No. 23-975

IN THE

Supreme Court of the United States

SEVEN COUNTY INFRASTRUCTURE COALITION, ET AL.,

Petitioners,

v.

EAGLE COUNTY, COLORADO, ET AL.,

Respondents.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF NON-FEDERAL RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain faithful to the text and history of important federal statutes like the National Environmental Policy Act. CAC therefore has a strong interest in ensuring that the National Environmental Policy Act is understood, consistent with its longstanding construction by the Council on Environmental Quality, to require agencies conducting environmental reviews to study all reasonably foreseeable environmental effects, including indirect effects, of major federal actions.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Loper Bright Enterprises v. Raimondo*, this Court reaffirmed that "when an Executive Branch interpretation was issued roughly contemporaneously with [the] enactment of [a] statute and [has] remained consistent over time," it is "'entitled to very great respect.'" 144 S. Ct. 2244, 2257-58 (2024) (quoting *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat) 206, 210 (1827)). That principle applies to this case.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

As pertinent here, the National Environmental Policy Act (NEPA) has always required agencies, in connection with a proposal for any "major Federal action[] significantly affecting the quality of the human environment," to prepare "a detailed statement" analyzing "any adverse environmental effects [of the action] which cannot be avoided." Pub. L. No. 91-190, 83 Stat. 852, 853 (1970) (codified at 42 U.S.C. § 4332(C)(2)). Since NEPA's enactment, the Council on Environmental Quality (CEQ) has consistently interpreted that text to require federal agencies to analyze not just direct environmental effects, but also any reasonably foreseeable indirect environmental effects of a proposed federal action. That contemporaneous and consistent construction should carry "great weight" in this Court's interpretation of NEPA, *Loper Bright*, 144 S. Ct. at 2259 (quoting *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 549 (1940)), and this Court should reject Petitioners' contrary interpretation, which is at odds with decades of CEQ practice and the text and history of NEPA.

1. Congress passed NEPA to "declare[] a broad national commitment to protecting and promoting environmental quality," and it created several critical "action-forcing procedures" to further those ends. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) (quotation marks omitted). Among other things, NEPA established CEQ as a watchdog agency with the "authority to issue regulations interpreting [the Act]." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).

From the time of NEPA's enactment, those regulations have required agencies conducting environmental reviews to study all reasonably foreseeable environmental effects—including indirect effects—of major federal actions. In CEQ's 1970 interim guidelines,

promulgated just four months after NEPA was passed, the Council instructed federal agencies that an environmental review under NEPA must include "[b]oth primary and secondary significant consequences for the environment." Statements on Proposed Federal Actions Affecting the Environment: Interim Guidelines, 35 Fed. Reg. 7390, 7391 (May 12, 1970); *see also* Statements on Proposed Federal Actions Affecting the Environment: Guidelines, 36 Fed. Reg. 7724, 7725 (Apr. 23, 1971) (finalized guidelines). In 1973, the Council amended its guidelines after public commentary, but it once again emphasized that "[s]econdary or indirect, as well as primary or direct, consequences for the environment should be included" in a NEPA analysis. Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20550, 20553 (Aug. 1, 1973).

Then, in 1978, CEQ issued binding regulations setting forth a framework for NEPA analysis. *See* NEPA Regulations: Implementation of Procedural Provisions, 43 Fed. Reg. 55978 (Nov. 29, 1978). The 1978 rule instructed federal agencies to analyze the cumulative, direct, and indirect effects of all major federal actions. *Id.* at 56004. CEQ defined "indirect effects" as those that "are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* This interpretation—that NEPA requires consideration of all reasonably foreseeable environmental effects, including indirect and remote ones—has stood for almost fifty years.

In 2020, for the first time in decades, CEQ said it would change its regulations by striking the three categories of effects and replacing them with one definition. Update to the Regulations Implementing the Procedural Provisions of NEPA, 85 Fed. Reg. 1684, 1707-08 (Jan. 10, 2020) (proposed rule). Though CEQ

initially proposed prohibiting agencies from considering indirect effects altogether (as Petitioners now all but ask this Court to rule), it ultimately walked back that stance, *see* 85 Fed. Reg. 43304, 43375 (July 16, 2020) (final rule). Instead, it instructed agencies that they "may" still weigh effects that occur later in time or are further removed in distance but "generally" need not. It purportedly did so to "provid[e] clarity on the bounds of effects consistent with the Supreme Court's holding in *Public Citizen*" that courts must "draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Id.* at 43343 (quoting *Pub. Citizen*, 541 U.S. at 767-68).

The 2020 rule did not last long and was never fully implemented. Shortly after the 2020 election, the new administration announced its intention to reverse course. By 2022, CEQ had "restore[d] the substance of the definition[] of 'effects' . . . contained in the 1978 regulations" that had been "in effect for decades." NEPA Implementing Regulations Revisions, 87 Fed. Reg. 23453, 23462 (Apr. 20, 2022); *see id.* at 23469-70. In doing so, CEQ rejected the 2020 rule's reading of *Public Citizen* and returned to the construction of NEPA that had been in place since the Act's enactment. *Id.* at 23464-65.

2. This Court and the courts of appeals have long agreed with CEQ that NEPA requires consideration of all reasonably foreseeable environmental effects, including indirect ones. Even the earliest cases interpreting NEPA—cases that predated CEQ's 1978 regulation—consistently held that NEPA "plainly contemplates consideration of both the long- and short-range implications to man." *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n,* 481 F.2d 1079, 1090 (D.C. Cir. 1973) (quotation marks omitted).

Petitioners do not address this caselaw. Instead, they claim that this Court's decision in *Public Citizen* silently catalyzed a radical upheaval of CEQ's and courts' longstanding view that all reasonably foreseeable environmental effects should be considered in a NEPA analysis. This Court said nothing of the sort. Rather, *Public Citizen* stands for the uncontroversial proposition that an agency need not evaluate environmental effects under NEPA when the agency "simply lacks the power to act on whatever information might be contained in the [environmental analysis]." 541 U.S. at 768. It is for that reason that, post-*Public Citizen*, courts have continued to hold that NEPA requires consideration of all reasonably foreseeable environmental effects. This Court should reject Petitioners' invitation to rewrite *Public Citizen* and decades of NEPA caselaw.

3. This is especially true because Congress has already clarified NEPA's proper scope. In its 2023 amendments to NEPA, Congress rejected proposals nearly identical to the position taken by Petitioners—including one that would have told agencies that they should generally ignore effects remote in time or space, *see* TAPP American Resources Act, H.R. 1335 §§ 202, 203, 118th Cong. (2023)—in favor of CEQ's longstanding interpretation that a NEPA analysis should include all "reasonably foreseeable environmental effects of the proposed action" and "any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented." Fiscal Responsibility Act, Pub. L. No. 118-5, Div. C, Tit. III, § 321(a)(3)(B), 137 Stat. 38 (2023) (codified at 42 U.S.C. § 4332(C)(i), (ii)); *see Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 721-22 (2018) (by using "the materially same language" as an "'administrative or judicial interpretation of a statute'" in the text of the

statute itself, Congress intended "for it to retain its established meaning" (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978))). At the same time, Congress codified *Public Citizen*'s modest holding that NEPA does not require "an agency to prepare a full [environmental impact statement] due to the environmental impact of an action it could not refuse to perform." *Pub. Citizen*, 541 U.S. at 769; *see* 42 U.S.C. § 4336e(10)(B)(vii) (near-identical language). Congress's affirmative rejection of Petitioners' view of *Public Citizen* is telling.

In short, Petitioners didn't get what they wanted from CEQ. They didn't get what they wanted from Congress. So they are now asking this Court to rewrite NEPA to say what they wish it said. This Court should refuse to do so.

ARGUMENT

I. Under *Loper Bright*, this Court Should Give Substantial Weight to CEQ's Contemporaneous and Consistent Interpretation of NEPA as Requiring Consideration of All Reasonably Foreseeable Indirect Effects.

A. In *Loper Bright*, this Court overruled the *Chevron* doctrine, holding that courts must independently interpret ambiguous statutes rather than grant automatic and controlling deference to reasonable agency interpretations of such ambiguities. 144 S. Ct. at 2273. Yet at the same time, this Court was careful to make clear that "exercising independent judgment often include[s] according due respect to Executive Branch interpretations of federal statutes." *Id.* at 2257. Thus, in the wake of *Loper Bright*, certain agency interpretations of statutes are still "entitled to

very great respect." *Id.* (quoting *Edwards' Lessee*, 25 U.S. (12 Wheat) at 210).

Chief among them are those interpretations "issued contemporaneously with the statute at issue, and which have remained consistent over time." *Id.* at 2262 (citing *Skidmore v. Swift & Co.*, 323 U.S. 124, 140 (1944)). At bottom, "[t]hat is because 'the longstanding practice of the government'—like any other interpretive aid—'can inform [a court's] determination of what the law is.'" *Id.* at 2258 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014)). No fewer than five times in *Loper Bright* did this Court admonish lower courts that it had not altered its practice of giving "'great weight' [to] the informed judgment of the Executive Branch[,] especially in the form of an interpretation issued contemporaneously with the enactment of the statute" and espoused consistently over time. *Id.* at 2259 (quoting *Am. Trucking*, 310 U.S. at 549); *see id.* at 2257, 2258, 2262, 2273.

That practice plays a critical role in this case. For almost fifty years, CEQ has consistently interpreted NEPA to require federal agencies to consider any reasonably foreseeable environmental effects of a major federal action, including its indirect effects. And repeatedly, this Court has said that CEQ's 1978 regulation interpreting NEPA "is entitled to substantial deference," *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)—not in the sense of *Chevron* deference, but in the sense of granting respect to contemporaneous and consistent agency interpretations of statutes, *see id.* (citing *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1309-10 (1974) (Douglas, J., in chambers)). Nothing in *Loper Bright* changed that. Rather, consistent with *Loper Bright*'s careful guidance, this Court should give "great weight" to CEQ's longstanding interpretation that NEPA requires federal

agencies to analyze all the reasonably foreseeable environmental effects of major federal actions, including those indirect effects that an agency does not directly regulate and do not fit squarely within the tort law concept of proximate causation. *Loper Bright*, 144 S. Ct. at 2259 (quoting *Am. Trucking*, 310 U.S. at 549).

B. NEPA was enacted in 1970. The Act was passed by a nearly unanimous Congress and signed into law by President Nixon to create a "national policy" to "prevent or eliminate damage to the environment and biosphere," improve public health, and enhance understanding of the environment. 83 Stat. at 852 (codified at 42 U.S.C. § 4321). "To ensure that this commitment [was] 'infused into the ongoing programs and actions of the Federal Government, the act also establishe[d] some important 'action-forcing' procedures.'" *Robertson*, 490 U.S. at 348 (quoting 115 Cong. Rec. 40416 (remarks of Sen. Jackson)). One of those is that agencies must prepare a "detailed statement" in connection with "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). As originally enacted, NEPA required such statements to include analysis of the "environmental impact of the proposed action" and any of its unavoidable "adverse environmental effects." 83 Stat. at 853.

NEPA also established CEQ and gave it the "authority to issue regulations interpreting [NEPA]." *Pub. Citizen*, 541 U.S. at 757; *see Andrus*, 442 U.S. at 358. Shortly after NEPA was enacted, the President directed CEQ to issue guidelines to implement the statute, including its mandate that agencies consider the "adverse effects" of any proposed action covered by NEPA. Exec. Order No. 11514, 35 Fed. Reg. 4247 (Mar. 7, 1970).

In its 1970 interim guidance—issued just four months after NEPA was enacted—CEQ first made clear that NEPA requires consideration of all reasonably foreseeable environmental impacts, including indirect ones, of major federal actions. The Council instructed federal agencies that a NEPA analysis must include "[b]oth primary and secondary significant consequences for the environment." 35 Fed. Reg. at 7391. This was because "[s]ignificant adverse effects on the quality of the human environment include both those that directly affect human beings and those that *indirectly* affect human beings through adverse effects on the environment." *Id.* (emphasis added). A complete environmental review under NEPA, it concluded, "requires the agency to assess the [proposed] action for cumulative and long-term effects from the perspective that each generation is [a] trustee of the environment for succeeding generations." *Id.* at 7392. These guidelines were finalized, without any relevant changes, in 1971. *See* 36 Fed. Reg. at 7724.

In 1973, after requesting and receiving public comments, the Council amended its guidance. 38 Fed. Reg. at 20550. Like its 1971 predecessor, the 1973 guidance again required agencies to study indirect environmental effects to comply with NEPA "to the fullest extent possible." *Id.* at 20551. CEQ instructed that "[s]econdary or indirect, as well as primary or direct, consequences for the environment should be included" in every NEPA analysis. *Id.* at 20553. To illustrate what it meant by "indirect" effects, the Council explained that "[m]any major Federal actions, in particular those that involve the construction or licensing of infrastructure investments," such as highways or airports, "stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities." *Id.* And to illustrate

just how seriously it expected agencies to take indirect effects, CEQ also explained that "[s]uch secondary effects, through their impacts on existing community facilities and activities, through inducing new facilities and activities, or through changes in natural conditions, may often be *even more substantial than the primary effects of the original action itself*." *Id.* (emphasis added). The Council concluded that in licensing a new infrastructure project, like a highway or railroad, NEPA requires agencies to estimate the project's secondary environmental effects including, but not limited to, things like "population and growth impacts." *Id.*

In 1977, for the first time, President Carter ordered CEQ to issue a single set of uniform, mandatory regulations "after consultation with affected agencies" and "such public hearings as may be appropriate." Exec. Order No. 11991, 42 Fed. Reg. 26967 (May 25, 1977). In response to the President's order, CEQ promulgated, through notice-and-comment rulemaking, its first formal regulation interpreting NEPA. *See* 43 Fed. Reg. at 55978. The 1978 rule defined "effects" under NEPA to include three categories: direct effects, indirect effects, and cumulative effects. *Id.* at 56004. CEQ defined "indirect effects" broadly, requiring agencies preparing environmental impact statements to consider those effects that "are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* Indirect effects, CEQ explained, might include things such as "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems," provided that they are reasonably foreseeable. *Id.*

Notably, though the Council sought comments from "NEPA's critics as well as its friends," *id.* at 55980, and received feedback from nearly 12,000 stakeholders prompting significant amendments to the final rule, the requirement that federal agencies consider reasonably foreseeable indirect effects emerged without controversy or change. That interpretation—that NEPA requires consideration of all reasonably foreseeable environmental effects, including remote ones—has stood for close to fifty years.[2]

Guidance documents issued after the 1978 rule reinforced the importance of indirect effects to NEPA's procedural framework. In 1981, for example, CEQ published answers to the "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations." 46 Fed. Reg. 18026 (Mar. 23, 1981). In this document, CEQ stated that federal agencies had a duty under NEPA to "identify all the indirect effects that are known, and make a good faith effort to explain the effects that are not known but 'are reasonably foreseeable.'" *Id.* at 18031. It noted that, "in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences." *Id.* This did not mean, the Council qualified, that agencies had to "engage in speculation" if there was "total uncertainty." *Id.* But it did mean that agencies were not permitted to "ignore" effects of a proposed action that were "uncertain, but probable." *Id.* Again, CEQ made clear the breadth of "indirect effects" and said nothing to indicate that an agency's consideration of indirect

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[2] CEQ made technical amendments to the 1978 regulations in 1979, NEPA Regulations: Implementation of Procedural Provisions; Corrections, 44 Fed. Reg. 873 (Jan. 3, 1979), and amended one provision in 1986, NEPA Regulations: Incomplete or Unavailable Information, 51 Fed. Reg. 15618 (Apr. 25, 1986). Those changes are not relevant here.

effects should be limited to those effects that it directly regulates or that fit within the tort law concept of proximate causation.

C. In 2020, CEQ announced it would "comprehensively update and substantially revise the 1978 regulations." 85 Fed. Reg. at 1684. It did so in response to President Trump's exhortation that the federal government should "change the way it processes environmental reviews" to more quickly approve infrastructure projects. Exec. Order No. 13807, 82 Fed. Reg. 40463 (Aug. 24, 2017).

The proposed rule, which initially sought to outright forbid consideration of indirect effects, was finalized at lightning speed. CEQ provided only a two-month window to respond to its comprehensive changes. In that period, however, it received 1.1 million comments, many in opposition. *Wild Va. v. Council on Env't Quality*, 56 F.4th 281, 289 (4th Cir. 2022). This was in stark contrast to the lengthy, consensus-building process CEQ had utilized in finalizing its 1978 rule.

Despite the plethora of critical comments, the 2020 final rule mostly mirrored the proposed version. The final rule struck the three extant categories of "effects" that had provided the framework for NEPA review since the 1970s. 85 Fed. Reg. at 43343. Notably, however, CEQ walked back its proposal to prohibit agencies from considering indirect effects. *Id.* at 43375. Instead, it adopted a single definition of "effects" that stated that agencies "may," but "should generally not," consider effects "if they are remote in time, geographically remote, or the product of a lengthy causal chain." *Id.* at 43375. The 2020 rule also stated that "[e]ffects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the

proposed action," *id.*, a change which purported to "codify a key holding of *Public Citizen*," *id.* at 43344.

D. The 2020 changes, however, did not last long. *Cf. Wild Va.*, 56 F.4th at 292-93 (holding that intervening regulatory changes mooted a challenge to the 2020 rule's definition of "effects"). Instead, after the 2020 election, the new administration announced its intention to reconsider the most recent changes to CEQ's regulations. *Id.* at 290-91. Most importantly here, it proposed restoring the "definitions of 'effects' in the prior, longstanding 1978 NEPA regulations." NEPA Implementing Regulations Revisions, 86 Fed. Reg. 55757, 55759-60 (Oct. 7, 2021). After two years' worth of public commentary, during which the "vast majority of the unique comments" CEQ received "expressed some level of support" for the revision, 87 Fed. Reg. at 23455, CEQ promulgated a final rule in 2022 that restored the original 1978 definition of effects. *Id.* at 23453.

The 2022 rule rejected the alleged statutory basis for the 2020 rule. It explained that "conducting a robust consideration of all reasonably foreseeable effects of a proposed action" was not some dilatory tactic; "rather, doing so constitutes sound decision making and fulfills NEPA's statutory mandate." *Id.* at 23463. Consistent with the 1978 regulation, CEQ also explained that "consequential reasonably foreseeable environmental effects may occur remote in time or place from the original action"; for example, it noted that "toxic releases into air or water and greenhouse gas emissions that contribute to climate change often occur remote in time or place from the original action or are a product of a causal chain." *Id.* at 23465.

The 2022 rule also rejected the previous administration's reading of *Public Citizen*. *Public Citizen* held that where an agency lacked discretion to prevent

cross-border operations of Mexican trucks—because those operations themselves had been authorized by a presidential directive—it did not need to consider the indirect effects of the trucks' entry into the United States in its NEPA analysis. 541 U.S. at 770. As the 2022 rule recognized, *Public Citizen* said nothing to alter the requirement that an agency analyze all the reasonably foreseeable indirect effects of an action it does have the authority to prevent (regardless of whether those effects fall within the agency's regulatory wheelhouse). 87 Fed. Reg. at 23465.

In other words, CEQ recognized that *Public Citizen* "dealt with a unique context in which an agency had no authority to direct or alter an outcome," and that the 2020 changes had wrongly invoked *Public Citizen* "to provide a broadly applicable statement on effects analysis that [was] not compelled by the opinion itself." *Id.* at 23464-65. Rather than be guided by a case that arose in a unique "factual and legal context," CEQ emphasized, agencies are "better guided by the longstanding principle of reasonable foreseeability and the rule of reason in implementing NEPA's directives"—principles embedded in NEPA's text and CEQ's interpretation of it since the 1970s. *Id.* at 23465.

E. As this history demonstrates, CEQ's interpretation that NEPA requires consideration of all reasonably foreseeable environmental effects, including indirect effects, is almost as old as the Act itself. After NEPA was passed, CEQ immediately acknowledged that indirect, or secondary, environmental impacts not only mattered, but might in fact be more substantial than the direct consequences of a proposed federal action. And CEQ has, throughout its history, consistently insisted that NEPA requires agencies to weigh all the reasonably foreseeable environmental effects of

major federal actions in preparing environmental impact statements. This was true even in the intervening 2020 rule, in which CEQ continued to instruct agencies that they "may," though they "generally" need not, consider indirect effects that are "remote in time, geographically remote, or the product of a lengthy causal change." 85 Fed. Reg. at 43375. And that hastily made change was short-lived—CEQ quickly reverted to its decades-old interpretation. *See Robertson*, 490 U.S. at 355-56 ("[A]lthough less deference may be in order in some cases in which the administrative [rules] conflict with earlier pronouncements of the agency, substantial deference is nonetheless appropriate if there appears to have been good reason for the change." (quoting *Andrus*, 442 U.S. at 358 (quotation marks and citations omitted))).

In short, the arc of CEQ's interpretation of NEPA is one of remarkable consistency since the statute's enactment. CEQ has repeatedly made clear that NEPA requires agencies to consider any reasonably foreseeable environmental impacts of proposed actions, including indirect effects. Even the 2020 rule, in the end, rejected the proposal that Petitioners now champion to outright prohibit agencies from considering indirect effects. Consistent with this Court's repeated emphasis in *Loper Bright* that "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning," this Court should give "great weight" to CEQ's longstanding position. *Loper Bright*, 144 S. Ct. at 2259, 2262.

II. Since NEPA's Enactment, this Court and Other Courts Have Also Consistently Interpreted NEPA to Require Consideration of All Reasonably Foreseeable Indirect Effects.

Just as CEQ has for decades interpreted NEPA to require consideration of all reasonably foreseeable indirect environmental effects, so too have the federal courts—including this Court.

A. In the first major case to arise under the new Act, the D.C. Circuit rejected the Atomic Energy Commission's attempt to water down NEPA's requirements, including by limiting consideration of the downstream effects of a nuclear power plant. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1122-23 (D.C. Cir. 1971). The court held that "environmental issues" regulated by "other federal, state, or regional bod[ies]"—those very indirect effects that Petitioners claim NEPA does not reach—must be "assessed" and "weighed" in "each individual case." *Id.* at 1123. According to the court, by requiring agencies to comply with its environmental aims "to the fullest extent possible," *id.* at 1114 (quoting 42 U.S.C. § 4332), NEPA set a "high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts," to make sure NEPA does not become merely "a paper tiger." *Id.* Thus, for example, the Commission's failure to consider independently the downstream costs to water quality when weighing the benefits of a nuclear power plant was in "fundamental conflict with the basic purpose of the Act." *Id.* at 1123.

Shortly after *Calvert Cliffs*, the Atomic Energy Commission was back at the D.C. Circuit again in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973).

Again directly interpreting the text of NEPA, the court required the Commission to prepare an environmental impact statement for indirect effects that were potentially far-removed in time from the project. *Id.* "That the effects will not begin to be felt for several years, perhaps over a decade, is not controlling." *Id.* at 1090. NEPA, the D.C. Circuit held, "plainly contemplates consideration of 'both the long- and short-range implications to man, his physical and social surroundings, and to nature in order to avoid to the fullest extent practicable undesirable consequences for the environment.'" *Id.* (quoting CEQ's 1973 guidelines). The court also sharply criticized the Commission's attempt to avoid consideration of future effects as contrary to the text and purpose of NEPA. The agency "need not foresee the unforeseeable," but "[r]easonable forecasting and speculation is . . . implicit in NEPA, and [courts] must reject any attempt by agencies to shirk their responsibilities under NEPA by labelling any and all discussion of future environmental effects as 'crystal ball inquiry.'" *Id.* at 1092.

Following the D.C. Circuit's lead, other courts of appeals soon concluded—much as CEQ had done in its 1973 guidance—that "secondary effects" may "often be more important than primary impacts" under NEPA and are therefore "indispensable." *City of Davis v. Coleman*, 521 F.2d 661, 676-77 (9th Cir. 1975). For instance, in *Coleman*, the city sued to stop the construction of a new highway because the federal and state agencies involved had not prepared an environmental analysis pursuant to NEPA. *Id.* at 666. Though the avowed purpose of the highway was "providing slightly more convenient freeway access to a handful of local motorists," the record made it "unmistakable" that the highway was in fact built "to stimulate and service future industrial development."

Id. at 667. But because the immediate impact of the highway would be minimal, the agencies in charge had decided an environmental impact statement was unnecessary. *Id.* at 669.

The Ninth Circuit disagreed. "The growth-inducing effects" of the highway project were its "raison d'etre, and with growth will come growth's problems: increased population, increased traffic, increased pollution, and increased demand for services such as utilities, education, police and fire protection, and recreational facilities." *Id.* at 675. Though the court recognized that the "nature and extent" of these consequences were "still uncertain," it made clear that the agencies involved could not simply ignore them. *Id.* Even though "analysis of secondary effects is often more difficult than defining the first-order physical effects," NEPA necessitates considering them. *Id.* at 677. For example, a new highway "located in a rural area may directly cause increased air pollution as a primary effect," but "the highway may also induce residential and industrial growth, which may in turn create substantial pressures on available water supplies, sewage treatment facilities, and so forth." *Id.* at 676-77. Accordingly, the Ninth Circuit presaged that environmental impact statements "that do not address themselves to these major problems" of reasonably foreseeable indirect effects "are increasingly likely to be viewed as inadequate." *Id.* at 677.

Echoing the Ninth Circuit's reasoning, the Eighth Circuit rejected the contention that an environmental review under NEPA was not required because logging in a rugged boreal forest would have no significant environmental impacts that would be felt *directly* by humans. *Minn. Pub. Interest Rsch. Grp. v. Butz*, 498 F.2d 1314, 1322 (8th Cir. 1974). "This," it held, was "too restrictive [a] view of what significantly affects the

human environment." *Id.* Rather, "NEPA is concerned with indirect effects as well as direct effects," thanks to Congress's "recognition that man and all other life on this earth may be significantly affected by actions which on the surface appear insignificant." *Id.* For example, the Eighth Circuit explained, logging "creates excess nutrient run-off," and causes erosion that may "remain visible for as long as 100 years." *Id.*

B. It was with this caselaw in mind—decisions that interpreted NEPA as requiring consideration of all reasonably foreseeable indirect effects—that CEQ drafted its 1978 rule. Since then, this Court—and others—have adhered to the Council's view that NEPA "obligate[s]" federal agencies "to factor into [their] environmental analysis not just the direct, but also indirect, environmental effects" of a major federal action. *Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016) (citing *Pub. Citizen*, 541 U.S. at 764).

For instance, in *Marsh v. Oregon Natural Resources Council*, this Court considered a case in which challengers argued that the Army Corps of Engineers had violated NEPA by failing to prepare a supplemental environmental impact statement while building a dam designed to control the water supply in Oregon's Rogue River Basin. 490 U.S. 360, 368 (1989). New documents purported to show that the dam posed environmental risks, including indirect effects like downstream fish mortality from increasing temperatures of the affected river basin, that the Corps had not previously considered. *Id*. at 380. Though this Court held the Corps was already aware of these potential impacts, and so did not need to conduct a new assessment, there was "little doubt that if all of the information contained [in these documents] was both new and accurate, the Corps would have been required to prepare a second supplemental [environmental

review]" and "take a hard look at the proffered evidence" of these reasonably foreseeable indirect effects. *Id.* at 385.

Similarly, in the companion case of *Robertson v. Methow Valley Citizens Council*, citizens' groups sued to stop the development of a ski resort within the Forest Service's jurisdiction. 490 U.S. at 337. Although this Court allowed the development to go forward without a fully developed plan to mitigate all environmental harms, it did so because the Forest Service, in compliance with both "NEPA and CEQ regulations," had prepared a report with a "detailed analysis of both on-site and off-site mitigation measures" to address the indirect effects of the resort on the environment. *Id.* at 358. For instance, this Court noted that the Forest Service's assessment properly "addressed off-site impacts," *id.* at 339 (quotation marks omitted), including the resulting "increase in automobile, fireplace, and wood stove use [which] would reduce air quality below state standards," *id.* at 340, as well as losses to the local migratory deer herd, *id.* at 342.

In *Mid States Coalition for Progress v. Surface Transportation Board*, an environmental group challenging the building of a new railway argued that the Surface Transportation Board had failed to consider the effects on air quality that more readily available coal would produce. 345 F.3d 520, 548 (8th Cir. 2003). The Board responded that it did not have to consider the indirect effects on air quality of building a new railroad that was designed to transport coal more efficiently. *Id.* at 549. The Eighth Circuit rejected that claim, concluding that the "proposition that the demand for coal will be unaffected by an increase in availability [of coal] and a decrease in price, which is the stated goal of the project," was "illogical at best." *Id.* at 549.

The Eighth Circuit also rejected the Board's argument that, because the Board did not know where the power plants that would use this more-readily-available coal would be built and how much coal they would consume, the effects on air quality were too speculative to include in its environmental impact statement. *Id.* at 549. Even if true, this showed only that "the *extent* of the effect"— not its "*nature*"—was "speculative." *Id.* According to the court, it was "reasonably foreseeable—indeed, it [was] almost certainly true—that the proposed project [would] increase the long-term demand for coal and any adverse effects that result from burning coal." *Id*.

Consideration of reasonably foreseeable indirect effects requires consideration of reasonably foreseeable indirect *benefits* too under CEQ's longstanding interpretation of NEPA. In *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the Ninth Circuit held that the National Highway Traffic Safety Administration (NHTSA) contravened NEPA by setting fuel efficiency standards based on a cost-benefit analysis that "assigned no value to the most significant benefit of more stringent [fuel efficiency] standards: reduction in carbon emissions." 538 F.3d 1172, 1199 (9th Cir. 2008). The agency had failed to value this benefit because it viewed "the value of reducing emissions of CO2 and other greenhouse gases as too uncertain." *Id.* at 1200. The Court rejected NHTSA's argument that it "did not have to consider the effect of its rule on climate change," holding that it had to consider the indirect effects of its standards even where those indirect effects were primarily regulated by another agency. *Id.* at 1213.

C. Petitioners do not address this history. Instead, they argue that this Court's decision in *Public Citizen* resulted in a radical upheaval of decades of

NEPA caselaw. But *Public Citizen* did no such thing. It did not excuse agencies from considering indirect effects of major federal actions over which they have statutory authority. It did not import wholesale from tort law a nebulous proximate causation test for NEPA review. Nor did it hold that agencies need only consider effects that they are expressly told to regulate under their own organic statutes, which would have left NEPA largely superfluous. *Cf. Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1123 (rejecting a nuclear energy agency's position that it could, consistent with NEPA, ignore its impact on water quality). Rather, *Public Citizen* stands for the uncontroversial proposition that an agency need not evaluate environmental effects under NEPA when the agency "simply lacks the power to act on whatever information might be contained in the [environmental analysis]." 541 U.S. at 768. In other words, as this Court has said, "the basic principle announced in *Public Citizen*" was "that an agency cannot be considered the legal 'cause' of an action that it has no discretion *not* to take." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 667-68 (2007).

Thus, even after *Public Citizen*, courts across the country have continued to recognize that NEPA requires consideration of all reasonably foreseeable indirect effects. *See, e.g.*, *City of Shoreacres v. Waterworth*, 420 F.3d 440, 452 (5th Cir. 2005); *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1143 (11th Cir. 2008); *Nat. Res. Def. Council, Inc. v. FAA*, 564 F.3d 549, 560 (2d Cir. 2009); *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011); *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 602 (4th Cir. 2012); *Sierra Club*, 827 F.3d at 46; *Rocky Mountain Wild v. Dallas*, 98 F.4th 1263 (10th Cir. 2024). Courts properly read *Public Citizen* to extend "only to those situations

where an agency has 'no ability' because of lack of 'statutory authority' to address the impact." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105 (D.D.C. 2006). In other words, "*Public Citizen* . . . stands for nothing more than the intuitive proposition that an agency cannot be held accountable for the effects of actions it has no discretion not to take." *Florida Key Deer*, 522 F.3d at 1144. *Public Citizen*, for that reason, was not a departure from the long line of cases dating back to NEPA's enactment that have held that NEPA requires consideration of reasonably foreseeable indirect effects.

III. In Amending NEPA in 2023, Congress Codified Long-Held Administrative and Judicial Interpretations of NEPA that Required Consideration of All Reasonably Foreseeable Indirect Effects.

After CEQ announced that it was reconsidering its most recent changes, some members of Congress attempted to codify the 2020 rule's more limited definition of "effects." They did not succeed.

Instead, in 2023, Congress passed and President Biden signed into law the Fiscal Responsibility Act, which amended NEPA to clarify that environmental impact statements should analyze all "reasonably foreseeable environmental effects of the proposed agency action" and "any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented." Pub. L. No. 118-5, Div. C, Tit. III, § 321(a)(3)(B), 137 Stat. 38 (codified at 42 U.S.C. § 4332(C)(i), (ii)). By using "the materially same language" as the fifty-year-old "'administrative [and] judicial interpretation'" of NEPA, Congress made clear in the text of NEPA itself that it "intended for [NEPA] to retain its established meaning." *Lamar, Archer & Cofrin*, 584 U.S. at 721-22 (quoting *Lorillard*,

434 U.S. at 580). The 2023 amendments, in other words, codified the contemporaneous and longstanding construction of NEPA adopted by both CEQ and the courts.

A. The changes to NEPA originated in a bill introduced in 2021 and reintroduced in 2023 known as the BUILDER Act. *See* H.R. 2515, 117th Cong. (2021); H.R. 1577, 118th Cong. (2023). These bills would have amended NEPA to track the revised definition of "effects" in the 2020 rule. *Compare* H.R. 2515 § 2(a)(3)(B) *and* H.R. 1577 § 2(a)(3)(B), *with* 85 Fed. Reg. at 43375 (same language).

Another bill, the TAPP American Resources Act, incorporated the BUILDER Act and would have also codified CEQ's 2020 rule in its entirety. *See* H.R. 1335 §§ 202, 203, 118th Cong. (2023). The reporting committee, in approving the bill, explicitly noted that it was doing so in response to CEQ's restoration of its longstanding definition of effects. H.R. Rep. No. 118-28, pt. 1, at 33 (2023). Perhaps hoping to recreate the broad consensus that had animated NEPA and its regulatory framework in the first place, the reporting committee claimed that the bill had been "drafted to attract bipartisan support." *Id.* at 83. But that support never materialized. *Id.*

Ultimately, neither of these proposals were enacted. Although the bill Congress passed was still called the BUILDER Act, it did not contain the proposed limitations on the types of effects agencies should consider under NEPA. Congress chose instead to codify CEQ's longstanding requirement, first promulgated in 1978, that effects must be "reasonably foreseeable," 137 Stat. 38 (codified at 42 U.S.C. § 4332(C)(i), (ii))—language that had long been understood by courts to encompass all reasonably foreseeable indirect effects of a major federal action.

Of the changes the 2020 rule had claimed were demanded by *Public Citizen*, Congress adopted only one. The newly codified definition of "major Federal action" now excludes "activities or decisions that are non-discretionary and made in accordance with the agency's statutory authority." 42 U.S.C. § 4336e(10)(B)(vii).

B. Congress's decision to amend NEPA as it did "leave[s] no doubt" that CEQ "reached the correct conclusion" when it announced, almost fifty years ago, that its enacting statute requires all reasonably foreseeable environmental effects, including indirect ones, to be weighed in an environmental impact statement. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983). Congress affirmatively rejected the attempt to codify wholesale CEQ's 2020 changes, instead enacting language that both CEQ and the courts had long held requires consideration of all reasonably foreseeable indirect effects.

In doing so, "[i]t is hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on." *Id.* at 600-01. Throughout NEPA's history, CEQ has said, and courts have agreed, that indirect effects can cause serious environmental harm. When CEQ proposed altering course in 2020, its suggestion that indirect effects "generally" have no significant environmental impact was among the most controversial. 85 Fed. Reg. 43375; *see* Lisa Friedman, *Trump Weakens Major Conservation Law to Speed Construction Permits*, N.Y. Times, July 15, 2020, www.nytimes.com/2020/07/15/climate/trump-environment-nepa.html. More than 140 members of Congress and thirteen senators criticized CEQ's attempt to "disregard indirect effects." H. Nat. Res. Comm., Letter to CEQ (Jan. 23, 2020), https://tinyurl.com/y2x6p4u4; S. Comm. on Env't & Pub. Works, Letter to CEQ (Feb. 27,

2020), https://tinyurl.com/4kmcxk63. Once the 2020 rule was finalized, a concurrent resolution was introduced encouraging CEQ to reverse course. H.R. Con. Res. 89, 116th Cong. (2020); S. Con. Res. 537, 116th Cong. (2020). When the Council promptly did restore the 1978 definition of effects, members of Congress introduced the BUILDER and TAPP Act to carve into stone the 2020 limitations. Those proposals failed.

Instead of codifying a limited definition of "effects," Congress did the exact opposite: it "ratified" CEQ's and the courts' "long-held position" that NEPA requires consideration of all reasonably foreseeable indirect effects. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000). "The re-enactment by Congress" of a statute "which had previously received long-continued executive construction, is an adoption by Congress of such construction." *United States v. Hermanos y Campania*, 209 U.S. 337, 339 (1908); *see also Brewster v. Gage*, 280 U.S. 327, 337 (1930) ("The substantial re-enactment in later acts of the provision theretofore construed by the Department is persuasive evidence of legislative approval of the regulation."). That is especially true when the agency's construction has also been adopted by courts through a "judicial consensus" that is "so broad and unquestioned that [this Court] must presume Congress knew of and endorsed it." *Jama v. ICE*, 543 U.S. 335, 349 (2005).

Here, there is no question that Congress knew of and endorsed CEQ's contemporaneous interpretation, also widely adopted by courts, that NEPA requires agencies to weigh all reasonably foreseeable effects, including indirect ones. Congress did not just reenact NEPA—it amended the Act to codify that longstanding interpretation. In other words, here, we have far more than "congressional *acquiescence* to [an] administrative interpretation[] of a statute"—we have affirmative

evidence of Congress's *adoption* of that interpretation. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001) (emphasis added).

By codifying CEQ's contemporaneous and consistent interpretation of NEPA dating back to the 1970s, Congress also rejected the 2020 rule's reading of *Public Citizen* with respect to indirect effects. The 2020 rule had relied on *Public Citizen* for two propositions relevant here: first, that NEPA is not triggered when an agency is carrying out a non-discretionary obligation, and second, that indirect effects are "generally" beyond the scope of NEPA. The first, which Congress ultimately adopted in its newly codified definition of "major Federal action," *see* 42 U.S.C. § 4336e(10)(B)(vii), simply restates *Public Citizen*'s holding. *Pub. Citizen*, 541 U.S. at 769 (NEPA does not require "an agency to prepare a full [environmental impact statement] due to the environmental impact of an action it could not refuse to perform"). But the second, rejected by Congress, was simply never contemplated by *Public Citizen*. In amending and reenacting NEPA in 2023, Congress appropriately recognized that this Court in *Public Citizen* did not overturn CEQ's decades-old interpretation that NEPA requires consideration of all reasonably foreseeable indirect effects.

* * *

This Court has long held that "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning." *Loper Bright*, 144 S. Ct. at 2262 (citing *Skidmore*, 323 U.S. at 140). In this case, CEQ, courts, and Congress have all consistently said that NEPA requires agencies

to study all reasonably foreseeable environmental effects, including indirect ones, of major federal actions. This Court should not stray from that long-established course.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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