.

18 JUSTICE KAGAN: Plus outside the
19 jurisdiction.

20 So I -- I think I get "outside the
21 jurisdiction." What does "remote in time and
22 effect" mean? And -- and I think it would help
23 me if you applied it to this case and to the
24 particular things that the agency should have
25 considered under that and -- and didn't have to

1 consider under that.

2 MR. CLEMENT: Sure. What I'm trying
3 to do with "remote in time and space" is to get
4 it outside of the realm of the project itself
5 and the realm of where mitigation measures could
6 be brought to bear or alternatives would make a
7 difference because, if -- if it's -- if it's
8 inside that realm, then, if another agency has
9 some partial jurisdiction, that's supposed to be
10 taken care of in the consultation process.

11 JUSTICE KAGAN: So is it within the
12 realm of the project -- for example, here's this
13 88 miles of line, and railroads are going to
14 cross it and wildfires are going to start as a
15 result. Is that within time and space?

16 MR. CLEMENT: Totally. And within
17 that time and space, they're not just supposed
18 to be, well -- you know, they're not supposed to
19 say: Well, we're the STB, all we care about is
20 railroad commerce, so we're not going to talk to
21 the local officials or we're not going to talk
22 to, you know, Fish and Wildlife or other
23 agencies. All of that took place here.

24 It's just that once you get outside of
25 that, now you're thinking about --

1 JUSTICE KAGAN: And the pollution that
2 those trains are going to cause, that's also
3 time and space -- within the time and space that
4 you have the trains running?

5 MR. CLEMENT: Yeah, yeah, within --
6 within -- within the confines of those 88 miles.
7 But then, as you asked me to apply it to this --
8 sort of this -- this plan, so now you're talking
9 about tracks that are a hundred -- 500 miles
10 away, that have already been there, that are
11 already regulated by other agencies. And then
12 the question is, like, what is the STB supposed
13 to do about it?

14 And I think the answer is not much
15 because they're not in a position to mitigate
16 there. I mean, the reason they can put
17 mitigation measures on my clients is because
18 they're going to own and operate that 88 miles
19 of track.

20 JUSTICE KAGAN: Are -- are -- are you
21 saying that anything that falls outside these 88
22 miles is not their problem?

23 MR. CLEMENT: I'm saying that anything
24 that is outside that 88 miles and is in the
25 jurisdiction of another agency is not something

1 that should be fatal to an EIS.

2 I'm not saying that the agency can't
3 take it into account. And I think one of the
4 problems with the D.C. Circuit's approach is it
5 actually kind of make -- you know, it has this
6 "no good deed unpunished" flavor where, if the
7 agency says a little bit about downline traffic
8 or a little bit about where this sort of waxy
9 crude is going to go, then, aha, it was
10 foreseeable, so now you have to study it to a
11 fare-thee-well.

12 And so I -- I -- I think the way I'm
13 thinking about it is you can't be reversed as
14 the agency for something that is remote in time
15 and space, plus in another agency's bailiwick.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 I wanted to just ask you about what I
19 think you just started to touch on. I have
20 trouble seeing how this is going to work out as
21 a practical matter. If you're at the agency or
22 the counsel for the private party, I mean, what
23 are you going to do? Are you going to say:
24 Okay, I've identified this possible issue, but I
25 think it's too far away?

1 I mean, do you counsel your client to
2 say: Well, you better put it in because they
3 might decide that it's not too far away? Or do
4 you counsel your client in saying: Well, I
5 think that's remote enough, so don't put it in?

6 I mean, it seems to me that it's hard
7 to figure out what you should require as a
8 matter of law when it's -- a agency is going
9 to -- or your client in front of the agency
10 is -- is going to put enough in I would say sort
11 of no matter what.

12 Like, if you come in and you're
13 whoever's advising them and say this might be
14 included, I think you'll want to address it.
15 Otherwise, you're making judgments and have a
16 higher risk when you go to court to say that
17 this should have been addressed and wasn't.

18 MR. CLEMENT: I agree, Mr. Chief
19 Justice. And in some respects, I think it would
20 be helpful to sort of distinguish between that
21 which can get an agency reversed and that which
22 is, you know, something that is available to the
23 agency.

24 And, you know, Congress in this
25 BUILDER Act has provided direction to the

1 agencies that they should try to knock these
2 environmental impact statements out in 150
3 pages. I mean, that's going to be impossible
4 unless there is a reaffirmation that you don't
5 have to look at things that are not within the
6 immediate ambit of the project and are in
7 another agency's lane.

8 And -- and I think, you know, that
9 could promote better decision-making in the long
10 run because I think, if you look at the 91
11 mitigation measures that were imposed here, and
12 that's on top of 56 voluntary measures, if you
13 stick to the 88 miles of track, you can be
14 incredibly helpful and you can direct the S --
15 you can direct my clients to consult with the
16 Railroad Safety Administration, and you can
17 direct them to consult with local agencies to
18 make sure that, like, the crossing where the
19 railroad crosses the road has the right signage,
20 or where the railroad crosses a water, that it's
21 done in a way that protects the environment,
22 including where that stream is going to go next.

23 JUSTICE SOTOMAYOR: Mr. Clement --

24 CHIEF JUSTICE ROBERTS: Thank -- thank
25 you, counsel.

1 Justice Thomas?

2 I -- I think we'll go --

3 JUSTICE SOTOMAYOR: Okay.

4 JUSTICE THOMAS: Mr. Clement, would
5 you just briefly state with respect to the 88
6 miles what your test would be?

7 MR. CLEMENT: So my -- my test would
8 be as to the 88 miles that there is an
9 obligation on the agency to cooperate with other
10 agencies that have necessary permits and to
11 consult with other agencies that have expertise
12 to bring to bear on the project itself.

13 And that happened here. There was
14 cooperation with four federal agencies and Utah,
15 and then there was consultation with 27 federal
16 and state agencies and the Ute tribe.

17 All of that happened. Among the many
18 sins that the D.C. Circuit found in this case,
19 there was no sin in terms of not doing enough
20 consultation. So that's what you need to do
21 with the project, and that was that.

22 JUSTICE THOMAS: But how far downline
23 or -- or upstream or downstream should you look?

24 MR. CLEMENT: You should stop there.
25 And you should understand -- and -- and let's

1 just take the three things that they were
2 faulted for. So upstream development, that's
3 all in the future.

4 JUSTICE THOMAS: Yeah.

5 MR. CLEMENT: And that's going to be
6 permitted either by Utah or the Ute tribe, and
7 they're going to have their own environmental
8 review.

9 So the next thing that they -- they
10 fault us for is downline. It's about 500 miles
11 in Eagle County, Colorado. That's already
12 regulated by other agencies, and that's track we
13 don't even own, so we can't mitigate there.

14 And then the last thing, kind of
15 the -- you know, the cherry on the proverbial
16 sundae, is this -- you know, is Gulf community
17 environmental quality, and, again, that's --
18 that's in the regulatory agencies of those local
19 communities. They can affect it directly. They
20 could -- they could expand the refinery. They
21 could shut it down tomorrow.

22 It would be perverse to say, yeah,
23 let's put the kibosh on 88 miles of track in
24 northeastern Utah because of effect in a
25 community when the community itself could

1 regulate it directly.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: Could you just say a
4 word about the relationship of the tort concept
5 of proximate cause to the test that you're
6 asking us to apply?

7 MR. CLEMENT: Yes. I think there are
8 two things that are relevant that -- from
9 proximate cause principles. One is the
10 principle that this Court already derived in
11 Public Citizen from Prosser and Keeton, which is
12 the idea that when you're looking at proximate
13 cause in tort, what you're trying to figure out
14 is who's the legally responsible party.

15 And so you applied that in Public
16 Citizen. Obviously, the FMCSA was not the
17 responsible -- legally responsible party. It
18 was the president's determination to let the
19 trucks in subject to the safety inspections.
20 And, here, the legally responsible party for all
21 of these disparate things are the agencies that
22 will ultimately regulate them directly.

23 But the other principle, I guess I
24 would almost think of it as like a cross-check,
25 which is, if you think that -- if you sort of

1 try to re- -- restate the EIS violation in tort
2 liability claims, if it doesn't even come close,
3 if it doesn't pass the straight-face test, then
4 I think you're expanding the -- NEPA too far.

5 JUSTICE ALITO: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 JUSTICE SOTOMAYOR: I think that my
9 colleague, Justice Jackson, had a point that --
10 that is hard to get out of in addressing this
11 case, and it's not the argument that you've made
12 in your brief, but it is embedded in the
13 argument you're making here.

14 This agency did look at all the
15 reasonably foreseeable impacts. So it's not a
16 question of did it fail to look at something.
17 The only qualification to that might be the
18 effect of the railroad on the Colorado River.
19 That's a separate issue, okay?

20 But it did look at the impact upstream
21 and downstream. So the question before us was,
22 was it arbitrary and capricious for it not to
23 consider something more?

24 But that's not how you want us to
25 rule. You don't want us to say it wasn't

1 arbitrary and capricious because what it did was
2 enough and why. You want us in the process to
3 create rules that say -- even though you said to
4 the contrary a little while earlier, the agency
5 can choose to look at almost anything. The
6 question is, if it says I looked at it, but it
7 won't impact my views, is that arbitrary and
8 capricious?

9 MR. CLEMENT: So, to be clear, I mean,
10 you know, I'm here in front of -- you know, in
11 front of -- on the behalf of seven counties that
12 want this project to move forward and an
13 investment group that, you know, got streamlined
14 approval for this track in 2021.

15 So, if you want to affirm -- if you
16 want to reverse the D.C. Circuit and say this
17 environmental impact statement is sufficient
18 based principally on arbitrary and capricious
19 review, I'd be delighted. But I do think we're
20 here at least in part because the lower courts
21 are divided on this issue and need additional
22 guidance, so I'm also trying to be responsive to
23 that. And I think the way to be responsive to
24 that is to say focus on the project. Focus on
25 the 88 miles, and do your consultations.

1 JUSTICE SOTOMAYOR: But they did.

2 MR. CLEMENT: I --

3 JUSTICE SOTOMAYOR: That's not --

4 MR. CLEMENT: And yet still we're here
5 thanks to the D.C. Circuit --

6 JUSTICE SOTOMAYOR: That may --
7 that -- that has --

8 MR. CLEMENT: -- that's faithfully --
9 in its mind, faithfully applying Public Citizen.

10 JUSTICE SOTOMAYOR: Okay.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: I'm wondering whether
13 your test sounds pretty good for this project
14 but may not sound quite as good for other
15 projects in the sense that, like, your project,
16 it's 88 miles, so focus on 88 miles. And that
17 sounds big enough. Thanks.

18 But, you know, suppose that the
19 project is just a single facility. I mean, you
20 wouldn't say just focus on the one square mile
21 that that plant is, right? I mean, you would
22 acknowledge that some kind of plant can have
23 effects that are far broader than just the, you
24 know, 50 acres on which it sits.

25 So how does your project work in any

1 number of other sorts of projects that might be
2 much smaller or, alternatively, might be larger,
3 like a FERC pipeline or something?

4 MR. CLEMENT: So I think it's a fair
5 question. I think that, in reality, I think the
6 lower courts haven't actually struggled much
7 with the smaller projects, and they've been able
8 to understand that, yeah, you look at -- I mean,
9 you look where the smokestack, you know, and the
10 smoke goes and you don't just, like, you know,
11 look at the -- the boundary of the property, but
12 you keep focused on the project.

13 And I -- I don't think it's an
14 accident that the lower courts that have
15 approached this more the way that I would like
16 them to have largely been dealing with in the --
17 in the context of Army Corps projects, where
18 it's a pretty discrete project and they say,
19 yeah, this is -- you know, we'll look at how it
20 affects the immediate environment, but the fact
21 that it actually facilitates phosphate mining,
22 that's not something we're going to look at.
23 That's somebody else's problem.

24 I think, you know, the FERC pipelines
25 are probably the hardest case because, you

1 know -- and -- and -- and I think they're --
2 they're less remote in the sense that, you know,
3 the pipeline might go all the way to the -- near
4 a power facility. And the D.C. Circuit has this
5 Sabal Trail case, which we don't like very much,
6 and we would say, even in Sabal Trail, pipeline
7 goes to the plant, but the emissions of the
8 plant are regulated by Florida, and so that's a
9 case where you don't have to study the
10 greenhouse gas emissions. That's our position.

11 But you could disagree with us on that
12 because you think our test would apply a little
13 differently to the pipeline. But I think our
14 test is a pretty good start. And, I mean, look,
15 you know, in the realm of defining proximate
16 cause, if I could give you a 10-word test that
17 took care of every hard case, I mean, you know,
18 they'd give me tenure at Harvard. But --

19 (Laughter.)

20 MR. CLEMENT: -- but -- but -- but I
21 think, you know, having a test --

22 JUSTICE KAGAN: I'm sure they'd give
23 you that anyway.

24 (Laughter.)

25 MR. CLEMENT: I -- I -- I -- but I

1 think, if -- if you move it in the right
2 direction and -- and maybe note that, yeah,
3 maybe this is going to play out differently,
4 maybe, you know, you have to take another NEPA
5 case someday in a pipeline, I think that would
6 still move the ball in the right direction for
7 that.

8 JUSTICE KAGAN: Can I -- can I go back
9 to Justice Alito's question about how this
10 relates to proximate cause and, you know, in --
11 in -- in Metro Edison, we clearly said that
12 there's an analogy to proximate cause concepts
13 and we're supposed to sort of think about those
14 concepts kind of. But -- but it also said "kind
15 of." It -- it said, like, whether you would be
16 held liable in a tort suit is not the right
17 inquiry.

18 And are you suggesting a change in
19 that view, or are you copacetic with it?

20 MR. CLEMENT: Call it a refinement.
21 And -- and my refinement is exactly what I told
22 Justice Alito. I mean, I think the principal
23 thing that you've already derived out of
24 proximate cause is this idea that you got to
25 think about who's the legally responsible party.

1 And that's what proximate cause does
2 in general, and that's why, if there's another
3 agency, if it's -- if we're miles and miles from
4 the project and there's another agency that's
5 supposed to be focused on it, if something goes
6 wrong, they're going to be the legally
7 responsible party.

8 And then the other thing I think is
9 useful is just as a cross-check. I mean, nobody
10 in their right mind would say that a project in
11 northeastern Utah is the legally relevant cause
12 or the proximate cause of additional pollution
13 in Shreveport, Louisiana. Nobody. And if it's
14 not even a close case, then -- then the analogy
15 has got to be useful.

16 And the problem is my friends on the
17 other side describe proximate cause principles
18 as a fundamental mismatch, and that's pretty
19 unfaithful to Metropolitan Edison and Public
20 Citizen.

21 JUSTICE KAGAN: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh?

24 JUSTICE KAVANAUGH: Can I ask you
25 about the nature of judicial review and the

1 nature of deference? Arbitrary and capricious
2 review, of course, is deferential, but it does
3 have both a procedural and substantive
4 reasonableness component.

5 When we're talking about NEPA, it's
6 purely procedural. So how should we think about
7 the role of the Court applying deference to
8 something that's purely procedural? How does
9 that affect what we normally say about arbitrary
10 and capricious review?

11 MR. CLEMENT: I mean, I would say
12 that, if anything, that calls for an even
13 lighter touch. And if you're thinking about --
14 I mean, you know, who is better than the STB to
15 decide what it needs to consider and what's
16 outside of its ken or what it can sort of, you
17 know, usefully study and what it can usefully
18 not study. So I think there, because it's
19 procedural, you probably want to be even more
20 deferential.

21 And then I do think, you know, it's --
22 it's -- it's always worth remembering the sort
23 of due regard for prejudicial error point of the
24 APA. And so, in a case like this, you know, if
25 you think that the agency didn't perfectly study

1 something it didn't have to study, boy, that
2 just seems to me to be the quintessential
3 application of a harmless error-type principle.

4 And so I think, if you added all of
5 that to the test that I'm suggesting, I think we
6 would have a much better situation and we'd be
7 much closer to the situation Congress seems to
8 want and the CEQ initially envisioned, which is
9 you didn't have encyclopedias; you had
10 relatively tight environmental impact statements
11 that were focused on the alternatives and
12 focused on mitigation measures and things the
13 agency could control.

14 JUSTICE KAVANAUGH: What do you think
15 we should say about Sabal Trail in this
16 opinion --

17 MR. CLEMENT: Well --

18 JUSTICE KAVANAUGH: -- from your
19 perspective?

20 MR. CLEMENT: -- I -- I -- I think you
21 should say that it's wrong. But, if you want to
22 reserve the pipeline question or something, I
23 think what Sabal Trail has come to be known for
24 is worse than the decision itself, which is this
25 notion that as long as the agency mentions

1 something, that makes it foreseeable and,
2 therefore, they have to do more.

3 And I think part of the problem with
4 the D.C. Circuit's approach and, I would
5 respectfully suggest, my friend's position
6 here is that they want to decouple
7 "foreseeable" -- "reasonably foreseeable" from
8 "environmental effects."

9 And, as the SG's brief says, those --
10 those are either separate requirements or
11 they -- they clearly tell you that just being
12 reasonably foreseeable is not enough.

13 There's nothing more reasonably
14 foreseeable than, once the FMCSA in Public
15 Citizen gave the final regulations for
16 inspections, those trucks were coming across the
17 border and they wouldn't be great for air
18 quality this side of the border. That was all
19 reasonably foreseeable.

20 But this Court said: No, not the
21 legally relevant cause.

22 JUSTICE KAVANAUGH: Then last, just a
23 bigger-picture question of how to think about
24 NEPA more generally.

25 When NEPA was enacted -- or since NEPA

1 was enacted, there have been all sorts of
2 amendments and new environmental statutes, and
3 you've alluded to this in your comments so far,
4 that so many different agencies are involved, so
5 many different environmental checks are in place
6 on land, air, water, pollution.

7 What is NEPA adding to the substantive
8 statutes, and how should that affect how we
9 think about NEPA in terms of what the judicial
10 role is with respect to enforcing NEPA?

11 MR. CLEMENT: As it's currently
12 applied in the D.C. Circuit and the Ninth
13 Circuit, NEPA is adding a juicy litigation
14 target for project opponents. And I think that,
15 you know, if you narrow --

16 JUSTICE KAVANAUGH: What -- what
17 should it add properly construed?

18 MR. CLEMENT: Well, I -- I -- I think
19 it should be more focused on the project at hand
20 and NEPA challenges -- you know, the universe of
21 situations where the NEPA challenge is
22 successful but the substantive environmental
23 statute challenge is unsuccessful should be a
24 pretty small universe.

25 And it should either be pretty

1 egregious violations of -- you know, of -- of --
2 of -- of the scope of what they should be
3 looking at, or, you know, you can also have NEPA
4 violations where they've made a consultation
5 error, which we don't have here, or there are
6 situations where you have a scoping -- or, you
7 know, the -- the segmentation problem, where
8 they break up a project into a bunch of little
9 projects and only do EAs and not EISs.

10 So, like, there still would be a role
11 for NEPA in this kind of narrower view, but I --
12 I do think that sort of historical perspective
13 is important because, when NEPA was first
14 passed, there were very few substantive
15 environmental statutes, and so it was really
16 designed to make sure that the agencies weren't
17 heedless of the environmental consequences.

18 Now, with all these substantive
19 environmental statutes, I don't think an agency
20 could possibly be -- be heedless of the
21 environmental consequences.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: So this dovetails

1 with Justice Kavanaugh's questions.

2 I mean, NEPA's a procedural statute.
3 And, as you mentioned, now, with the amendments,
4 we've shrunk down to pretty significant page
5 limits, and now you're looking in the
6 neighborhood of 150, and you have judicially
7 enforceable deadlines. So you have shrinking
8 from the thousands of pages, like the report in
9 this case.

10 What effect do you think those
11 procedural requirements are? I mean, it's going
12 to be impossible for agencies to consider as
13 many downstream and upstream effects as they did
14 in this case just because of the procedural
15 constraints.

16 So what are -- what can we add? Or do
17 you see that -- I mean, obviously, this case
18 happened before the amendment. But what can
19 this add to that, or how can it dovetail with
20 that when we have an eye looking forward to, you
21 know, the amendments?

22 MR. CLEMENT: Yeah. And I suppose, if
23 you remanded here for additional NEPA analysis,
24 that would be subject to the statute. So I
25 think the statute is highly relevant.

1 I mean, I -- you know, I view the fact
2 that it slimmed things down as a feature, not a
3 bug. And I think, you know, to me, what would
4 be most useful is reaffirming the principle that
5 this Court has already said, which is, you know,
6 the purpose of this thing is largely to inform
7 the agency.

8 But, in the context of NEPA in
9 particular, what it should be informing the
10 agency about are the environmental qualities of
11 the reasonable alternatives that they're
12 supposed to consider. And the CEQ itself is
13 called the heart of the EIS, is the analysis of
14 the reasonable alternatives and the mitigation
15 measures.

16 And all of that is going to be
17 naturally focused on the project at hand, and
18 all of that is like -- 150 pages ought to be
19 pretty good to tell you that, yeah, Route 3 is
20 better than Route 2, and Route 3 will be even
21 better if you adopt the following however many
22 mitigation measures.

23 All of that, I think, can make an
24 150-page EIS still be valuable and, frankly,
25 probably more valuable than a 3600-page EIS.

1 JUSTICE BARRETT: A follow-up on the
2 proximate cause questions you've already
3 answered.

4 I mean, I had taken your brief to take
5 a harder line on proximate cause than you have
6 today, so are you soft-pedaling proximate cause?
7 Would it be -- it's hard for me to see when I
8 think about how an opinion would write if you
9 win. You know, is it you start with proximate
10 cause and then you ask: Well, should we go a
11 little bit beyond this, maybe applying a rule of
12 reason? So -- or are you still kind of
13 pushing -- maybe I misoverread your brief. Are
14 you pushing for a harder proximate cause line?

15 MR. CLEMENT: So, I mean, I -- I
16 think, as -- as -- I'd go where this Court went,
17 which is proximate cause maybe isn't the alpha
18 and omega, but it sure is helpful.

19 JUSTICE BARRETT: Mm-hmm.

20 MR. CLEMENT: And then I -- I do
21 think, having, you know, ruminated on the
22 question a fair bit, that maybe the best thing
23 that you could say is: If it is remote in time
24 or space, which gets at proximate cause
25 principles, and in the jurisdiction of another

1 agency, then you're outside the consultation
2 requirement and you're -- you're talking about
3 something that if things go wrong years from
4 now, the STB and this project is not going to be
5 the legally relevant cause.

6 You know, maybe it'll be poor
7 management by the Federal Railroad
8 Administration or the wrong speed limit in
9 Colorado. Or maybe it'll be because Port
10 Arthur, Texas, actually likes having refineries
11 because it's the best thing for their local
12 economy. But you're not going to say 88 miles
13 of track in northeastern Utah is the legally
14 relevant cause.

15 JUSTICE BARRETT: So you see it as
16 saying what we've said before but maybe putting
17 a little bit more flesh on the bone with your
18 "remote in time and place" language as kind of
19 the measure of when you go beyond proximate
20 cause? Is that how you would think of it?

21 MR. CLEMENT: Yeah, and -- but I would
22 emphasize that if it's in the jurisdiction of
23 another agency and -- and remote --

24 JUSTICE BARRETT: Mm-hmm.

25 MR. CLEMENT: -- that really means

1 it's not the legally relevant cause because
2 another way to explain the split --

3 JUSTICE BARRETT: Mm-hmm.

4 MR. CLEMENT: -- is, you know, some
5 people look at Public Citizen and they get just
6 what I've told you out of Public Citizen.

7 Other people look at Public Citizen
8 and they say either that's a case about the
9 president or they say that's a case where the
10 last agency to act had no discretion whatsoever.
11 And I think that way narrows what Public Citizen
12 should stand for.

13 So, in -- in a sense, if -- if -- if
14 you make clear that Public Citizen and its test
15 for the legally relevant cause really looks to
16 another agency that's in a better position to
17 regulate it and not -- it's not just, like, a
18 ticket for, you know, one train --

19 JUSTICE BARRETT: Mm-hmm.

20 MR. CLEMENT: -- sorry, the pun --
21 then -- then I think that will have a lot of
22 help.

23 JUSTICE BARRETT: And do you see your
24 position as inconsistent with the government's
25 since they don't really kind of -- I don't want

1 to say go as far as you do, but they don't
2 articulate the same test. So how do you see the
3 daylight?

4 MR. CLEMENT: I don't think there's a
5 lot of distance or daylight between our
6 positions, but I think what daylight there is
7 reflects the fact that my clients have to invest
8 money and they need predictability.

9 And so the idea that, you know, there
10 are all these factors, but don't make any one of
11 them too dispositive, don't provide too much
12 guidance -- I mean, you know, I love almost
13 everything in the government's brief except when
14 it says "context-specific" or, you know, "a
15 factor but not dispositive."

16 People who are actually trying to
17 invest in these infrastructure projects need a
18 little more clarity on that and a little more
19 assurance that they're not going to get hung up
20 for years and years based on litigation in the
21 D.C. Circuit and the Ninth Circuit.

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: So I guess I think

1 that my concern with your test, the remote in
2 time and effect plus outside the jurisdiction,
3 is that it feels to me to be unmoored from the
4 purposes of NEPA, which you have, I think,
5 articulated correctly as to informing the agency
6 with respect to its own decision-making process.

7 So I -- I'm trying to figure out how
8 to best articulate the concern, but your focus
9 is on identifying who is legally responsible if
10 this were to go wrong, as if NEPA is about
11 solely mitigation measures.

12 I thought NEPA was about the agency
13 who has some responsibility over an aspect of
14 this project determining whether or not to
15 approve it, and it's got to take into account
16 not only the environmental consequences of the
17 actual building of its piece but whatever
18 approving its piece is going to have happen in
19 the environment broader than that.

20 Now I understand that's really hard to
21 do, it gets far afield, and we can fight about
22 the extent of that. But your argument looking
23 only at the 88 miles, I think, might narrow in
24 too closely for a purpose of really informing
25 the agency about its approval of this piece of

1 the project.

2 MR. CLEMENT: So I -- I -- I'm going
3 to disagree. And I'm going to disagree -- I
4 mean, I think you've identified there's a
5 difference in sort of what you just
6 articulated --

7 JUSTICE JACKSON: Yeah.

8 MR. CLEMENT: -- and the position I
9 think you should adopt.

10 JUSTICE JACKSON: Okay.

11 MR. CLEMENT: And I think the position
12 you've articulated I don't think is really
13 consistent with 150-page EISs. And I think one
14 way to articulate the difference is I think part
15 of the problem with that is that views the
16 agency under NEPA, whatever its -- its organic
17 statute power gives it, that sort of suggests to
18 every agency that they can put the kibosh on a
19 project for reasons that have nothing to do with
20 the details of the project or their own
21 jurisdiction.

22 JUSTICE JACKSON: But, no, I mean,
23 isn't that where we come in? I mean, that's
24 where I say -- that's where I say deference and
25 where the Court has previously said deference is

1 supposed to be taken into account and, you know,
2 advocacy, right? There are people who appear
3 before the agency and explain to them that the
4 statute actually presumptively says in this case
5 you're supposed to approve, Agency, and, you
6 know, if you're, like, arbitrarily saying no,
7 you can't do it because of something that's
8 happening 200,000 miles away or whatever, then
9 we're going to go to court because that's a
10 problem. And the -- and I would expect the
11 court to recognize that under those
12 circumstances.

13 But what I worry about with your test
14 is that you're suggesting that the agency can't
15 even look at the, you know, effects of the
16 project outside of the -- the very piece that it
17 has sole responsibility for, and -- and I don't
18 know that NEPA was actually designed to be that
19 narrow.

20 MR. CLEMENT: So just two responses.

21 I mean, one is what I'm saying is, if
22 they look way outside their bailiwick, it's not
23 that they can't do it. It's that they shouldn't
24 get reversed for not doing it well enough or for
25 not doing it.

1 JUSTICE JACKSON: Fine.

2 MR. CLEMENT: And -- and the second --
3 the second thing --

4 JUSTICE JACKSON: But you -- your test
5 suggests they can't or they shouldn't or they --

6 MR. CLEMENT: No, no.

7 JUSTICE JACKSON: -- they're not
8 allowed to.

9 MR. CLEMENT: We -- we tried to say
10 both in our briefs and here, if the agency wants
11 to go beyond the -- what's necessary, I mean,
12 have at it. You know, try to be brief --

13 JUSTICE JACKSON: But I guess what I'm
14 asking is, why isn't what's necessary anything
15 that would reasonably affect its own decision
16 about whether or not to approve its piece? And
17 that might be things outside of exactly what the
18 environmental impact of its piece is.

19 That's where you're saying you got to
20 cut it off there. And I'm just suggesting that
21 if we focus everyone's attention on what an
22 agency should reasonably be taking into account
23 with respect to its own approval of this 88
24 miles, whether it's the 88 miles themselves or
25 the other environmental impacts downstream or

1 whatever, I don't understand why it can't be
2 broader if we focus everyone's attention on the
3 standard being what Public Citizen says, the EIS
4 based on the usefulness of any new potential
5 information to the decision-making process.

6 MR. CLEMENT: So the reason I think
7 you shouldn't go down that route is because I
8 think that takes you to a world where an agency
9 that maybe has effectively a veto over a project
10 can consider everything under the sun and
11 essentially use NEPA to be almost like a -- a --
12 a veto and take into account everything that the
13 project is the but-for cause of.

14 JUSTICE JACKSON: I appreciate that,
15 but that's not this case. In fact, you agree
16 with the agency in this case, and we don't have
17 a situation in which the agency has not taken
18 into account. You -- it's the D.C. Circuit, I
19 thought you said, was the problem here.

20 MR. CLEMENT: Yeah. The D.C. Circuit
21 is the problem here to be sure, but the agency
22 obviously was reacting in part to what the D.C.
23 Circuit has required and where the litigation
24 would be. And if you just think how far outside
25 their mandate is, because, you know, you've

1 talked about, you know, they're really about
2 these tracks, but they not only are bound by but
3 enforce a common carriage requirement.

4 And if you think about this project,
5 almost none of the problems with this project
6 have anything to do with the trains. They have
7 to do with the cargo. But the irony of this is
8 the one thing this agency couldn't do as a
9 mitigating measure is say don't -- don't carry
10 any of that waxy crude on your trains. That
11 would clearly violate the statutory mandate.

12 So I think, rather than focus on every
13 environmental thing that might happen if the
14 agency went with the no action alternative, I
15 think, if instead they focus on, look, what's
16 going to make a difference between the
17 reasonable alternatives that actually accomplish
18 what this project is about and what mitigation
19 measures can we put on those reasonable
20 alternatives, whichever one we pick, to make
21 this project more environmentally friendly, I
22 think that accomplishes a lot.

23 It doesn't make NEPA the end all and
24 be all of all environmental policy, but that's
25 actually as it was intended and, certainly, I

1 think, what Congress was getting at in the
2 BUILDER Act.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER
8 ON BEHALF OF THE FEDERAL RESPONDENTS,
9 SUPPORTING THE PETITIONERS

10 MR. KNEEDLER: Mr. -- Mr. Chief
11 Justice, and may it please the Court:

12 This Court's NEPA decisions over the
13 last 50 years have announced principles that are
14 designed to enable an agency to concentrate its
15 environmental review on environmental issues
16 that the agency considers most useful to -- in
17 its evaluation of the project. What that --
18 that decision is reviewed, as has been said,
19 under the arbitrary and capricious standards,
20 but there are particular reasons under NEPA for
21 that deference.

22 And there are -- there are two more in
23 particular. One is that this Court's discussion
24 of NEPA constantly refers to reasonableness,
25 reasonable, rule of reason, reasonably

1 foreseeable content, actions, and reasonable
2 cause, is it a reasonable cause of the action.

3 When an agency is charged with acting
4 under a statute that calls for reasonableness,
5 that in itself suggests a broad amount of
6 discretion for the agency to focus on what is
7 actually going to affect the outcome.

8 And the last point, with respect to
9 the procedural nature of NEPA, Vermont Yankee is
10 very instructive on that. It says that an -- a
11 court is not supposed to impose procedures on an
12 agency that go beyond the APA or, in this case,
13 to the extent NEPA has a -- a substantive
14 element, it should not be imposing on the agency
15 outside measures of what should be considered.

16 With respect to the substance of NEPA
17 review, it might be helpful to think of it in
18 two steps. The first step is the court's review
19 has to be grounded in the first instance in the
20 action agency's organic statute. What does it
21 permit it to do, and, secondly, what is the
22 particular issue before the agency?

23 Here, that -- answering that question
24 is almost dispositive because of the unique
25 nature of this program. The -- the STB is --

1 regulates railroad -- railroad transportation
2 under a common carrier mandate. It does not
3 regulate oil. It doesn't regulate the commodity
4 on any train. It does not regulate oil and gas
5 development. And at the other end, after the
6 oil is offloaded, it does not regulate refining
7 or any other particular use of -- of the -- of
8 the product.

9 So, in this case, the NEPA review
10 is -- is concentrated or -- or guard-railed, if
11 you will, by the -- by the very nature of the
12 statutory provision. In other places, that may
13 not be true, where -- where you don't have
14 that -- that barrier.

15 The next thing is I think you can
16 condense all of the various tests or phrasing
17 that the Court has used into the one, is it --
18 is there a reasonably close causal connection?
19 And looking at that question, there are certain
20 formulations or ideas or notions that coalesce
21 into that -- that final point. Is it reasonably
22 close in -- in time or distance?

23 I think common sense suggests, if --
24 if it's not, that that's not a reasonably close
25 causal connection. And -- and, here, the -- the

1 oil development in the basin or the emissions
2 from refineries down the road are not going to
3 happen for quite some time because that will
4 depend on individual decisions by lessees of
5 land in the basin about where they're going to
6 drill. And those are individual decisions, and
7 they're also -- correspondingly, those decisions
8 are subject to the review of other agencies,
9 state, local, the -- the lessor. And then
10 downstream, the oil is not going to arrive there
11 until after the -- the drilling occurs and it's
12 loaded on the trains. That's in the distant --
13 in the -- in the future.

14 STB can't control where trains go.
15 Individual decisions of the purchaser of the oil
16 and other things will direct where it goes,
17 and -- and it may go to different refineries at
18 different time. So you have both the -- the
19 distance there and the fact that it's subject to
20 other -- other regulation.

21 And -- and it's -- and it's wrapped up
22 in this or instructive that STB can't do
23 anything. It can't prohibit any of the things I
24 just discussed. And also, it will happen so
25 much in the future that -- that the agency can't

1 mitigate whatever consequences there may be.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Mr. Kneedler,
4 Mr. Clement said that there was some difference
5 between the government's argument and his, and
6 he didn't articulate fully what that difference
7 was.

8 Would you spend a few minutes on that?

9 MR. KNEEDLER: Yes. I -- I think the
10 principal difference is I -- I think he
11 primarily wants hard-and-fast rules, rigid
12 rules. And I understand the instinct, and --
13 and as -- you know, the department defends a lot
14 of lawsuits challenging NEPA decisions by
15 agencies, and -- and we wish that the courts
16 would give more deference along the lines that I
17 just described.

18 Having said that, I think it's not
19 really right to say there should be absolute
20 rules. The -- the -- the mix of the factors
21 that I mentioned may push you in one direction
22 or another, or, in some cases, the statutory
23 mandate that the agency has will be virtually
24 dispositive, but you can't just focus -- in this
25 case, you can focus on the 88 miles because

1 that's really all the Board can do.

2 But, in other situations, it's been
3 settled for a long time that -- that a court --
4 or, excuse me, an agency should take into
5 account indirect effects too, which are not just
6 the immediate effects of the project.

7 JUSTICE KAGAN: Well, so could you put
8 some flesh on the bones of that?

9 Just, you know, thinking concretely
10 about Mr. Clement's test, which is this remote
11 in time and space and within the ambit of some
12 other regulatory authority, what are the
13 circumstances in which you would worry about
14 that kind of test?

15 MR. KNEEDLER: Well, I think, I
16 mean --

17 JUSTICE KAGAN: Or what -- you know,
18 what are the circumstances in which you think
19 that kind of test would be terrific and would
20 help everybody out?

21 MR. KNEEDLER: Yeah, no -- and -- and
22 I think both can -- both can be true. You could
23 have a situation where another agency could
24 regulate something, but there's no -- no
25 petition before it or there's no action before

1 it, and the -- the -- the federal agency might
2 think that it will have external consequences.
3 It should consult with that other agency.

4 But that doesn't absolve the -- not in
5 this case, but in another case, where the agency
6 isn't so confined, it -- that can't absolve the
7 agency from taking some account of -- of -- of
8 what's going to happen.

9 And, you know, one example is like
10 in -- in highways. The Federal Highway
11 Administration, in a funding decision, will look
12 not just at the highway but what development is
13 likely to occur if it's close in time. But, if
14 the highway is going to facilitate something
15 that may be five years down the road or 10 years
16 down the road, then maybe not.

17 So, you know, I think it does -- or --
18 or in the Corps of Engineers permitting
19 situation that Mr. Clement mentioned, where the
20 Corps of Engineers has a -- a minor role in
21 regulating the -- the discharge, it shouldn't
22 have to get into what other agencies are --
23 are requiring.

24 JUSTICE KAGAN: So I think I'm not
25 getting where you would think, oh, that's --

1 that test is not getting to the core of the
2 problem.

3 MR. KNEEDLER: Well, if you -- there
4 are other situations -- we're focusing here on
5 infrastructure projects because that's what's
6 before us.

7 But you could have -- you could have
8 land use decisions by a federal agency, where
9 there's a lot -- a lot more is within the ambit
10 of the federal agency to control. And maybe
11 when you cut timber, there -- there could be
12 some emissions that would go off -- off site or
13 something like that that another agency may take
14 account of or maybe not.

15 But the -- it wouldn't be wrong for
16 the landowner to say, in deciding whether to
17 approve a project: I'm going to consider the
18 emissions, I'm going to consider those other
19 things because of -- I -- I feel like I have a
20 special responsibility or a broader ambit
21 because I'm leasing my own land.

22 And, yes, maybe another agency could
23 step in, but -- but the agency would still feel
24 some responsibility.

25 JUSTICE BARRETT: But isn't that --

1 CHIEF JUSTICE ROBERTS: And then to --

2 JUSTICE BARRETT: -- overlapping
3 jurisdiction? I had understood Mr. Clement's
4 test to be if it's in the jurisdiction of
5 another agency, and so there's nothing that,
6 here, you know, the STB could do about it.

7 But what you're describing is -- maybe
8 I'm misunderstanding what you're saying. But is
9 what you're describing when there's overlapping
10 jurisdiction so that the agency, like the STB or
11 whatever, the Federal Highway Administration,
12 could consider it, but so could another agency?

13 MR. KNEEDLER: Or they both -- or they
14 both -- they both should consider it. If --
15 within their -- within -- if there's overlapping
16 regulatory jurisdiction, they both -- both
17 should consider it.

18 But there are also situations where
19 another agency has great insight in -- in -- in
20 what -- what might happen, technical expertise
21 or something that the action agency could
22 consult with.

23 Now, here -- here, as I said, there's
24 pretty stark separation for what the STB does or
25 what its responsibility --

1 JUSTICE BARRETT: But how is that
2 different from Mr. Clement's test, is I guess
3 what I'm getting at.

4 I mean, is the situation you're
5 talking about when another agency has insight
6 that it can offer? Are you envisioning a
7 situation in which there's not overlapping
8 jurisdiction, or are you -- or it is overlapping
9 jurisdiction?

10 MR. KNEEDLER: Well, here, there is
11 really not --

12 JUSTICE BARRETT: Well, I -- I know,
13 but I --

14 JUSTICE JACKSON: Mr. Kneedler, isn't
15 the answer it's not overlapping regulatory
16 jurisdiction, but the -- the landowner with the
17 timber has to decide under NEPA what informs
18 their decision as to whether to chop down the
19 timber?

20 And so, even though they may not have
21 jurisdiction over the area in which the
22 emissions would fall, you would still expect
23 that they would take into account, that they
24 would look at, that they would study, in making
25 their own determination about whether or not to

1 cut down the trees on their land?

2 MR. KNEEDLER: Right. And in some
3 situations even on federal land, there may be
4 situations where another agency would also have
5 jurisdiction but that for pollution --

6 JUSTICE BARRETT: I -- I -- I
7 understand -- I understand that. I'm not really
8 disputing Justice Jackson's point here.

9 I guess what I'm just trying to
10 understand is nailing down the difference. I'm
11 not hearing a ton of difference between
12 Mr. Clement's test and yours --

13 MR. KNEEDLER: Yeah.

14 JUSTICE BARRETT: -- on the
15 jurisdictional point.

16 MR. KNEEDLER: Yeah. I -- I -- I
17 don't think there is. As --

18 JUSTICE BARRETT: Okay.

19 MR. KNEEDLER: -- as he said, I think
20 we agree that -- that some -- sometimes the
21 principles he's announcing will be dispositive
22 or close to it, close to our rule. But we think
23 it -- we think the Court should preserve the --
24 the -- the possibility or -- or the likelihood
25 in some cases, but --

1 JUSTICE ALITO: Well, maybe this is --
2 maybe this is unfair, but can you -- so far,
3 in what you -- you've been talking about the --
4 the relevance of the agency's jurisdiction.
5 But, if you add in the other element to the
6 standard that he mentioned, remote in time and
7 space, can you think of situations -- past cases
8 or situations that you can anticipate where both
9 of those factors are present where you think
10 that his proposal would go too far?

11 MR. KNEEDLER: Well, I guess it
12 depends what you mean by "remote in time and
13 place." I mean, one of -- one of the -- one of
14 the differences that -- that I think I have
15 on -- on the way Mr. Clement was articulating it
16 is he said -- he was saying focus only on the 88
17 miles. But NEPA has long been understood to
18 require assessment of some indirect effects.
19 Direct effects are -- are normally what is
20 right -- what -- in this case, what is happening
21 on the 88 miles.

22 JUSTICE KAGAN: So that's what I think
23 I'm trying to get at, is where? I mean, in what
24 contexts would it be wrong to focus so clearly
25 on just the 88 miles or just the area around

1 whatever the project was?

2 MR. KNEEDLER: Well, I -- I think
3 where the agency is setting in motion something
4 that -- that is going to have effects, you know,
5 off the property or -- or -- or out driving cars
6 or -- or -- or future actions that might be
7 taken because of the -- the development that I
8 mentioned.

9 And the Robertson decision from this
10 Court is sort of instructive on that. There was
11 a question of whether the agency should grant a
12 permit to build a ski resort in the mountains.
13 And then there was the -- it was foreseen that
14 there would be a -- hotels and -- and whatnot
15 next to it. And the agency properly considered
16 not just what was going to happen on the federal
17 land that was being leased but what -- what
18 private development would -- would happen.
19 And --

20 JUSTICE BARRETT: That's not --

21 MR. KNEEDLER: -- if it's right next
22 door, that's close -- that's close in distance.
23 Maybe it would take a while to build the
24 project. And so that's a matter of the agency's
25 judgment, is: But what should be taken into

1 account?

2 JUSTICE BARRETT: But that's not
3 remote in time and place, right? I mean,
4 that's -- that's close in place. So is that --

5 MR. KNEEDLER: Right. No, I was -- I
6 was responding to the point that sometimes an
7 agency should take account of something that
8 isn't directly -- it's not just the place, it's
9 not just the ski lifts. It's --

10 JUSTICE BARRETT: I -- I agree. I
11 agree. It just seems like that's not -- I mean,
12 so I think, like, the 88 miles, just focusing on
13 the track itself, might be too narrow a focus.
14 But, if it's something kind of alongside either
15 in your hypothetical, it's something that seems
16 to me pretty close in space.

17 MR. KNEEDLER: Right. No, and that --
18 that -- that was my point about indirect
19 effects. Some -- it -- it's not the ski
20 resort -- it's not the ski lifts itself.
21 It's -- it's what -- what indirect consequences
22 that will have by building the ski resort there
23 or maybe a mile away. So it's a question --

24 JUSTICE KAGAN: Right. I guess what
25 Justice Barrett is saying is, you know, it

1 depends how you define the term "remote." But I
2 wouldn't think of that as remote. So I would
3 think of that as passing Mr. Clement's test.

4 Is there -- is there anything that
5 you're worried about that's not, like, just
6 around there but really is further away, that
7 the agency should really take a look at because
8 it could influence their decision-making?

9 MR. KNEEDLER: Well, I -- I think the
10 Corps of Engineers, in issuing a permit for a
11 deposit, is not just going to look at -- or
12 shouldn't just look at the immediate place where
13 there might be fill put in the river but -- but
14 should be concerned if the -- if whatever
15 pollutant is being added, what -- what's its
16 effect downstream going to be. Is it -- is it
17 poisonous? Would it affect drinking water
18 downstream?

19 JUSTICE SOTOMAYOR: That goes to the
20 issue of the nature of what the impact is,
21 correct?

22 MR. KNEEDLER: Yeah, yeah.

23 JUSTICE SOTOMAYOR: And some impacts
24 can be more localized, and some impacts might
25 not be.

1 MR. KNEEDLER: Right.

2 JUSTICE SOTOMAYOR: A smokestack might
3 be blown because of the winds in a particular
4 area to five states.

5 MR. KNEEDLER: Right.

6 JUSTICE SOTOMAYOR: In another, it
7 might be blown to two. And the same thing --
8 you just mentioned that if it's affecting the
9 water, you can't just look at the little pond
10 that's there; you have to look at where it
11 travels when it leaves the pond, correct?

12 MR. KNEEDLER: Right.

13 JUSTICE SOTOMAYOR: And it could go a
14 very far distance in some situations, correct?

15 MR. KNEEDLER: Right.

16 JUSTICE SOTOMAYOR: You can have
17 downhill motion that could take something miles
18 away.

19 MR. KNEEDLER: Yes.

20 JUSTICE SOTOMAYOR: So that's why a
21 test that just speaks about the local impact is
22 not enough if that's all you're saying.

23 MR. KNEEDLER: Right. No, I think
24 that's right. And -- and Mr. Clement was
25 concerned about context-specific analysis. To

1 some extent, that's inevitable, but I mean --
2 what I think we mean by context-specific is
3 looking at the statute that the agency's acting
4 on, what -- what is it supposed to be focusing
5 on, and enabling the agency to focus on that and
6 the particular decision that is being made.

7 Sometimes that focus will be informed
8 by the fact that another agency is also going to
9 look at this. Another agency will be concerned
10 about the downstream effects.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 You obviously focused on a lot more --
14 I don't know whether they were adjectives or
15 nouns, but particularly in your opening, to
16 determine what exactly is available here, and
17 then I think a lot of the questions were
18 pressing along the same direction.

19 In light of all that, I think the most
20 important question is going to be whether or not
21 the agency will entertain motions for extension
22 of the 150-page limit.

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: How in the
25 world -- how in the world -- putting aside

1 whether -- the question for the people who have
2 to -- and the agencies who have to fill this in,
3 how in the world is somebody going to know how
4 they should use a very, very limited, in terms
5 of government work, page limit and -- and --
6 and, at each turn, knowing that failure to
7 address a particular item could result in -- in
8 the project being either delayed or -- or
9 denied?

10 And -- and yet then -- and you sort of
11 gave yourself this safety valve: Well, in this
12 case, it's very clear, and in this case, that.
13 But, in other cases, you've left a lot of
14 uncertainty both for the agency and the people
15 appearing before it.

16 MR. KNEEDLER: Well, two responses to
17 that, and there may be more.

18 The first is that the page limit, I --
19 I think, should be a statutory affirmation that
20 the agency shouldn't have to go to the ends of
21 the earth to focus -- or to decide the
22 environmental issue. It should focus on what
23 are the -- what are the core concerns,
24 identifying what the core concerns are so that
25 the agency will have that in mind, and then

1 decide how deeply it needs to go into that. So
2 I think -- I think enabling -- as this Court's
3 decisions have sought to do, enabling the agency
4 to focus closely on what it regards as most
5 material to its decision.

6 The second point is -- is the other, I
7 think, problem that comes up in judicial review
8 is the fly-specking, which really isn't present
9 here but is more present in the other aspect of
10 this case in terms of downline effects, where
11 the track is going through another state.
12 Courts review these very intensely and said, oh,
13 you should have done another study or you've
14 got -- you've got this problem over here that
15 you could have talked about more.

16 And I think -- and it's not really
17 present in this case, but I think -- I think the
18 courts need to be reminded -- and, again, this
19 comes in with the reasonableness review and
20 Vermont Yankee and arbitrary and capricious --
21 need to be reminded that the agency gets to
22 decide in the first instance, with great
23 deference, how deeply it needs to go into
24 something. And if somebody comes in with a --
25 saying, well, you know, you didn't -- there's

1 another study you could have looked at, at some
2 point, this just has to be cut off, particularly
3 given the page limits and given the -- what NEPA
4 was about was focusing on the things that are
5 most important, which may include, does include,
6 some indirect effects.

7 CHIEF JUSTICE ROBERTS: Thank -- thank
8 you, counsel.

9 Justice Thomas?

10 Justice Alito?

11 Justice Sotomayor?

12 JUSTICE SOTOMAYOR: What do you
13 understand to be the issue before us? There
14 were a lot of decisions by the court below, at
15 least five that I'm aware of. One was on
16 sending it back for the railroad to consider the
17 additional oil production in the basin and the
18 other that the railroad would spur oil refining
19 in Texas and Louisiana. And your brief was
20 limited to those two issues.

21 MR. KNEEDLER: That's what we focused
22 on because we didn't understand the question
23 presented to cover the -- the downline effects.

24 JUSTICE SOTOMAYOR: Neither did I when
25 I read the cert petition.

1 But, having said that, because they
2 don't mention the other things, the -- the --
3 the wildfires, the railroad accidents, or the
4 Colorado River impact, you don't think those
5 issues are before us?

6 MR. KNEEDLER: I -- I -- I don't
7 think -- no, I don't think that they are before
8 you. And the precise issue, I think, before the
9 Court with respect to both the oil and gas
10 development and the -- and the refineries is
11 whether what the agency -- was it arbitrary and
12 capricious for the agency not to have done more?

13 On both ends of that, it identified
14 the aggregate. It identified a low and high
15 range of how much oil would be produced based on
16 the capacity of -- of the rail line and -- and
17 the aggregate amount of -- of emissions that
18 would happen in Louisiana.

19 JUSTICE SOTOMAYOR: So just so I'm
20 clear, the other items, the wildfires, the
21 accidents, and the Colorado River, were not
22 mentioned in the cert petition?

23 MR. KNEEDLER: I -- no, I don't -- I
24 don't believe -- but, no, the agency obviously
25 did evaluate those along the 88 miles. The

1 question is whether it -- whether it had -- and
2 it did evaluate those things downline. This is
3 an example of -- of fly-specking because the
4 Respondents said, well, they should have done a
5 little more. They should have done a little
6 more.

7 JUSTICE SOTOMAYOR: Thank you,
8 counsel.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?
10 Justice Kavanaugh?

11 JUSTICE KAVANAUGH: I want to pick up
12 on what you were saying to the Chief Justice
13 because -- and in some of the colloquy you were
14 having earlier because I think there's an
15 important distinction to be made between what an
16 agency can do or maybe should do as a matter of
17 good government and what the role of the courts
18 is in reviewing what the agencies do.

19 And we start with the deference on the
20 arbitrary and capricious standard, but given the
21 uncertain lines that were reflected in your
22 answers to Justice Barrett and Justice Kagan and
23 Justice Jackson about how far to go, it seems to
24 me the deference of the courts has to be huge
25 with respect to how the agencies think about the

1 scope of what they're going to consider.

2 And it seems to me the problem that
3 has crept in is conflating what the agency can
4 do and should do from what the role of the
5 courts is here. And by the courts taking an
6 overly aggressive role, it's in turn created an
7 incentive for the agencies to -- to do
8 3,000-page EI -- you know, environmental impact
9 statements.

10 MR. KNEEDLER: I think that's
11 absolutely correct, and it's -- it's no
12 coincidence that all the -- almost all of
13 these -- this Court's cases about NEPA have been
14 where a court has required the agency to do more
15 than the agency concluded in its own judgment
16 was necessary.

17 And so I -- I think the -- the Court
18 could accomplish a lot in terms of NEPA
19 litigation by emphasizing the points that you
20 just did against -- again, it's not
21 manufactured -- this Court has said
22 reasonableness is the -- you know, is the
23 standard in measuring how far an agency should
24 go. And who better than the agency in the first
25 instance, say this is the decision that's before

1 us, this is what I need or what I think I need
2 to -- to consider that, to have considered
3 environmental issues enough to go forward with a
4 decision.

5 One other point about the arbitrary
6 and capricious. Sometimes agencies treat the
7 EIS as if it's agency action that they should
8 independently review. The ultimate question is
9 whether the agency action should be set aside
10 because of some defect in the EIS in the end.
11 Analytically, the EIS is not its own agency
12 action. It's part of the record on which the
13 agency is acting.

14 So, if -- if the court finds some
15 defect in some detail of the -- of the
16 environmental impact statement, not only does
17 that not render the whole EIS invalid, but it --
18 but you have to ask a further question, should
19 we be setting aside the agency's decision on the
20 basis of -- of something in a document? It's a
21 very important document, but, again, it -- it
22 shows in judicial review some attenuation
23 between what the EIS does and what the agency's
24 substantive decision is.

25 JUSTICE KAVANAUGH: And just to

1 underscore something that I think you're going
2 to agree with, the new Act makes it impossible
3 for the agency to -- to do the kind of detail
4 that some courts have demanded. So --

5 MR. KNEEDLER: Yeah, it does --

6 JUSTICE KAVANAUGH: -- the deference,
7 it's going to be like deference squared with the
8 new Act, it seems to me, but --

9 MR. KNEEDLER: Well, it does -- it
10 does exempt appendices from that.

11 (Laughter.)

12 MR. KNEEDLER: I know. I -- you know,
13 I --

14 JUSTICE KAVANAUGH: Yeah.

15 MR. KNEEDLER: Yes. But -- but I --
16 but I -- but I think it's like --

17 JUSTICE KAVANAUGH: Don't try that
18 here.

19 (Laughter.)

20 MR. KNEEDLER: I think it's like
21 saying we'll get around -- get around the word
22 limit by put putting it in the -- but an agency
23 has to be able to -- an agency has to be able to
24 document technically some of its judgments. So
25 the E -- but I -- but I -- I do think that that

1 would ease the task of judicial review because
2 it necessarily will focus the -- the decision --
3 the decision in -- in readable, understandable
4 forms and force the agency to give the -- to
5 give its most important reasons. And a further
6 detail for, you know, some hydrological studies
7 and whatnot, that can be dealt with in the
8 appendix.

9 So I think it -- it can be a useful
10 separation of the agency's explication of its
11 reasons and what should -- what should be the
12 primary focus of the court.

13 JUSTICE KAVANAUGH: A last -- last
14 quick thing. What do you think we should say
15 about Sabal Trail?

16 MR. KNEEDLER: I think it's a close
17 question, frankly. And we -- we -- the
18 government argued that -- that FERC was not
19 required to evaluate the emissions at the -- at
20 the other end. There is a difference between
21 this case and -- and FERC pipelines because, in
22 this case, once -- you know, the STB doesn't
23 control where trains are going to go. That's
24 all left up to private decision-making.

25 When you have a pipeline, FERC is

1 authorizing the pipeline to take gas from here
2 to here. And so, if you had -- if you had the
3 power plant right, you know, at the end of the
4 pipeline, it would be sort of hard to say
5 that -- that that's not a -- a indirect effect
6 at least of -- of the pipeline.

7 But we are very concerned, as Mr.
8 Clement is, once you start expanding that to --
9 in -- in Sabal Trail, there were five refineries
10 it could go to. And so the courts tend to look
11 that -- at that as a factual question. If you
12 could figure out where it's actually going to
13 go, you should investigate it. I don't think
14 that's the right way to look at it or not -- not
15 the full way to look at it --

16 JUSTICE KAVANAUGH: Okay.

17 MR. KNEEDLER: -- because legal
18 responsibility, they're not responsible for
19 which particular refinery it's --

20 JUSTICE KAVANAUGH: Thank you.

21 MR. KNEEDLER: -- it's going to go to.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: Just one quick
25 follow-up on that because that was my question

1 too about Sabal Trail. You know, Mr. Clement
2 said, well, at least what Sabal Trail has come
3 to stand for.

4 And would the government agree that
5 even if Sabal Trail itself was correct for some
6 of the reasons that you say, that what courts
7 have interpreted Sabal Trail to mean is too
8 aggressive?

9 MR. KNEEDLER: Yes. No, that -- and
10 that's -- that's what I was -- was trying to
11 convey because that gets you into thing -- that
12 gets you into speculation. It gets you into
13 other agency responsible. It gets you into
14 individual decision-makers and -- and all that.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

17 JUSTICE JACKSON: Yes. So I'm
18 reflecting on your conversation with Justices
19 Kagan and Barrett, and maybe I don't understand
20 how Mr. Clement's test works, but I thought that
21 each element operated independently to narrow
22 the circumstances in which further study would
23 be required.

24 So right next door but within the
25 regulatory jurisdiction of another agency, I

1 thought, would not pass Mr. Clement's test
2 because he had a separate element about it has
3 to be in your own jurisdiction.

4 Is that how you understand?

5 MR. KNEEDLER: Yep. I -- I think it
6 could be understood that way. I'm not -- I'm
7 not sure he means -- he means the hardest form
8 of that.

9 JUSTICE JACKSON: But maybe -- maybe
10 he can respond on rebuttal --

11 MR. KNEEDLER: Yes.

12 JUSTICE JACKSON: -- but that's how I
13 thought -- I thought --

14 MR. KNEEDLER: That sort of -- that
15 sort of highlights a -- a -- a --

16 JUSTICE JACKSON: Highlights the
17 concern, right?

18 MR. KNEEDLER: Right. Yes.

19 JUSTICE JACKSON: Because it could be
20 next door. It could be clearly a foreseeable
21 impact. But he, I thought, wanted a line that
22 had everybody looking at what is in your own
23 regulatory jurisdiction. So it's not an
24 overlapping jurisdiction scenario.

25 MR. KNEEDLER: Right.

1 JUSTICE JACKSON: He posits to begin
2 with that different agencies have different
3 purviews. And if this thing at step one is
4 outside your purview, you don't have to study
5 it.

6 MR. KNEEDLER: Right. And that's like
7 putting blinders on something that -- that --
8 that may happen.

9 JUSTICE JACKSON: And instead, your
10 test, which seems to, I think, reflect what the
11 Court has said about deference to agencies
12 and -- and what Justice Kavanaugh was pointing
13 out about the arbitrary and capricious standard,
14 you said in your beginning that we're supposed
15 to start with the organic statute.

16 And I hear that as sort of the step
17 one court question is, has the agency properly
18 identified its own purview under the statute?
19 Once the agency does that, then the agency makes
20 a determination about what it needs to study to
21 inform its decision.

22 And then you said at step two, the
23 court asks once the agency makes that
24 determination, is there a reasonably close
25 causal connection in time and distance to the

1 thing that the challenger is saying the agency
2 is supposed to study versus what the agency
3 itself has said given its organic statute.

4 Do I sort of have your framework right
5 as to what courts are supposed to be doing?

6 MR. KNEEDLER: On the -- on the second
7 step --

8 JUSTICE JACKSON: Yes.

9 MR. KNEEDLER: -- I would add one
10 modification.

11 JUSTICE JACKSON: Yes.

12 MR. KNEEDLER: It would be was the
13 agency arbitrary and capricious in concluding
14 that anything further than that was not a --
15 should not be regarded as a reasonably close
16 causal connection. I don't think that's the
17 test for the Court to decide in it -- in its
18 own --

19 JUSTICE JACKSON: In its own. Filter
20 that through the arbitrary and capricious?

21 MR. KNEEDLER: Right.

22 JUSTICE JACKSON: Yeah.

23 MR. KNEEDLER: Because it -- it --
24 it's one aspect of the agency's decision. It's
25 both the organic statute and NEPA, how do they

1 fit together, and given that, did the agency
2 make a reasonable -- was it arbitrary and
3 capricious in making the judgment it did that
4 going further than that was not --

5 JUSTICE JACKSON: So, in the
6 government's position, if we were to articulate
7 something like that, do you think that would
8 be -- that meaning these two steps that this is
9 the way the Court is supposed to be looking at
10 this in these situations, would that be helpful?

11 MR. KNEEDLER: Yes. I think it would
12 be very helpful for the -- for the NEPA
13 litigation that -- that we do see and then
14 identifying the factors that can reasonably go
15 into what's a reasonably for -- a reasonably
16 close causal connection. And this is what the
17 agency is looking at and was it on -- on those,
18 you know, sort of factors, was it arbitrary and
19 capricious.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Jay.

24

25

1 ORAL ARGUMENT OF WILLIAM M. JAY
2 ON BEHALF OF RESPONDENTS EAGLE COUNTY, ET AL.

3 MR. JAY: Mr. Chief -- Mr. Chief
4 Justice, and may it please the Court:

5 Petitioners' argument and this case
6 have shifted somewhat from the cert stage, as
7 Justice Sotomayor's colloquy with my friend
8 brought out, and I'd just like to focus on two
9 of those at the threshold. One is about the 88
10 miles and one is about the outside the agency's
11 jurisdiction point, that the agency itself did
12 not take this outside the 88 miles view. The
13 agency reviewed and found foreseeable the
14 downline impacts.

15 We obviously don't think those are
16 within the question presented, but it's striking
17 that Petitioners are taking a -- a view of what
18 the agency should have studied that is
19 considerably narrower than the agency itself.

20 And the second is about the agency's
21 jurisdiction. This case came to this Court as a
22 case in which the D.C. Circuit had recognized
23 that the agency had jurisdiction to -- and
24 authority to consider the effects that were
25 being studied.

1 So, as Petitioners' position has
2 shifted, I think it's also lost any grounding in
3 the text of NEPA. So I think it would be -- it
4 would be good to -- to step back there.

5 The impacts at issue here are
6 reasonably foreseeable consequences of this \$2
7 billion railway project whose entire rationale
8 is to transport crude oil. Reasonable
9 foreseeability is the test that Congress -- that
10 has been in NEPA since the beginning and that
11 Congress has recently reaffirmed in the BUILDER
12 Act.

13 In that -- in that statute, as in
14 agency practice leading up to it, when an effect
15 is within the scope of reasonable foreseeability
16 and within the agency's authority to consider,
17 Congress doesn't direct agencies to pass the
18 buck to someone else. It directs all federal
19 agencies to cooperate on, where possible, a
20 single environmental review so that federal
21 decision-making at -- from the threshold is
22 informed by these environmental considerations.

23 Congress also addressed these policy
24 concerns that Mr. Clement has emphasized quite
25 vigorously by adopting the page limits, the time

1 limits, and also some scope limits that
2 haven't -- haven't come up this morning.

3 We agree with a number of the things
4 that the government said in its brief. In
5 particular, points B1 and B3 of its brief, I
6 think you'll find more agreement with what I've
7 said than Mr. Kneedler was able to get to today.
8 There's no reason --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. Thank you.

11 MR. JAY: Thank you, Your Honor. I
12 welcome the Court's questions.

13 JUSTICE THOMAS: Would you just spend
14 a -- articulate what you think the close
15 connection is with the Gulf Coast communities?

16 MR. JAY: So the reason that the
17 effects -- the refining effects are reasonably
18 foreseeable in this case and I think probably
19 would not be in some others is that the very
20 purpose of this project is not only to bring a
21 specific type of crude oil to the National Rail
22 Network but to transport it for refining, and
23 there are only a few places that have the
24 capacity to do that.

25 I think that's why the agency itself

1 was able to identify the limited number of
2 places where this oil could go. And, again, the
3 whole raison d'être of this project is to
4 transport one commodity and one commodity only.

5 That -- that won't be the -- that
6 won't be the case in many other railroad
7 projects, but I do think it's a -- it's a little
8 bit misleading for Mr. Clement to suggest this
9 is an 88-mile railroad, as if the train just
10 went back and forth for 88 miles. It's a
11 connection to the National Rail Network, whose
12 entire purpose was to bring this crude oil to
13 the market.

14 JUSTICE SOTOMAYOR: Do you think as a
15 common carrier that this agency could say we
16 don't like oil refining, and, hence, because it
17 creates pollution, I'm not going to build this
18 railroad because the crude oil will lead to oil
19 refining that will pollute the environment?

20 MR. JAY: So I think -- so let me just
21 say as a prefatory matter, I think that would be
22 a question about the agency's organic statute
23 and not about NEPA. I suspect that it probably
24 could not because of the common carrier --

25 JUSTICE SOTOMAYOR: So, if it --

1 MR. JAY: -- mandate.

2 JUSTICE SOTOMAYOR: -- can't, which is
3 what I assume because the statute doesn't permit
4 it to discriminate in that way -- it says you
5 have to carry all products and person -- cargo
6 and persons -- then why is it within their
7 purview to say or determine what the increase of
8 refining will be and whether it'll be damaging
9 when there's another agency that has the power
10 to control that? It can't -- it has no power to
11 say don't refine the oil. Another agency might
12 do that.

13 MR. JAY: So the -- the purpose of
14 NEPA review of this -- on this point, I'd like
15 to make three points.

16 So one is that the Board is weighing
17 the transportation merits of this project,
18 whether to authorize this project as -- as a
19 substantive matter, against the environmental
20 consequences. That's the test that the Board
21 applies under its organic statute. And so, when
22 the Board concludes that a railway project is --

23 JUSTICE SOTOMAYOR: But it's not the
24 carrying that causes the pollution; it's the
25 refining that causes the pollution, and the

1 railroad can't control that refining because it
2 can't prohibit it. You know, it could stop it
3 by not permitting the shipment, but it's not
4 entitled to make those choices. It's a common
5 carrier. It has to carry the goods.

6 MR. JAY: I think that as a matter of
7 its organic statute, it might well take that
8 approach. Now, in -- but --

9 JUSTICE SOTOMAYOR: Isn't that what it
10 did here?

11 MR. JAY: No, I don't think so. I --
12 I think that it's closer -- what it did here is
13 closer to something that you said a moment ago,
14 which is to say, essentially, we -- we, this
15 agency, don't regulate the refineries, and,
16 therefore, we need not look at the -- at the
17 consequences.

18 And I think that that's inconsistent
19 with what the agency -- with what NEPA requires
20 because --

21 JUSTICE SOTOMAYOR: Thank you,
22 counsel.

23 JUSTICE JACKSON: But why is -- why
24 is --

25 JUSTICE KAGAN: Why don't you complete

1 your answer.

2 JUSTICE JACKSON: Yeah.

3 MR. JAY: Just -- just very briefly,
4 the -- NEPA requires agencies to look at even
5 harms that they cannot mitigate and harms that
6 they do not regulate directly precisely because
7 they provide a springboard for public comment to
8 the agencies. So, even if the agency doesn't
9 think that it would out -- conclude that the
10 environmental harms outweigh the transportation
11 merits, it allows the public to participate in
12 the process, and it also allows those local air
13 pollution regulators that you referred to, Your
14 Honor, to essentially be aware of the
15 consequence coming downstream from this --

16 JUSTICE KAGAN: So that --

17 MR. JAY: -- central decision.

18 JUSTICE KAGAN: -- if I understand you
19 correctly, Mr. Jay, that takes NEPA outside of
20 the things that are reasonable to inform agency
21 decision-making and says, even if this thing
22 wouldn't reasonably inform agency
23 decision-making, couldn't reasonably inform
24 agency decision-making, still NEPA might impose
25 an obligation, has an interest in public airing

1 of that matter.

2 And that's -- that seems to go beyond
3 what I thought the statute was all about.

4 MR. JAY: So that is not our position,
5 Justice Kagan. We're not -- we're not saying
6 that -- that -- that NEPA requires the agency to
7 conclude -- to conduct environmental review that
8 wouldn't inform its decision-making.

9 And that -- that's an important aspect
10 of where I began, that the D.C. Circuit
11 concluded, and as the government pointed out in
12 Footnote 7 of its principal brief, nobody sought
13 cert on the question whether these effects are
14 with -- were within the government -- the
15 agency's authority to regulate. So Public
16 Citizen is an excellent -- excellent example of
17 the point that the agency is not required to
18 study what it has no authority to -- to act on,
19 as a --

20 JUSTICE JACKSON: But Public Citizen
21 is different. I mean, it's -- it -- it does --
22 it has the authority, the Board here has the
23 authority --

24 MR. JAY: Yes.

25 JUSTICE JACKSON: -- to decide whether

1 or not this 88-mile track is approved, right?

2 MR. JAY: Yes.

3 JUSTICE JACKSON: And the question is,
4 I think, that Justice Kagan is asking, to what
5 extent does information about what happens in
6 the refining process inform this Board's
7 determination with respect to exercising that
8 authority.

9 I don't understand why it matters if,
10 as Justice Sotomayor pointed out, they're a
11 common carrier, they have a -- they're not
12 allowed to discriminate as to what gets carried
13 on the tracks. So, if they can't say what gets
14 carried, then what difference does it make that
15 the refinery is putting -- you know, putting out
16 environmental effects to their decision as to
17 whether or not to approve this?

18 MR. JAY: So it matters because it is
19 a reasonably foreseeable consequence of this
20 railway project because of what these trains
21 will carry and because one of the things that
22 NEPA requires agencies to do is to look at the
23 foreseeable consequences even when they cannot
24 be mitigated.

25 I mean, that's in Section 4332(C)(ii)

1 of the statute. Any reasonably foreseeable
2 adverse environmental effects which cannot be
3 avoided if the proposal should be implemented.
4 That's part of the study.

5 And so, in other words, for the agency
6 to say, well, we don't have authority to
7 mitigate these effects and, therefore, we won't
8 look at them at all, that is ignoring a category
9 of consequences just like --

10 JUSTICE JACKSON: Don't you have to
11 have an argument that their study -- let's say
12 they do study them, and they determine they have
13 great impact. Don't we -- doesn't someone have
14 to make the determination that those impacts
15 should really matter with respect to whether or
16 not this project gets approved?

17 I mean, they're so far down the line.
18 They're really -- they depend on a bunch of
19 other people's actions. All the things they
20 say. Don't you have to show that there's some
21 pretty close connection or tie between those
22 impacts and this decision?

23 MR. JAY: So I want -- I want to
24 distinguish between two points. One is the
25 far-down-the-line point, and I think the

1 foreseeability standard deals with that. And
2 the second is the thrust of your question, which
3 is, would the agency look at it? And there
4 certainly are cases where agencies either don't
5 take environmental considerations into -- into
6 account or they -- or they don't take certain
7 environmental considerations into account.

8 But the effects in this case -- and
9 we've been talking a lot about refining, but
10 there are obviously multiple categories of
11 effects in this case -- these are the types of
12 effects that the Board, in conducting this broad
13 weighing between transportation merits and
14 environmental consequences, does take into
15 account.

16 I mean, take the downline
17 consequences. The Board has an entire
18 regulation about the environmental consequences
19 of permitting a new railway which will then have
20 trains go onto the National Rail Network and
21 go -- go onto other tracks. It has an
22 environmental -- an entire regulation directing
23 applicants to explain the environmental
24 consequences for other areas, for things like
25 air pollution.

1 Obviously, the Board doesn't regulate
2 air pollution, but it absolutely does take into
3 account the -- the consequences on other rail
4 lines of adding new rail traffic. The downline
5 impacts in this case, which -- which the Board
6 studied but made basic APA errors on --

7 JUSTICE JACKSON: But you don't
8 appreciate --

9 MR. JAY: -- are an example of that.

10 JUSTICE JACKSON: -- you don't
11 appreciate a difference between the downline
12 impacts of having more train traffic in certain
13 areas versus what is being carried on those
14 trains and what then happens to that cargo?

15 MR. JAY: So I think the standard is
16 foreseeability for both, but I do think that it
17 will be much more rare for the trains to be
18 carrying a single commodity for refining in a
19 single -- for consumption in -- in a single
20 location. That, I think, is what makes this
21 case, you know, a particularly unrepresentative
22 example of -- of the foreseeability standard
23 because, in many cases, as the D.C. Circuit
24 acknowledged, the -- whatever the commodity is,
25 whether it's on a train or in a pipeline, it

1 will go into some national distribution network
2 and no one will know where it will go, what
3 will -- how it will be consumed, whether it will
4 displace other goods. And I think the D.C.
5 Circuit made -- made that point in
6 distinguishing one of its own precedents
7 involving natural gas.

8 But, in this case, the -- the entire
9 purpose of the project is to carry waxy crude
10 oil, and the record before the agency shows that
11 every train that leaves the Uinta Basin is going
12 to be carrying waxy crude oil, every one. And
13 the Board was able to quantify both the amount
14 of oil that would be necessary to make the
15 project financially viable and to identify where
16 it would go.

17 So, if the Board has essentially
18 tracked the oil out of the basin onto the trains
19 and to the refineries, what the D.C. Circuit
20 pointed out is that since the agency was also
21 assuming that all of the oil would be refined,
22 it needs to -- it needs to taut up the
23 environmental consequences at the refinery.

24 In many cases, that will not be the
25 case, but that's -- that's why the reasonable

1 foreseeability standard is met here. And the --

2 JUSTICE KAGAN: Do -- do -- do you
3 think that the agency could turn down the
4 project on that basis? I mean, I -- I take it
5 you must, because you were assuming that the
6 agency couldn't mitigate the harms by saying you
7 can't carry this particular product.

8 Do you think that the agency can turn
9 down the product? Is that the sort of
10 assumption that's underlying what you're saying?

11 MR. JAY: So I think that is the
12 assumption on which the D.C. Circuit decided the
13 case. But that's not a NEPA question obviously.
14 It is a question of the -- the authority under
15 the ICCTA.

16 JUSTICE KAGAN: I mean, it seems
17 related to a NEPA question because, if the
18 agency can't mitigate the harm and it can't turn
19 down the entire project, one wonders what all
20 this fuss and bother is about.

21 MR. JAY: Right. I think the D.C.
22 Circuit understood that these were the types
23 of -- the types of considerations and certainly
24 the downline impacts, I -- I -- I think probably
25 the upstream impacts as well, were the kinds of

1 considerations that -- I mean, they did motivate
2 at least one member of the Board to dissent
3 from -- to dissent from the decision.

4 So, as the case came to the Court and
5 as the question presented is framed for you,
6 that -- that is not the question. That --
7 that's -- that's taken as a given.

8 JUSTICE KAGAN: Can --

9 MR. JAY: And I take --

10 JUSTICE KAGAN: -- can I ask about
11 foreseeability? Because, I -- I mean,
12 foreseeability is certainly part of the inquiry,
13 but I'm having -- you're -- you're -- you're
14 seeming to make it the entire thing.

15 And if it were the entire thing,
16 Public Citizen couldn't have come out the way it
17 came out, where it was perfectly foreseeable
18 what environmental effects were going to flow
19 from those trucks.

20 So I guess I'm wondering, it's got to
21 be more than that, right, Mr. Jay?

22 MR. JAY: It is more than that. So
23 the government has this mantra in its brief
24 about attenuated, speculative, contingent, or
25 otherwise insufficiently material.

1 We actually agree with a lot of that,
2 that -- that things that are too attenuated or
3 speculative for the agency to -- to look at,
4 those are excluded by the foreseeability
5 standard.

6 And then setting it even separate and
7 apart from the foreseeability standard, this is
8 almost sort of the -- the flip side of -- of
9 Mr. Clement's position. Mr. Clement seems to be
10 saying that if somebody else has authority to
11 look at it, this agency shouldn't. So our --
12 our position is, if the -- if this agency
13 doesn't have authority to look at it, it is not
14 required to.

15 And then the third point is that they
16 obviously have to be environmental in nature.
17 That was the thrust of Metropolitan Edison, that
18 some things are not environmental consequences
19 at all because they don't bear -- there's no
20 causal relationship between the -- the agency
21 action and the effect on the physical
22 environment.

23 So I think each of those is -- is part
24 of the analysis, but quite a -- quite a bit of
25 it is accomplished by the reasonable

1 foreseeability standard. And I -- I think that
2 there -- there -- it's important to distinguish
3 between two questions. One is how much process
4 should NEPA -- should the agency give the things
5 that are within what NEPA tells it to look at?
6 And much of Mr. Kneedler's presentation focused
7 on that.

8 And we agree a hundred percent that
9 agencies have a lot of discretion to say we're
10 going to prioritize these effects over others.
11 And we think that's the necessary concomitant of
12 the -- of the BUILDER Act and the 150-page limit
13 and the time limit, that agencies are going to
14 have to prioritize some effects over others.
15 They will get deference if they explain briefly
16 what their reasoning is for doing so. That
17 could have to do with their statutory mission.
18 It could have to do with their expertise.

19 But what Congress did not do is say
20 that it was going to attack this -- the problem
21 of NEPA being too -- having too broad a compass
22 by saying -- by changing the reasonable
23 foreseeability standard.

24 And that's the problem with what
25 Mr. Clement is proposing, is that he's saying

1 that even where the agency finds something
2 reasonably foreseeable and says, we should study
3 that, and in that study, it makes a basic AP
4 error -- APA error, like the one that the
5 district court -- sorry, that the court of
6 appeals in this case found to be utterly
7 unreasoned.

8 Mr. Clement says: No problem,
9 harmless error, because NEPA didn't require you
10 to study that at all.

11 And that, we think, is the wrong way
12 to -- to attack the problem because the
13 reasonable foreseeability standard is in the
14 statute, and -- and this sort of alternative
15 "not my problem" standard is not.

16 If anything, the text of -- as Justice
17 Sotomayor brought out at the very beginning of
18 the argument, the text of the statute directs
19 agencies not to ask do I have the -- the
20 statutory authority to -- to mitigate this
21 issue? It ask -- it directs the federal
22 government together to -- to bring together all
23 agencies that have jurisdiction by law or
24 special expertise with respect to any
25 environmental impact involved.

1 And so Congress built on that in the
2 BUILDER Act by specifying that, where possible,
3 there should be one environmental review
4 precisely because that -- that is how
5 environmental review is better streamlined,
6 rather than fragmenting environmental review.

7 JUSTICE JACKSON: Why do you say that
8 the agency here didn't do anything? I thought
9 there were 50 pages of their EIS that was
10 dedicated to the environmental consequences of
11 new oil and gas drilling and refining.

12 MR. JAY: So the -- the -- the
13 upstream development, I -- I -- I think it's --
14 it's a curious case, Justice Jackson, because
15 the -- as you say, the agency took quite a bit
16 of time looking at certain aspects of upstream
17 development. And in those 50 pages, they
18 indulged the project sponsor's assumption that
19 the railroad would be viable because there would
20 be enough oil developed to -- for it to -- to be
21 carried to market and make the -- make the
22 railway a -- a financially viable going concern.

23 But then what -- with respect to a
24 couple of categories of impacts, what the agency
25 said was: Well, these are not within our

1 authority to mitigate. We don't regulate oil
2 and gas -- we don't regulate oil and gas. So
3 we're only -- we're going to look at it, but
4 we're only going to look at it where it's near
5 the rail line.

6 And what the D.C. Circuit said was
7 that that distinction base -- is based on, one,
8 something that's not driven by NEPA, this --
9 this point that we've been discussing about
10 whether agencies should look at environmental
11 effects that they don't regulate directly, and,
12 two, just whether it made any sense as a matter
13 of the APA.

14 And so should -- the agency did look
15 at an -- at upstream development and as a
16 factual matter agreed with the predicate that
17 had been laid for looking at all those things,
18 such as how many -- about how many wells will be
19 needed to generate about this much waxy crude
20 oil.

21 We're not asking -- we are not in this
22 case asking that the agency look at things that
23 it can't know -- can't look at without knowing
24 where individual wells would be. That
25 obviously, as the -- as the agency said, that

1 would be speculative. But that's not what's at
2 issue.

3 What's at issue is the foreseeable
4 consequences of oil development at that scale.
5 And recall that the agency, elsewhere in its
6 EIS, assumes that all of the oil shipped out on
7 the rail line would be new oil development. So,
8 in other words, it's not substituting for oil
9 that's currently being developed and shipped out
10 by truck.

11 When you make those assumptions, then
12 it follows that the agency should be -- should
13 be looking at the -- at least the basin-wide
14 effects of -- of the oil development because
15 they're reasonably foreseeable. And that --
16 that is the applicable standard.

17 The -- the agency's response to the
18 comments basically just stopped based on this --
19 on this notion that those aren't things that it
20 regulates directly.

21 I'd like to turn for a moment to
22 Mr. Clement's allusion to the idea of -- of
23 prejudicial error. And I think that that --
24 that certainly is a standard in the APA.

25 But this case, I think, illustrates

1 why that would be of -- of grave concern, that I
2 think it's a bedrock principle under the APA
3 that when -- when an agency tackles an issue,
4 it's supposed to respond -- respond to it in a
5 way that is not arbitrary and capricious. That
6 obviously is a deferential standard, but it
7 requires intelligible reasoning that -- that is
8 subject to appropriate judicial review.

9 And what Mr. Clement is proposing in
10 this case is to say that no matter the utterly
11 unreasoned nature of, for example, the -- the
12 agency's handling of the downline impacts, and
13 no matter the fact that the agency did not read
14 this to be outside the scope of NEPA because
15 it's not within the 88 miles or for any of the
16 other reasons that -- that Mr. Clement was --
17 was offering, that the courts should decide that
18 as a matter of substantive NEPA law, I guess,
19 they -- they -- those errors are per se
20 harmless.

21 And I think that there's both a NEPA
22 problem and a Chenery problem with -- with doing
23 that.

24 The -- the NEPA problem is that it
25 doesn't apply the actual foreseeability standard

1 in the statute and that where the agency has
2 concluded that -- that effects are foreseeable
3 and that it should or indeed must tackle them,
4 that to have the courts come in and say, no,
5 that's -- that's not what's required, I think,
6 should require a higher standard and not a
7 lesser one.

8 And the second is -- is a principle
9 about Chenery, which is that this is
10 essentially -- like, not even the government is
11 here defending the -- the agency's rationale.
12 To have Mr. Clement defend it on a rationale
13 that the agency did not itself adopt I think
14 is -- is a further problem.

15 The -- we've talked a little bit
16 about -- about the basic thrust of NEPA. And I
17 want to get back to a question that Justice
18 Kavanaugh asked early on, which is: What is
19 NEPA adding in this -- in this suite of
20 environmental statutes?

21 Because, as you -- as you observed,
22 NEPA was the first of a great many environmental
23 statutes. It was adopted in 1970, before a
24 number of the agencies that we now know existed.

25 And Mr. Clement seemed to be

1 suggesting that, well, its importance has eroded
2 over time.

3 But what hasn't eroded is the text,
4 right? And the -- the text sets out a
5 requirement that, to the fullest extent
6 possible, all agencies are to follow these basic
7 proceed -- these basic NEPA procedures.

8 One of those NEPA procedures is to
9 take environmental considerations into account
10 in deciding on major federal actions. And there
11 obviously are limits on what is a major federal
12 action. But what -- what NEPA requires is that
13 they follow the -- that sub -- that -- sorry,
14 procedural guide to making better decisions and
15 precisely because, at the time NEPA was adopted,
16 a number of agencies might well have said, not
17 my problem, I'm just a highway agency, I'm just
18 a railroad regulator, and not taken
19 environmental considerations into account, when
20 they might well have been able to mitigate or
21 avoid environmental problems had they done the
22 proper degree of study.

23 Sometimes -- and this goes back,
24 Justice Kagan, to our colloquy a -- a few
25 minutes ago. Sometimes that might lead the

1 agency to say we're not going to approve the
2 project at all because the environmental
3 consequences are too great, and it is consistent
4 with our mission to -- to turn the project down
5 on that basis.

6 More often, we think, the -- the study
7 of environmental consequences is going to lead
8 to public comment, informed decision-making,
9 and, where possible, consideration of
10 mitigation. That's -- that's exactly what NEPA
11 sought -- sought to get at and what I --

12 JUSTICE KAVANAUGH: I think that the
13 concern raised, though, is when the agency has
14 said -- has approved the project and a court
15 comes in and says -- in this new, as you say,
16 suite of statutes era, and says even though the
17 agency approved the project, even though the
18 project and all the effects comply with all the
19 substantive environmental laws that have been
20 passed over the years, which regulate very
21 extensively, obviously, we, court, are going to
22 come in and second-guess.

23 So I -- I don't think your answer
24 focused on that particular problem and the
25 deference given that -- maybe it's just extra

1 deference given the -- the overall situation
2 now. Maybe "extra" is the wrong word but
3 just -- just appropriate deference.

4 MR. JAY: So I think that where an
5 agency recognizes that there is an environmental
6 issue and that it will be dealt with in the
7 mitigation process -- or, I'm sorry, in the
8 review process by other agencies, which could be
9 state or federal agencies, that rationale might
10 well be -- be sufficient all by itself to -- to
11 satisfy NEPA review, but what we're -- what
12 we're discussing here is a different question,
13 which is whether the ring fence around NEPA
14 should be drawn so tightly that the agency
15 doesn't have to ask that question at all.

16 I mean, as I said a moment ago and I
17 think this really is one of the most important
18 pieces of this case, that how much the agency
19 has to do under NEPA is different from saying
20 that certain effects are beyond the scope of
21 NEPA so that Mr. Clement's aggressive view of
22 harmless error can come in and over -- and fix
23 an agency's flawed decision-making on grounds
24 that the agency itself did not give.

25 That -- that, I think, is -- is the

1 core of the point, that even -- even where some
2 agency has -- some other agency has
3 responsibility, the first -- that agency is
4 going to be at the table in the NEPA review.
5 The first agency may well be able to rely on
6 the -- on the agency with expertise in the NEPA
7 review, and the flip side of that -- and this is
8 made explicit in the 2023 amendments -- is that
9 where the first NEPA review answers these
10 questions, the second agency can look back to
11 the first NEPA review and say we're all done
12 here.

13 JUSTICE JACKSON: Mr. Jay --

14 MR. JAY: We don't need another one.

15 JUSTICE JACKSON: Mr. Jay, can I just
16 give you a chance to answer what I think is the
17 hardest part for you? And that is, if -- if the
18 environmental impacts come from the cargo that
19 is to be carried on these trains and the Board
20 cannot, because of the common carrier mandate,
21 really consider the cargo or discriminate on the
22 basis of the cargo, then how is it that these
23 environmental impacts are useful to the Board's
24 decision-making in the way that NEPA requires?

25 MR. JAY: So there -- as we -- as

1 we've been discussing, there are three sets
2 of -- three general sets of impacts. And I
3 don't think that, for example, the wildfire set
4 of impacts on the -- along the downline stretch,
5 I don't think that's driven by the cargo, so
6 let's bracket that for the moment.

7 I think that in many cases, where
8 you're building a railroad and the railroad will
9 carry whatever -- whatever all comers want,
10 whether it's passengers or freight, then the
11 Board would be justified in saying this is a --
12 you know, this is a common carrier line. It
13 would be totally speculative to ask what cargo
14 it will carry.

15 In this case, it's not speculative at
16 all because the entire purpose is to carry one
17 set of cargo. And if you look at the -- at the
18 record, you will see that --

19 JUSTICE JACKSON: Would the Board be
20 justified in saying we know what this cargo is,
21 and because we can't discriminate on the basis
22 of our common carrier mandate, there's no impact
23 on our decision with respect to NEPA or
24 whatever, and so, therefore, we don't have to
25 study it?

1 MR. JAY: So I think probably in the
2 context of a project like this one, where the
3 Board's mission is to weigh the transportation
4 merits against the environmental consequences
5 and the transportation merits are heavily
6 weighted with the oil and gas -- the oil
7 development in the basin, the economic value
8 that it will create, and the -- the ability to
9 unlock this important natural resource, we're --
10 we're -- we're not saying that the Board would
11 conclude that the environmental consequences are
12 too grave to -- to permit the railway as a
13 matter of law or something like that.

14 But we are saying that what
15 environmental consequences would result
16 foreseeably from carrying one cargo to
17 particular destinations in very large
18 quantities, that's foreseeable, whereas, as the
19 Board said about the other things that -- that
20 might go along on this rail line, we don't know
21 what they might be. It would be speculative --
22 it would be speculative to wonder what they
23 might be, but we do know that there will be no
24 trains carrying anything else -- let me say that
25 more precisely. There will be no trains

1 carrying cargo other than oil and only cargo
2 other than oil. Every train leaving this basin
3 is going to be carrying waxy crude oil. There
4 might be a little, you know -- one car tacked --
5 tacked on for something else if there were a --
6 a market for it.

7 And so, under those circumstances
8 where the rationale for the project is to permit
9 unlocking more waxy crude oil development and
10 where the -- where the Board's consideration of
11 the benefits of the project is tied to the --
12 that oil development, it -- it follows that the
13 Board would at least consider what the
14 environmental consequences of doing so would be.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 Justice Alito?

19 Justice Sotomayor?

20 JUSTICE SOTOMAYOR: I do see that
21 there are different questions here. You
22 mentioned the train accidents and the wildfire
23 or pollution. No one's ever -- I don't think
24 Petitioner has ever said the agency should not
25 study those things. Those are directly caused

1 by the train, the project.

2 MR. JAY: Mr. Clement said that this
3 morning, that it's --

4 JUSTICE SOTOMAYOR: Exactly. And so,
5 really --

6 MR. JAY: -- you know, it's 88 --
7 outside the 88 miles.

8 JUSTICE SOTOMAYOR: -- that's a
9 different challenge as to whether they did it
10 adequately or not, which is what the D.C.
11 Circuit said, they didn't do it adequately.
12 That's the question of arbitrary and capricious,
13 purely an arbitrary and capricious standard,
14 correct?

15 MR. JAY: It is purely arbitrary and
16 capricious.

17 JUSTICE SOTOMAYOR: All right. The
18 issue of whether they had to study at all the
19 increased oil -- oil refinery is the issue
20 that's before us, correct?

21 MR. JAY: Whether the -- whether they
22 had to address the environmental consequences of
23 developing the oil in the basin --

24 JUSTICE SOTOMAYOR: Right.

25 MR. JAY: -- and of refining it --

1 JUSTICE SOTOMAYOR: Okay.

2 MR. JAY: -- at the point of delivery.

3 JUSTICE SOTOMAYOR: All right. Thank
4 you.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

6 JUSTICE KAGAN: And just on that, if I
7 could get you to focus specifically on Mr.
8 Clement's test and say what you think is wrong
9 with it. And, as I understood Mr. Clement's
10 test, and he will tell me if I'm wrong, but that
11 it's a kind of two-part test.

12 And if it is both remote in time and
13 place, space, and another agency has regulatory
14 authority, then you can't fault the agency for
15 not looking at it. And so, again, Mr. Clement
16 will tell me if I'm making his test more
17 stringent than he would like it to be, but it's
18 two parts. If both are satisfied, you can't
19 fault the agency.

20 What's wrong with that?

21 MR. JAY: So two things. Let me start
22 with the other agency's authority piece first.
23 I -- I think Justice Barrett brought out in a --
24 in a colloquy at the beginning about -- about
25 whether agencies sometimes have concurrent

1 authority. And the answer is yes, they
2 absolutely do in a lot of cases.

3 And -- and therein, I think, lies the
4 problem, that Mr. Clement's rule would say
5 Agency Number 1 passed the -- passed the buck to
6 Agency Number 2. It's not clear that Agency
7 Number 2 would then say we're going to do the
8 study rather than pass the buck to someone else.

9 And I think that that's directly in
10 the teeth of NEPA and the -- the provisions for
11 timely and unified federal review, like the one
12 document provision at new Section 107(b), that
13 all the agencies with expertise or jurisdiction,
14 either one, are supposed to be participating in
15 the -- in the NEPA review and to coordinate. So
16 that's one piece.

17 The second piece you asked me about is
18 the remote in time and -- and space point.
19 And -- and I think, obviously, our test
20 likewise -- the statutory test would likewise
21 rule out some things that are remote in time or
22 space, but just as foreseeability doesn't have a
23 strict geographic line -- I think Mr. Clement's
24 rule, by making it strictly geographic, that's
25 not really tied to the concept of the project.

1 Projects in our large federal
2 government, you know, especially multi --
3 multibillion-dollar projects like this one, may
4 well have effects that are felt beyond just next
5 door. And I think that the fact that Mr.
6 Clement says that the only rail line between
7 these -- between this railway and the Texas
8 refinery, so, in other words, every railcar
9 going to Texas or Louisiana, they're all going
10 to come out of this railway, they're all going
11 to turn left, and they're all going to go down
12 the Union Pacific line, Mr. Clement says, well,
13 that's -- that's too remote in time or space for
14 our test to -- to bring it in.

15 We think that the foreseeability test
16 makes that a really good example. It is very,
17 very foreseeable that the rail cars that come
18 off of Mr. Clement's 88 miles of track and turn
19 left are going to cross that rail line. And the
20 agency itself foresaw that about once a year
21 there's going to be an accident with an
22 oil-laden car and about one out of every four of
23 those is going to result in an oil spill.

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 Justice Barrett?

3 Justice Jackson?

4 Thank you, counsel.

5 MR. JAY: Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.

7 Clement?

8 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

9 ON BEHALF OF THE PETITIONERS

10 MR. CLEMENT: Thank you, Mr. Chief

11 Justice. Just a few points in rebuttal.

12 First, Justice Kagan, you understand
13 our test perfectly. And the reason it has both
14 elements is to deal with this situation of
15 concurrent jurisdiction or to deal with the
16 situation where another agency has information
17 that bears directly on the project.

18 And that's why, if you look at the
19 mitigation measures that were adopted, both the
20 voluntary ones and the ones imposed, they talk
21 about the other agencies that are involved.

22 And other agencies were directly
23 involved here. The most obvious is the -- is
24 the Forest Service that provided a right-of-way.
25 And all of that took place in the cooperation

1 and consultation process. Twenty-seven agencies
2 were consulted, and nobody's complaining about
3 that. That's why it's a disjunctive -- or
4 that's why we have to have both elements there.

5 But, if it's remote in time and space
6 and it's in another agency's -- you don't put
7 them in the consultation process, and you let
8 them deal with the process.

9 The second point I'd like to make is
10 just to be specific about what's wrong with
11 Sabal Trail, in addition to its decision to
12 disregard FERC's judgment that the EIS there was
13 enough.

14 I mean, first of all, it decouples
15 reasonable foreseeability from environmental
16 effects, and that's what the Respondents do as
17 well. As long as it's reasonably foreseeable,
18 it's foreseeable that it goes down the tracks
19 500 miles, never mind that once it gets there,
20 the safety regulation is the job of a different
21 agency; the tracks are no longer operated by my
22 clients; the trucks, the -- the tanker trucks on
23 there are owned by a third party.

24 It's got nothing to do with us. If
25 there was an accident there, FRA would come in.

1 They would talk to lots of people and they
2 wouldn't talk to us because we have nothing to
3 do with that down -- that downline accident.

4 So that's one thing that's wrong. The
5 other thing that's wrong is it has this formula
6 that if you think about it even a little bit,
7 then it's foreseeable, then you have to study it
8 to death. That creates all the wrong
9 incentives.

10 The last point I would make is just
11 about what's before you. I think the entire
12 environmental impact statement and whether or
13 not you have to consider effects that are not
14 proximate and are in the jurisdiction of another
15 agency is properly before you.

16 The question presented doesn't
17 distinguish between downline and downstream. I
18 don't even know what that exactly means.
19 There's not a stream here.

20 So I would think you look at all of
21 the things that -- that the D.C. Circuit faulted
22 this agency for and the downline impacts are not
23 materially different. Indeed, both the refining
24 in the Gulf and the extra traffic on the train
25 tracks in Colorado depends on the idea that

1 there's going to be more upstream development in
2 the basin.

3 This basin is not some small area.
4 It's as big as the State of Maryland. And all
5 of that is speculative. If a project happens
6 and there are concerns with the vegetation or
7 whatever, then either the Ute tribe or Utah can
8 make a determination, they can impose their own
9 mitigation measures.

10 Just the last thing I'll say is, if
11 you're worried about sort of trying to provide
12 some additional detail to what's remote in space
13 and time, I do think that the scope of the
14 reasonable alternatives and the scope of the
15 mitigation measures provides a good guide, but
16 this is a common carrier agency.

17 The one thing it could not do is say
18 let's mitigate by saying no waxy oil in these
19 trains. It just doesn't make a lot of sense to
20 make that agency responsible for combustion in
21 the Gulf.

22 Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 The case is submitted.

1 (Whereupon, at 12:01 p.m., the case
2 was submitted.)
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