No. 21-560

In The
Supreme Court of the United States

DAKOTA ACCESS, LLC,

Petitioner,

v.

STANDING ROCK SIOUX TRIBE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

TRIBAL RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under NEPA, an agency that carefully considers all criticisms of its environmental analysis must also "resolve" those criticisms to the court's satisfaction to justify a finding of no significant impact.

2. Whether procedural error under NEPA per se warrants remand with vacatur.

RELATED PROCEEDINGS

To counsel's knowledge, there are no related proceedings beyond those included in Petitioner's Rule 14.1(b)(iii) statement.

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TRIBAL RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Petitioner seeks review of a fact-bound decision that does not implicate a circuit split or any other issue that warrants this Court's attention. The panel below held that the U.S. Army Corps of Engineers violated the National Environmental Policy Act when it granted an easement allowing the Dakota Access Pipeline to cross the Missouri River immediately upstream

of the Standing Rock Sioux Tribe's reservation without preparing a full environmental impact statement. Though the dispute over the pipeline garnered national attention, the D.C. Circuit's decision plowed no new ground. Instead, it applied conventional "arbitrary and capricious" review to find that the Corps failed to address serious questions concerning oil spill risks and impacts raised by technical experts for the Tribes. The regulation that the decision below interpreted, which defined when an environmental impact statement is required, was repealed in 2020.

The panel also found no abuse of discretion in the district court's vacatur of the easement. The order applied the well-settled test governing vacatur of unlawful agency action. And it rested on a careful consideration of evidence submitted by the parties and amici and a weighing of multiple factors, including that the Corps had already been given one remand without vacatur to improve its analysis. The vacatur order also has had no on-the-ground effect because the D.C. Circuit reversed the district court's order to shut down the pipeline. The Corps has taken no action against the pipeline that would stop the flow of oil while the Corps prepares an environmental impact statement, even while the pipeline has expanded operations. As the panel recognized, this case is "quite unusual" in that vacatur did not result in the pipeline being shut down during the remand. Pet. App. 39a.

The Corps is in the process of preparing that statement, with an expected date of completion in late 2022. Once it is complete, the Corps will make a new

permitting decision on a new record. In short, the petition presents no question that merits review by this Court.

The petition should be denied.

STATEMENT

A. Statutory and Regulatory Background

NEPA reflects "a broad national commitment to protecting and promoting environmental quality." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) (citing 42 U.S.C. § 4331). Before a federal agency can carry out a significant federal action, NEPA requires that it consider the potential effects the action might have on the environment.

Having an agency give these consequences a "'hard look'" before it acts fulfills this commitment in two ways. *Balt. Gas & Elec. Co.* v. *Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). It "ensures that" the agency will have "detailed information concerning significant environmental impacts," and will consider that information, when deciding whether to move ahead with an action. *Robertson*, 490 U.S. at 349. And making an agency show its work "gives the public the assurance that the agency has indeed considered environmental concerns." *Id.* (quotation omitted)

NEPA's requirements apply to "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). When proposing

such an action, an agency must provide "a detailed statement"—known as an environmental impact statement, or EIS—that canvasses "the environmental impact of the proposed action," its unavoidable "adverse environmental effects," alternatives to the proposal, and "any irreversible and irretrievable commitments of resources" that the action would entail. *Id.*

Council on Environmental Quality ("CEQ") regulations set out a staged process for complying with NEPA's commands. *See Andrus* v. *Sierra Club*, 442 U.S. 347, 357 (1979) (discussing CEQ's role). An environmental assessment, or EA, is generally the first step. At this stage, the agency assesses whether an action will "significantly" affect the environment and thus whether an EIS is required. 40 C.F.R. § 1501.3 (2019).[1]

Under then-applicable regulations, the significance determination turned on "considerations of both context and intensity." *Id.* § 1508.27 (2019). Context recognized that "significance varies with the setting of the proposed action." *Id.* § 1508.27(a) (2019). Intensity captured the "severity" of the potential impacts, evaluated under ten factors. *Id.* § 1508.27(b) (2019). These factors included "[t]he degree to which the proposed action affects public health or safety," "[t]he degree to which the effects on the quality of

[1] CEQ revised its implementing regulations during the pendency of this litigation. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020). Because the current regulations do not govern this proceeding, *id.* at 43,372, this statement cites to the prior regulations

the human environment are likely to be highly controversial," and "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources." *Id.* § 1508.27(b)(2)-(4) (2019). The significance definition, including the specific context and intensity factors at issue in this case, have since been repealed. *See* 85 Fed. Reg. at 43,332.[2]

If an agency decides the effects of the proposed action are not significant enough to trigger an EIS, it memorializes the decision in a "finding of no significant impact," or FONSI. 40 C.F.R. § 1501.3(e) (2019). If the agency cannot say that the effects of its proposed action are insignificant, then it must prepare an EIS. *Id.* To do this, the agency releases a draft, considers agency and public comments, and issues a final statement that addresses the comments and informs its ultimate decision. *See id.* §§ 1502.9 (2019), 1503.1 (2019), 1505.2 (2019).

B. Procedural History

1. Tribal respondents are sovereign Tribes and successors to the Great Sioux Nation with Treaty rights in the Missouri River. Lake Oahe, created by a dam on the Missouri River, stretches from Bismarck, North Dakota to Pierre, South Dakota and marks the

[2] Legal challenges to the 2020 updated regulations, Pet. at 4. n.1, have either been stayed or dismissed. CEQ recently proposed to restore some elements of the prior rule, but not the intensity factors at issue in this case. *See generally* National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757 (Oct. 7, 2021).

eastern reach of the Standing Rock Sioux and Cheyenne River Sioux Reservations, home to these Respondents.[3] Pet. App. 364a. The Tribes' patchworked reservation lands reflect the federal government's "deci[sion] to abandon the [United States'] treaty obligation to preserve the integrity of the Sioux territory." *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 378 (1980). When the Corps dammed the Missouri River to create the lake in 1958, it flooded hundreds of thousands of acres of land, forcing the people who lived there to relocate. That land included "56,000 acres of some of the best land from Standing Rock's Reservation" and "104,420 acres of Cheyenne River's trust lands." Pet. App. 364a (quotation omitted).

The waters of the Missouri River "hold[] special significance for the Standing Rock and Cheyenne River Sioux Tribes," which manage them to sustain physical and spiritual life on the reservations. Pet. App. 364a. The Standing Rock Tribe Sioux uses the lake's waters to support agriculture and industry and serve homes, schools, and businesses on the Reservation. And most of the Cheyenne River Sioux Tribe's water comes from the lake. *See id.* The waters are "sacred" to the Tribes and "central to [their] practice of religion." *Id.* at 365a (quotation omitted).

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[3] The other tribal Respondents also reside near, and are connected to, Lake Oahe. The Pine Ridge Reservation, home to the Oglala Sioux, lies southwest of the reservoir and receives its water from the lake. The Yankton Sioux Reservation is downstream, also drawing water discharged from the lake.

2. This case arose out of another decision by the federal government that carried serious consequences for the Tribes. Petitioner Dakota Access, LLC planned a pipeline to convey over half-a-million barrels of crude oil per day from North Dakota to Illinois. *Id.* at 365a. It proposed building the pipeline under Lake Oahe immediately upstream of the Standing Rock Sioux Reservation, on Treaty-protected lands. *Id.* at 364a. Because this route crossed federally regulated waters, Petitioner needed three approvals from the Corps: a Clean Water Act permit, a Rivers and Harbors Act approval, and a Mineral Leasing Act easement. *Id.* at 365a.

The Corps needed to comply with NEPA before granting these approvals. It prepared a draft environmental assessment proposing to find that the pipeline would not significantly affect the environment. *Id.* The draft paid scant attention to the Tribes the pipeline would affect: It did not depict their reservations on any map, nor did it discuss their Treaty, water, or subsistence hunting, fishing, and gathering rights. *See* Supp. Appx. at 611-12, 659-74, D.C. Cir. No. 20-5197, Doc. 1861909 (Sept. 16, 2020).

Several government entities raised serious concerns with the draft. Tribes with management responsibilities over the affected waters identified major gaps in the analysis, especially about the risks of an oil spill and the devastating effects a spill would have on the Tribes. Pet. App. 366a. The Department of the Interior stated that the Corps did not adequately consider the impacts of a leak or explain why this major pipeline would have no significant impact. *Id.* at 366a-367a.

Similarly, the Environmental Protection Agency questioned the Corps's "spill analysis," among other things, because "based on its 'experience . . . ,' a break or leak could significantly affect water resources." *Id.* at 368a. The Tribes and Interior called for the Corps to prepare an EIS to fully examine the effects and risks. *Id.* at 366a. EPA "did not believe that the draft EA 'would support a FONSI.'" *Id.* at 367a.

These critiques notwithstanding, in July 2016, the Corps issued a FONSI and final environmental assessment concluding the pipeline's effects were insignificant, and granted two of the three approvals Petitioner needed with an EIS. *Id.* at 368a.

3. The Standing Rock Sioux Tribe sued the Corps, raising claims under NEPA and other statutes.[4]

A few months later, the federal government concluded that the Tribes had raised "important issues" that justified further review before the third approval—the easement—would issue. *Id.* at 370a. During this review, the Tribes submitted additional information, including "an expert review of the EA" that identified serious errors, and a report "critiquing the EA's spill-volume analysis." *Id.* at 371a, 373a. The Interior Solicitor "supplied a memorandum" noting the Corps's "ample legal justification" for denying an easement and recommending that the Corps consult with the Tribes

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[4] The Cheyenne River Sioux Tribe intervened as a plaintiff. Pet. App. 468a. The suit was later consolidated with cases brought by the Oglala Sioux and Yankton Sioux Tribes. *Id.* at 783a.

and "prepar[e] an EIS" before granting an easement. *Id.* at 374a. The agency subsequently agreed with this recommendation and published its intent to prepare an EIS before issuing the easement. *Id.* at 375a.

Shortly thereafter, a new administration took office, reversed the decision to prepare an EIS, and granted Petitioner the easement. *Id.* at 375a-376a. By June 1, 2017, the pipeline was operational. *Id.* at 377a.

After updated briefing, the district court applied the Administrative Procedure Act's "arbitrary and capricious" standard to find that the Corps failed to comply with NEPA in three "substantial" ways. *Id.* at 380a, 435a.

First, it had not adequately considered the intensity factor of "'[t]he degree to which the effects . . . are likely to be highly controversial.'" *Id.* at 393 (quoting 40 C.F.R. § 1508.27(b)(4) (2019)). "[C]ontroversy" includes "scientific or other evidence that reveals flaws in the methods or data" an agency used. *Id.* at 394a (quotation omitted). The Tribes submitted expert reports with "such scientific critiques," but the Corps "never said" why it discounted them. *Id.* at 396a-397a.

Second, the Corps did not consider how a spill would affect tribal fishing and hunting activities. Precedent required the Corps to consider the chances and effects of a spill, unless the harm was "so remote and speculative as to reduce the effective probability . . . to zero." *Id.* at 404a (quotation omitted). But the Corps "offered only a cursory nod to the potential effects of an

oil spill" that did not "explain[] . . . what those effects would be." *Id.* at 406a.

Third, the Corps gerrymandered the environmental justice analysis conducted under Executive Order 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994). It considered only a 0.5-mile radius around the Lake Oahe crossing when the Standing Rock reservation lies "80 yards" downstream from that radius. *Id.* at 414a. The court was "hard pressed" to find that reasonable: The Corps had not used such a small area before, its own counsel had questioned that limit, and the small radius allowed it to ignore impacts on communities immediately downstream. *Id.* at 415a-421a.

The district court remanded for the Corps to address these "deficiencies" but declined to vacate the easement. *Id.* at 467a. The court noted its "discretion [to] leave the agency action in place" based on "'the seriousness of the . . . deficiencies . . . and the disruptive consequences of an interim change.'" *Id.* at 472a-473a (quoting *Allied-Signal* v. *U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). As to seriousness, the court indicated the Corps might be able to justify producing "only an EA, rather than an EIS" if it filled in the gaps in its analysis. *Id.* at 485a-486a. As to disruption, there would be "some," but the court viewed Petitioner's claims with "skepticism" given its prior claim that delays "would have disastrous consequences" after which "no apparent calamity ensued." *Id.* at 489a, 497a. The seriousness factor sufficiently counseled against vacatur, so the easement was left in place. *Id.* at 497a.

Following a remand, the Corps reaffirmed its decision not to prepare an EIS, and the Tribes renewed their NEPA challenge.

4. The district court again applied "arbitrary and capricious" review to this decision, based on a record that included numerous "expert comments submitted . . . during" the remand, and again for the second time that the Corps "violated NEPA" by determining an EIS was unnecessary. *Id.* at 816a.

The court focused on the first of the three remand issues: whether environmental effects " 'are likely to be highly controversial.' " *Id.* at 790a. Of the "many topics to choose from" on this factor, a "non-extensive selection" of four "suffice[d] to show the necessity of an EIS." *Id.* at 797a. Commenters identified "serious gaps in crucial parts of the [EA's] analysis" about each topic "and the Corps was not able to fill any of them." *Id.* at 816a. Acknowledging criticisms, as the Corps did at times, was not sufficient because it did not offer a response sufficient to "resolve[] the controversy." *Id.* at 792a (quoting *Nat'l Parks Conservation Ass'n* v. *Semonite*, 916 F.3d 1075, 1085-86 (D.C. Cir. 2019)); *id.* at 787a (arbitrary and capricious review asks if an agency "articulated a satisfactory explanation for its action" (alterations and quotation omitted)).

First, the Corps did not respond to substantial criticisms of the planned leak-detection system. For example, the system "was not designed" to detect leaks of less than 1% of the pipeline's flow rate—25,2000 gallons a day. *Id.* at 799a. *Second*, the Corps did not

explain why it declined to consider the pipeline operator's spill record, which was far worse than the national average, when assessing the spill risk. *Id.* at 801a-803a. *Third*, it did not respond to expert comments about the potential delay from "harsh North Dakota winters on response efforts" after a spill. *Id.* at 803a. *Fourth*, to calculate the "worst-case-discharge-estimate," 40 C.F.R. § 194.105(b)(1), that informed its spill analysis, the Corps considered only "what [the] leak-detection is capable of," "a best-case scenario," and non-winter conditions. Pet. App. 810a, 812a, 815a. Because of the extent of unresolved controversy over environmental effects on this record, the court concluded that the Corps had to prepare an EIS. *Id.* at 816a-817a.

The outcome of the first issue "obviate[d]" the need for the court to address the others. *Id.* Because it had found that the Corps had to prepare an EIS, "the other two [remanded] NEPA issues" could yield no further relief. *Id.* The court did not rule on separate claims that the Corps violated its Tribal consultation obligations for the same reason. *Id.* at 818a.

The court took additional briefing and evidence on the *Allied-Signal* vacatur factors and, "[w]ith the benefit of this bountiful briefing," exercised its discretion to vacate the easement. *Id.* at 833a. As to the seriousness factor, the court emphasized that it had earlier declined vacatur to give the Corps a chance to bolster its analysis, but "the Corps had not been able to substantiate its decision." *Id.* at 834a, 836a. As to disruption, the court "d[id] not take lightly the serious

effects" a shutdown could have. *Id.* at 845a; *id.* at 841a-851a. But it found that the Corps's 13-month estimate for completion of an EIS "cabin[ed] the economic disruption," as did lower oil demand during the COVID-19 pandemic. *Id.* at 846a. And it found that not vacating the easement risked disruption of its own, namely, an oil spill under Lake Oahe, a place of central importance to Tribal Respondents. *Id.* at 848a. The court vacated the easement and ordered "oil to stop flowing" in the pipeline. *Id.* at 853a.[5]

5. The D.C. Circuit stayed the district court's decision pending appeal to the extent that it ordered Petitioner to "shut down" the pipeline but declined to stay any other portion of the decision. *Id.* at 856a. The pipeline never shut down, and has remained operational to this day.

6. A unanimous D.C. Circuit panel held that the Corps violated NEPA by not preparing an EIS, and also found "no basis for concluding that the district court abused its discretion in applying the *Allied-Signal* factors" to vacate the easement. *Id.* at 37a.

The panel first discussed the "degree to which effects . . . are likely to be highly controversial" under

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[5] For the Court's convenience, Tribal Respondents note that the petition cites evidence filed during the vacatur briefing, which was not part of the administrative record. *See, e.g.*, Pet. 3-6, 22 (citing Docket Entries 520 and 543). Tribal Respondents assume that the petition does not mean to imply this evidence is relevant to the NEPA claim. *See, e.g.*, *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-44 (1985) (Courts review agency action on the record before the agency.).

the then-applicable intensity factors. 40 C.F.R. § 1508.27(b)(2)-(4) (2019). This required more than "highly agitated" people "willing to go to court." Pet. App. 14a (quotation omitted). Instead, it can be triggered when an agency merely "confronts but fails to resolve serious outside criticism" raised by experts of the EA's analysis. *Id.* at 15a.

The panel disagreed with the suggestion that it should treat serious technical criticism from Tribes as less weighty. *Id.* at 16a. Prior precedent had involved expert criticism from federal or state agencies. *Id.* at 17a. But the panel explained that Tribes are "sovereign nations" with stewardship responsibility over their lands and people, and that their criticisms must also be "treated with appropriate solicitude." *Id.* at 16a-17a.

The panel also declined the Corps's request to hold that if an agency offers any response to serious criticisms, effects cannot be highly controversial. *Id.* at 15a-16a. It explained that the test "is not the volume of ink spilled . . . , but whether the agency has through the strength of its response, convinced the court that it has materially addressed and resolved serious objections to its analysis." *Id.* at 16a; *id.* at 23a (the Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983))).

Evaluating the Corps's responses to the same four serious criticisms on which the district court had focused, the panel held that the Corps failed that test.

First, the Corps "failed to address" a relevant study on leak-detection time and "did not evaluate" the possibility of a slow leak. Pet. App. 19a, 21a. The study showed the pipeline's leak-detection system was less effective than "visual identification," by an employee or private citizen passing by. *Id.* at 18a-19a. That "cast[] serious, unaddressed doubt on the Corps's statement that the system" would detect leaks within seconds. *Id.* at 18a. The Corps "acknowledge[d] that it did not explicitly discuss the . . . report." *Id.* at 19a (quotation omitted). The Tribes also introduced evidence that pinhole leaks in similar systems "leaked for hours or days after similar detection systems failed." *Id.* at 20a (quotation omitted). When asked why it had not evaluated "an undetected slow pinhole leak, the Corps responded that 'there was no particular reason.'" *Id.* at 21a (quotation omitted).

Second, the Corps's assessment of the likelihood of a spill had relied "on general pipeline safety data, rather than [the pipeline] operator's specific safety record." *Id.* at 21a. The record revealed "a serious risk that [the operator's] record is worse than the industry average." *Id.* at 22a. But the Corps did not explain why its EA did not "incorporate that record into its analysis" of the likelihood of a spill. *Id.* (quotation omitted).

Third, the Corps made only "passing reference to winter conditions' 'mixed' effects, without more." *Id.* at

24a. The record contained expert reports showing "winter conditions create significant difficulties" for spill response. *Id.* (quotation omitted). The panel explained that the Corps "would have been entitled to substantial deference" if it had identified how winter conditions can contain spills, or how they can slow spill response, and concluded "that winter's countervailing effects measured out to zero." *Id.* at 25a. But the Corps's EA made "no attempt" to do that. *Id.*

Fourth, the Corps did not explain "its choice to ignore the real-world possibility of significant human errors or technical malfunctions" when "calculating what it claimed was a worst-case estimate" that formed the core of its spill analysis. *Id.* at 27a. Expert evidence before the Corps showed, for example, that spills usually occur when multiple things go wrong at once. *Id.* Its "failure to explain why it declined to consider any such eventualities leaves unresolved a substantial dispute as to its worst-case discharge calculation." *Id.* at 27a-28a.

The panel concluded that the Corps's repeated failure to adequately respond to evidence or explain its reasoning left the pipeline's effects in controversy and called for an EIS. *Id.* at 31a. The EIS process exists "to provide robust information" when an EA "leav[es] a project's effects uncertain." *Id.* at 15a. The Corps been given one, year-long "opportunity to resolve the Tribes' serious criticisms" already "and failed to do so." *Id.* at 31a. This made the case for an EIS even "stronger." *Id.*

The panel then turned to the remedy and found no abuse of discretion in the district court's application of the *Allied-Signal* factors to vacate the easement that the Corps had issued based on the deficient EA.

As to the seriousness of the error, the Corps's failure to justify the decision "to forgo an EIS" before granting the easement, after being given a second chance to do so, supported vacatur. *Id.* at 33a. The panel rejected petitioner's proposed approach of (1) assuming the Corps would complete a NEPA-compliant EIS, and (2) asking if the Corps could then grant the same easement because that approach lacked support in precedent. *See id.* at 34a-35a. And it "would subvert" NEPA by giving agencies license "to build first and conduct comprehensive reviews later." *Id.* at 35a.

As to disruption, the panel concluded that the district court had "considered all important aspects of the issue," including economic consequences. *Id.* at 37a. Petitioner disagreed with how the court weighed the evidence, but a reviewing court should not second-guess that weighing of evidence "[i]n view of the discretion owed the district court" and in light of its consideration of the appropriate factors. *Id.* Petitioner's arguments were, in any event, "undercut significantly" by the reversal of the order requiring the pipeline to be shut down. *Id.*

On that issue, the panel held the district court erred in "order[ing] the pipeline to be shut down without . . . making the findings necessary for injunctive relief." *Id.* at 40a. The district court assumed a shutdown

followed from vacatur of the easement, but vacatur meant only that the pipeline would be "an encroachment," and the Corps could decide "how and on what terms" to "enforce its property rights." *Id.* at 39a. Because the case was "quite unusual"—involving an easement, rather than a construction or operation permit—the panel "cabin[ed]" its "decision to the facts before" it. *Id.*

7. In May 2021, the district court denied the Tribes' motion to permanently enjoin the pipeline. *Id.* at 892a, 894a (noting "the Corps actively tolerates [the pipeline]'s continued operation" and had not acted to enforce the easement). The Corps has taken no enforcement action to date and the pipeline remains operational. Petitioner has expanded the pipeline's capacity, even as the easement has been vacated. *See* Dakota Oil Pipeline Expansion Completed: Update, Argus Media (Aug. 3, 2021) (reporting capacity increase of 180,000 barrels per day), perma.cc/QC49-PXU6.

8. Petitioner sought rehearing en banc, which was denied after no judge requested a vote. Pet. App. 895a.

9. Petitioner sought a stay of the mandate pending the resolution of this petition, which was also denied. *See* Order, D.C. Cir. No. 20-5197, Doc. 1898480 (May 13, 2021).[6]

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[6] Tribal Respondents again note, for the Court's convenience, that the petition cites evidence filed during briefing on the permanent injunction, which was never before the panel. *See, e.g.*, Pet. 5, 22, 34-36 (citing Docket Entries 593 & 596). Tribal

This petition followed.

REASONS TO DENY THE PETITION

I. The First Question Presented Does Not Warrant Certiorari.

The panel below applied the familiar arbitrary and capricious standard to the administrative record before it, and held that the Corps violated NEPA when it chose not to prepare an EIS for a major crude oil pipeline underneath a critical Treaty-protected water supply. This fact-bound decision does not warrant review. To argue otherwise, Petitioner mischaracterizes both the decision below and the applicable precedent.

A. There is no split on the standard of review of NEPA claims.

Courts review an agency's decision not to prepare an EIS under the "arbitrary and capricious" standard. *Marsh* v. *Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). To do so, a court asks if "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* Though "narrow," this review is still "searching and careful," and courts must "carefully review the record and *satisfy[ ] themselves* that the agency has made a reasoned

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Respondents similarly assume that the petition does not mean to imply this evidence is relevant to vacatur. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 158 n.16 (1970) (Evidence not before the court below "cannot be properly considered.").

decision" based on the information before it. *Id.* (emphasis added).

Petitioner devotes several pages to the run-up to the decision in *Marsh*, but it is not clear why. Pet. 17-19. The D.C. Circuit applied arbitrary and capricious review to NEPA claims before *Marsh*. *See, e.g.*, *Nat'l Wildlife Fed'n* v. *Appalachian Reg'l Comm'n*, 677 F.2d 883, 889 (D.C. Cir. 1981) (collecting cases). And it still does. *See, e.g.*, *Vecinos para el Bienestar de la Comunidad Costera* v. *Fed. Energy Regul. Comm'n*, 6 F.4th 1321, 1327 (D.C. Cir. 2021).

If anything, *Marsh* is relevant as a cautionary tale. Petitioner cites two dissents from denials of certiorari urging the Court to resolve the standard of review of NEPA claims. Pet. 17-18 (citing *Gee* v. *Boyd*, 471 U.S. 1058, 1059 (1985) (White, J., dissenting from denial of certiorari); *Morningside Renewal Council, Inc.* v. *U.S. Atomic Energy Comm'n*, 417 U.S. 951, 954 (1974) (Douglas, J., dissenting from denial of certiorari)). When the Court did so, each Justice who joined those dissents joined the Court's unanimous conclusion that, in the end, "the difference between" circuits' differently worded standards was "not of great pragmatic consequence." *Marsh*, 490 U.S. at 377 n.23. This serves as reminder that cert-stage claims often wither under merits-stage scrutiny.

The fact that the panel below used the phrase "convincing case" does not mean it applied a different standard, as Petitioner asserts. Pet. 19-20. The D.C. Circuit sometimes uses four factors to guide arbitrary

and capricious review in the NEPA context.[7] But as Petitioner acknowledges, *id.* at 19, the D.C. Circuit has expressly stated that this factor parallels arbitrary and capricious review. *See Sierra Club* v. *Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011) ("Although our decisions have frequently (but not invariably) repeated the phrase 'convincing case' . . . our scope of review is in fact the usual one." (citation and quotation omitted)); *TOMAC* v. *Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006) (listing the factors after the "arbitrary, capricious, or an abuse of discretion" standard). Indeed, it mirrors a phrase in this Court's standard description of arbitrary and capricious review. *See State Farm*, 463 U.S. at 43 (an agency must "articulate a satisfactory explanation for its action); *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (same); *see also Marsh*, 490 U.S. at 378 ("courts should not automatically defer . . . without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision").

This is not a case where the agency "considered the relevant impact at length" and reached a reasoned conclusion about it. Pet. 21. Instead, the panel found that concerns presented by Tribal experts went "unaddressed," were "discount[ed]," or had been entirely

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[7] *See, e.g.*, *Sierra Club* v. *Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983). The others are "(1) whether the agency took a 'hard look' at the problem; (2) whether the agency identified the relevant areas of environmental concern; . . . and (4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum." *Id.*

"ignore[d]." Pet. App. 20a, 25a, 27a; *see also id.* at 18a (Corps "failed entirely to respond" to deficiencies in its analysis). This is the commonly used analytical framework for arbitrary and capricious review in all circuits and this Court.

Petitioner points to two portions of the panel decision as "illustrat[ing]" something other than arbitrary and capricious review, but both show the opposite. Pet. 21. First, with respect to the pipeline's remote leak detection system, which the Corps heavily relied upon to support its FONSI, the court held that the Corps had "failed to address" detailed expert critiques of the system. Pet. App. 18a-19a. This omission cast "serious, unaddressed doubt" on the Corps's confidence in it. *Id.* at 18a; *see also id.* at 19a ("[t]he Corps has failed to address the apparent disconnect" between historically poor performance and Petitioner's claims of effectiveness). The panel highlighted the Corps's admission that "there was no particular reason" it failed to analyze undetectable pinhole leaks. *Id.* at 21a.

Second, as to the company's poor safety record, the panel concluded that the Corps must "cogently explain" why it declined to weigh the operator's safety record in assessing the risk of a spill, as this Court's precedent explicitly requires. *Id.* at 23a. But "the Corps made no effort to do so." *Id.* (citing *State Farm*, 463 U.S. at 48).

The panel's discussion of why the Corps failed to adequately explain its reasoning on two other issues, ignored by Petitioner, further confirms that the panel applied ordinary arbitrary and capricious review. With

respect to winter conditions, the Corps "simply declared the evidence 'mixed' and offered no attempt at explaining its apparent conclusion that winter's countervailing effects measured out to zero." Pet. App. 25a. The panel explained that "[h]ad the Corps considered the problem and concluded that no comprehensive analysis was possible," its decision would have been entitled to deference. *Id.* at 25a-26a. Similarly, the court recognized that the Corps could have explained how the effects of ice on slowing the spread of a spill counterbalanced the difficulty of cleanup. But the Corps did not do either: The Corps's failure to "consider" the issues at all was the problem. *Id.* And as to worst-case discharge, the Corps did not "begin to explain its choice to ignore the real-world possibility of significant human errors or technical malfunctions," which "leaves unresolved a substantial dispute as to its . . . calculation." *Id.* at 27a-28a.

The same is true of the panel's reference to the Corps's inability to "resolve" expert controversies. *Id.* at 16a-18a. Read in context, the panel did not apply a higher standard of scrutiny. The panel even provided examples of how the Corps could have "resolved" expert critiques, by considering the critiques and explaining its decision in light of them. *Id.* at 24a-25a. This confirms that the panel merely asked whether the Corps had addressed the relevant factors and did not "offer[] an explanation for its decision that runs counter to the evidence" in front of it. *State Farm*, 463 U.S. at 48. This is nothing more than a fact-specific application of conventional arbitrary and capricious review.

B. There is no split on the repealed regulatory definition of "significance."

Departing from the question presented, Petitioner next takes issue with the panel's interpretation of the "highly controversial" intensity factor in NEPA's now-repealed implementing regulation defining significance. But the panel never ruled that the presence of "controversy" is "dispositive" and always triggers an EIS. Pet. 24-25. In fact, the panel noted that "[i]mplicating any one of the [intensity] factors *may* be sufficient to require development of an EIS." Pet. App. 30a (emphasis added).[8] The panel recognized that criticism and opposition do not establish a "substantial dispute" over an action's likely effects, but that "concrete objections to the Corps's analytical process and findings" from expert agencies might. *Id.* at 14a (quotation omitted).

The panel found both significance factors met. As to intensity, the panel found multiple material factual disputes around the pipeline's potential impacts. *Id.* at 30a-31a. The panel also highlighted the important "context" of the case. 40 C.F.R. § 1508.28 (2019). Here, that context was a "landscape of profound cultural importance, and the water supply for the Tribes and

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[8] The assertion that the panel held that "a single intensity factor suffices to 'trigger the need to produce an EIS,'" Pet. 24, badly misquotes the decision. The quoted language arises in the background discussion of NEPA, in which the panel correctly observed that actions with "significant environmental effects" trigger an EIS. Pet. App. 6a; *Kleppe* v. *Sierra Club*, 427 U.S. 390, 399 (1976).

millions of others." Pet. App. 31a. Taken together, these factors weighed in favor of an EIS. So did the fact that the Corps had been given a chance to justify its decision in a year-long remand, and had fallen short. *Id.*

Petitioner asserts that other circuits "squarely reject" the D.C. Circuit's approach, Pet. 25, but none of the cited cases hold that single intensity factor can never trigger an EIS. In most, the issue was not presented because the court found that the effects of the action were not highly controversial in the first place. *See McGuinness* v. *U.S. Forest Serv.*, 741 F. App'x 915, 927 (4th Cir. 2018); *Hillsdale Env't Loss Prevention, Inc.* v. *U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1181 (10th Cir. 2012); *Coliseum Square Ass'n, Inc.* v. *Jackson*, 465 F.3d 215, 234 (5th Cir. 2006); *Soc'y Hill Towers Owners' Ass'n* v. *Rendell*, 210 F.3d 168, 184 (3d Cir. 2000). In the remaining case, the agency was not required to assess significance at all. *See Sierra Club* v. *U.S. Forest Serv.*, 828 F.3d 402, 411 (6th Cir. 2016). Petitioner's claimed circuit split is illusory.

Petitioner then repeats its mistaken claim that the Court applied something other than arbitrary and capricious review in assessing controversy. Pet. 26-27. The panel did not rule, either implicitly or explicitly, that the "mere fact of disagreement among experts" renders a project controversial enough to warrant an EIS. *Id.* at 26. The fact that other cases, on different records, conclude that the agency had sufficiently addressed criticisms of its analysis only reinforces the fact-bound nature of APA review. *See WildEarth Guardians* v. *Conner*, 920 F.3d 1245, 1263 (10th Cir.

2019) (finding agency's analysis showed "there was no legitimate controversy"); *Hillsdale Env't Loss Prevention*, 702 F.3d at 1182 ("none of the federal or state agencies" opposed "the Corps's analysis"); *Highway J Citizens Grp.* v. *Mineta*, 349 F.3d 938, 957 (7th Cir. 2003) (stating "mere . . . disagreement" is insufficient); *Ind. Forest All., Inc.* v. *U.S. Forest Serv.*, 325 F.3d 851, 861 (7th Cir. 2003) (finding agency "provided alternative scientific data that addresses the controversy"); *North Carolina* v. *FAA*, 957 F.2d 1125, 1133 (4th Cir. 1992) (noting controversy but finding that a supplemental EIS for another project would address it); *Roanoke River Basin Ass'n* v. *Hudson*, 940 F.2d 58, 64 (4th Cir. 1991) (stating agency "addressed the specific comments of the other agencies"). One does not discuss the highly controversial factor at all. *See Save Our Cumberland Mountains* v. *Kempthorne*, 453 F.3d 334, 339 (6th Cir. 2006).

C. This first question does not present an important issue.

1. The "highly controversial" regulatory factor no longer exists. *See supra* p. 4 n.1; 85 Fed. Reg. at 43,322 ("The controversial nature of a project is not relevant to assessing its significance.").[9] The panel's interpretation of this defunct factor will have no effect going forward. There is thus no merit to Petitioner's claim that people will submit comments in NEPA's public

[9] Instead of assessing "intensity," agencies now analyze "the potentially affected environment" considering four factors. 40 C.F.R. § 1501.3(b).

comment process to "manufacture a high controversy" going forward. Pet. 32; Br. of the Am. Fuel & Petrochemical Mfrs., et al. as Amici Curiae 18-19. Petitioner's claim that litigants will now feel some inexorable pull to the D.C. Circuit is meritless for the same reason. Pet. 33. No one will "flock," *id.*, to the D.C. Circuit to challenge an agency's compliance with a repealed regulation.

Nor is there any reason to believe the panel's interpretation of this now-repealed regulation will "thwart" infrastructure projects. *Id.* at 32. It has been nearly a year since the panel issued the decision below. Just one court has cited its discussion of the highly controversial factor, and that court upheld an agency's decision not to prepare an EIS. *See Sierra Club* v. *U.S. Army Corps of Eng'rs*, 997 F.3d 395, 407 (1st Cir. 2021). Only one other court has cited the panel's NEPA analysis. *Red Lake Band of Chippewa Indians* v. *U.S. Army Corps of Eng'rs*, No. CV 20-3817, 2021 WL 430054 at *12 (D.D.C. Feb. 7, 2021). It also upheld a no-EIS decision.

2. The answer to the question presented is not outcome determinative in this case. The decisions below addressed just one of the Tribes' three challenges to the Corps's NEPA analysis. Pet. App. 817a. And they addressed just one set of claims—the NEPA claims. *Id.* at 817a-818a. Petitioner does not acknowledge the other deficiencies in the Corps's decision.

3. Finally, the Corps is poised to issue the ordered EIS, which it estimates in September 2022. *See*

U.S. Army Corps of Engineers Omaha District, Dakota Access Pipeline (accessed Dec. 9, 2021), perma.cc/MP6K-LVG9. That decision will produce a new record and a new decision on an easement that will supplant the current decision.

II. The Second Question Presented Does Not Warrant Certiorari.

The courts of appeals that have addressed the issue apply the same test to decide whether to vacate unlawful agency action, as Petitioner admits. Pet. 28. This lack of a split is "reason enough" to deny certiorari. *Id.* at 27; Sup. Ct. R. 10(a). In finding no abuse of discretion in the district court's vacatur order, the panel applied this consensus test. The petition makes a plea to review this finding, but correcting errors in a fact-based application of an unchallenged legal standard is not a basis for certiorari. Additionally, the decision will have little impact because the panel reversed the shutdown order, leaving the vacatur order with no on-the-ground effect and little precedential value in other vacatur determinations. This Court should deny certiorari.

A. There is no split on the standard for vacatur of unlawful agency action.

The Administrative Procedure Act directs courts to "set aside" unlawful agency action. 5 U.S.C. § 706(2). Given that directive, vacatur of the underly action is the ordinary remedy when an agency has acted

unlawfully. *See, e.g.*, *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (APA "requires agencies to engage in reasoned decisionmaking, and directs that agency actions be set aside if they are arbitrary or capricious" (citations and quotations omitted)).

Even so, courts in some situations exercise discretion to leave agency action in place during a remand. As Petitioner acknowledges, courts have converged around the same two-part discretionary test for assessing whether to do so. Pet. 28. That test balances "the seriousness of the [action's] deficiencies" and "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal*, 988 F.2d at 150-51.

1. Petitioner asks this Court to decide "[w]hether procedural error under NEPA per se warrants remand with vacatur." Pet. ii. But the panel below nowhere held that it does. Instead, it expressly recognized that "[a] court is not without discretion to leave agency action in place while the decision is remanded for further explanation," and applied the two-part *Allied-Signal* test. Pet. App. 32a (quotation omitted). Indeed, the district court previously remanded to the Corps without vacatur in this very case. Pet. App. 498a. The case for vacatur is stronger when an agency fails to get it right a second time—a fact not present in any case cited by Petitioner. *See Comcast Corp.* v. *FCC*, 579 F.3d 1, 8-9 (D.C. Cir. 2009) (vacating rule when agency "failed to heed [court's] direction and [it was] again faced with the same objections").

2. In the body of the petition, Petitioner leaves the question presented behind. Instead, it claims that in applying the consensus test, the panel below "broke rank" with D.C. Circuit precedent and other circuits in how it applied both steps of the test. Pet. 29. Petitioner is wrong on both fronts.

a. As to the seriousness of the error, Petitioner suggests (at 29-30) that any possibility that an agency may correct an error—such as by offering more explanation or remedying a procedural misstep—prohibits a conclusion that error is "serious" enough to support vacatur. No court has ever adopted such a standard, which would collide with the APA's admonition that unlawful agency action—including action "without observance of procedure required by law"—"shall" be "set aside." 5 U.S.C. § 706(2). Only recently, this Court affirmed the vacatur of agency action promulgated in violation of a "procedural" requirement. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1916. And courts routinely vacate procedurally deficient agency action despite the possibility of correction. *See, e.g.*, *Nat. Res. Def. Council* v. *Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2d Cir. 2018) (vacating a rule promulgated without notice and comment); *El Paso Elec. Co.* v. *FERC*, 832 F.3d 495, 510 (5th Cir. 2016) (vacating and remanding "for further explanation and fact finding").

Petitioner's cases reveal only that a fact-specific test calling for the exercise of discretion will produce varied results when applied to varied facts. For example, Petitioner relies on *Texas Ass'n of Mfrs.* v. *U.S. Consumer Prods. Safety Comm'n*, 989 F.3d 368, 383, 387

(5th Cir. 2021), where the Fifth Circuit remanded without vacatur in a case challenging a rule banning dangerous toys where there was a "serious possibility" the agency would be able to substantiate its decision after considering additional public comments. *Id.* at 389. Similarly, in *California Cmtys. Against Toxics* v. *EPA*, 688 F.3d 989 (9th Cir. 2012), the Ninth Circuit remanded without vacatur because the agency had offered "new reasoning" for its rule that it could adopt on remand, and there would be "severe" consequences if the rule were vacated. *Id.* at 993-94. Any procedural error, if one even existed, was harmless. *Id.* And in *Pollinator Stewardship Council* v. *EPA*, 806 F.3d 520, 532 (9th Cir. 2015), the Ninth Circuit did vacate a rule where studies deemed crucial by the agency might change the result and where leaving the rule in place "risk[ed] more potential" harm. *Id.*

Other cases cited by Petitioner (at 30) reinforce the fact-specific nature of the test that depends on the courts' weighing of both *Allied-Signal* factors. In *Cent. & S. W. Servs., Inc.* v. *EPA*, 220 F.3d 683, 692 (5th Cir. 2000), the Fifth Circuit largely upheld a regulation but found that the agency failed to respond to a handful of comments pertaining to a single industrial sector. The court declined to vacate the rule because the agency "may well be able to justify its decision" after responding to the comments, and "it would be disruptive to vacate a rule that applies to other members of the regulated community." *Id.*; *see also Cent. Me. Power Co.* v. *FERC*, 252 F.3d 34, 48 (1st Cir. 2001) (declining to vacate "at this time" where "further explanation" of a

new charge on electric utilities was needed but uncertainty from "[a]n on again-off-again" charge would cause harm). Neither case foreclosed vacatur. And in the only case reviewing a lower court ruling, the circuit court did not conduct the *Allied-Signal* analysis because "[i]t is the district court . . . that is best-suited to make these fine-grained and fact-intensive determinations." *Black Warrior Riverkeeper, Inc.* v. *U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290-91 (11th Cir. 2015) (accepting agency's admission that it underestimated environmental effects).

Petitioner also argues that the panel below erred by focusing on whether it was the deficiencies in the Corps's EA that were "serious," and should have instead asked whether the Corps could issue an easement despite the NEPA violation. Pet. 29. Notably, it does not cite any decision taking this approach in a NEPA case. There is a reason why: doing so would eviscerate Congress's charge that agencies consider and disclose the environmental impacts of their decisions *before* they take action.

To see why, assume that an agency decides to permit logging on national forest lands adjacent a national park or designated wild river, but entirely ignores NEPA's procedural requirements. Under Petitioner's approach, a court could ask only whether the agency *might* still be able to permit the logging once it complies with NEPA. But the answer to that question will always be yes, because NEPA imposes procedural requirements, not "substantive, result-based standards." *Robertson*, 490 U.S. at 351. The seriousness

factor would thus never support vacatur of the permits, effectively creating a per se rule against vacatur, in violation of the APA's language.

Regardless, the panel did accept Petitioner's invitation to focus the "seriousness" inquiry on "the Corps's odds of ultimately approving the easement," Pet. App. 35a, and still found vacatur warranted. Because NEPA prohibits uninformed agency action, the failure to prepare a legally required EIS raises a question as to whether the agency "chose correctly" regarding the substantive action. *Id.* at 36a (quoting *Oglala Sioux Tribe* v. *U.S. Nuclear Regul. Comm'n*, 896 F.3d 520, 538 (D.C. Cir. 2018)). NEPA violations can still be "serious" for *Allied-Signal* purposes, even if an agency "might ultimately be able to justify the ultimate action." *Id.*

Other courts agree. "The typical remedy for an EIS in violation of NEPA is . . . to vacate the agency action." *High Country Conservation Advocs.* v. *U.S. Forest Serv.*, 951 F.3d 1217, 1228 (10th Cir. 2020); *see also Cal. Wilderness Coal.* v. *U.S. Dep't of Energy*, 631 F.3d 1072, 1106 (9th Cir. 2011). Even so, in some situations, the *Allied-Signal* analysis will support remand without vacatur. *See, e.g.*, *Vecinos para el Bienestar de la Comunidad Costera*, 6 F.4th at 1332; *City of Los Angeles* v. *Dickson*, No. 19-71581, 2021 WL 2850586, at *3 (9th Cir. July 8, 2021) (failure to complete environmental review is a "serious error" but no vacatur due to uncontroverted evidence of "severely disruptive" effects).

b. Petitioner's argument that the panel below "precluded consideration" of the disruption factor is wrong. Pet. 30. The panel extensively addressed this factor.[10] The district court reviewed "bountiful briefing" on the issue of vacatur, Pet. App. 833a, and its assessment of disruption fills 12 pages of the Petition Appendix. *Id.* at 841a-853a. The panel reviewed its assessment under an "abuse of discretion" standard, and found that the district court "considered all important aspects of the issue and reasonably concluded that the harms were less severe than the Corps and [Petitioner] suggested." *Id.* at 37a. And Petitioner's claims of disruption were "undercut significantly" by the fact that vacatur did not require the pipeline to shut down. *Id.*

The panel nowhere suggested that vacatur is always warranted to further NEPA's purposes. Indeed, it noted that the district court declined vacatur the first time it found NEPA violations. *Id.* at 32a-33a. Among many other factors, the panel weighed that it would undermine NEPA's goals if an agency can take action first, and then point to the costs of undoing that action as a bar to vacatur in all cases. *Id.* at 33a. But the panel established no categorical rule.

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[10] Not for the first time, the Petition misquotes the opinion, claiming that panel found that "allowing 'economic consequences' to" support remand without vacatur "would 'subvert NEPA's purpose.'" *Id.* (quoting Pet. App. 35a). But the language Petitioner splices together from different sentences appears in the panel's discussion of the seriousness factor, not disruption.

The cases Petitioner cites (at 31) do not establish a split, or even any tension. Instead, they confirm that courts finding procedural error sometimes exercise their equitable discretion to vacate and other times remand without vacatur. For example, *U.S. Steel Corp.* v. *EPA*, 649 F.2d 572, 576 (8th Cir. 1981), a forty-year-old case that predates and hence does not apply *Allied-Signal*, left the agency action in place during remand, but noted that other circuits vacated similar procedurally invalid agency actions. *Id.* (following *W. Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 813 (9th Cir. 1980)). And *Cook Inletkeeper* v. *EPA*, 400 F. App'x 239, 242 (9th Cir. 2010) (mem.), left an action in place pending a voluntary remand to conduct admittedly deficient notice and comment.

In the end, Petitioner just disagrees with the district court's evaluation of the evidence and balancing of the *Allied-Signal* factors. This Court does not take cases to review "factual findings" or a claimed "misapplication of a properly stated rule of law." Sup. Ct. R. 10. Even if it did, Petitioner does not even try to offer any "basis for concluding that the district court abused its discretion." Pet. App. 37a.

B. This second question does not present an important issue.

1. Reality belies Petitioner's claim that this Court is all that stands between it and a shutdown of the pipeline. Pet. 33-35. Seventeen months have passed since the district court vacated the easement,

and the pipeline remains fully operational and has even expanded. The Corps has not acted to oust the pipeline; rather, it "acknowledge[d]" it might not "decide how to enforce its property rights prior to completion of the [EIS]." Pet. App. 869a. The EIS will be finalized, triggering a new easement decision and ending any chance of an interim shutdown, in September 2022. *See supra* p. 28.

2. There is also no merit to Petitioner's suggestion that the panel, made up of judges with a collective 69 years on the bench, somehow designed a "weapon" for shutting down "infrastructure projects." Pet. 32. Since the decision below, the D.C. Circuit has twice declined to vacate agency actions because the *Allied-Signal* factors counseled against disrupting infrastructure projects. *See Vecinos para el Bienestar de la Comunidad Costera*, 6 F.4th at 1332; *Shafer & Freeman Lakes Env't Conservation Corp.* v. *FERC*, 992 F.3d 1071, 1096 (D.C. Cir. 2021).

Environmental Def. Fund v. *FERC*, 2 F.4th 953 (D.C. Cir. 2021), *pet. for cert. filed*, No. 21-848 (Dec. 3, 2021), does not indicate otherwise. Pet. 33. There, the court applied *Allied-Signal* to vacate a certificate of public convenience and necessity for a natural gas pipeline. *Id.* at 976 (recognizing "there may be some disruption" but finding that it was "not at all clear" that FERC could remedy the "serious deficiencies" in its decision). Only then did the court note that it did "not wish to encourage" unlawful agency action in this context, where the certificate carried immense powers, such as the power to take private homes through

eminent domain. *Id.*[11] That remand without vacatur "sometimes invites agency indifference," is nothing new, and hardly controversial. *In re Core Commc'ns*, 531 F.3d 849, 861 (D.C. Cir. 2008) (Griffith, J., concurring).

3. Finally, the panel emphasized that the case was "quite unusual" because vacatur of the easement did not prevent the continued operation of the pipeline. Pet. App. 39a. The vacatur, therefore, has had little practical impact, and it did not set a precedent for the far-more common context in which vacatur arises. This unusual situation "cabins [the] decision to the facts before" the court and presents no groundbreaking precedent warranting this Court's intervention.

[11] The Federal Energy Regulatory Commission subsequently authorized the pipeline to continue to operate pending the remand proceeding, resolving disruption concerns. *Spire STL Pipeline LLC*, 177 FERC ¶ 61,147 (Dec. 3, 2021).

CONCLUSION

The petition for a writ of certiorari should be denied.

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