No. 21-560

In the Supreme Court of the United States

DAKOTA ACCESS, LLC, PETITIONER

v.

STANDING ROCK SIOUX TRIBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL REPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that, under since-amended regulations implementing the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, the United States Army Corps of Engineers was required to prepare an environmental impact statement before granting an easement for a portion of petitioner's Dakota Access Pipeline to cross underneath Lake Oahe.

2. Whether the district court abused its discretion in vacating the easement while the agency prepares an environmental impact statement on remand.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 985 F.3d 1032. An earlier order of that court granting in part and denying in part motions for a stay pending appeal (Pet. App. 855a-857a) is not published in the Federal Reporter but is available at 2020 WL 4548123.

The opinion of the district court vacating and remanding to the U.S. Army Corps of Engineers (Pet. App. 826a-854a) is reported at 471 F. Supp. 3d 71. Earlier opinions of that court (Pet. App. 359a-465a, 466a-499a, 776a-825a) are reported at 255 F. Supp. 3d 101, 282 F. Supp. 3d 91, and 440 F. Supp. 3d 1. The court's post-judgment opinion denying a renewed motion for a permanent injunction (Pet. App. 858a-894a) is not published in the Federal Supplement but is available at 2021 WL 2036662.

JURISDICTION

The court of appeals entered judgment on January 26, 2021. A petition for rehearing was denied on April 23, 2021 (Pet. App. 895a-896a). The petition for a writ of certiorari was filed on September 20, 2021. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, directs federal agencies to prepare a detailed statement, known as an environmental impact statement, before undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). NEPA "imposes only procedural requirements." *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 756 (2004). It "does not mandate particular results, but simply prescribes [a] necessary process" for agency decisionmaking. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

The Council on Environmental Quality (CEQ) in the Executive Office of the President, 42 U.S.C. 4342, has issued regulations to implement NEPA that generally bind other federal agencies, 40 C.F.R. 1500.3. The current regulations instruct agencies to determine "the appropriate level of NEPA review" by assessing whether a proposed action is "likely to have significant effects." 40 C.F.R. 1501.3(a)(2) and (3). Agencies may do so by preparing an environmental assessment, which is a "concise public document," 40 C.F.R. 1508.1(h), that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement," 40 C.F.R. 1501.5(c)(1). If the agency determines on the basis of the environmental assessment that an environmental impact statement is not

required, then it issues a "finding of no significant impact," setting forth the reasons why the agency action will not have a significant impact on the human environment. 40 C.F.R. 1501.6(a).

CEQ amended its regulations during the course of this dispute, making both substantive and reorganizational changes. See 85 Fed. Reg. 43,304, 43,357-43,376 (July 16, 2020). The pre-2020 regulations applicable here defined the term "significantly"—as used in NEPA's reference to agency actions "significantly affecting the quality of the human environment," 42 U.S.C. 4332(2)(C)—to require consideration of both "context" and "intensity." 40 C.F.R. 1508.27 (2019).* The regulations stated that "intensity" refers to "the severity of impact," 40 C.F.R. 1508.27(b) (2019), and they contained a list of matters that "should be considered in evaluating intensity," *ibid.*, such as "[t]he degree to which the proposed action affects public health or safety," 40 C.F.R. 1508.27(b)(2) (2019).

This case primarily concerns one of the enumerated "intensity" considerations in the pre-2020 regulations: "The degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. 1508.27(b)(4) (2019).

2. Petitioner constructed and operates the Dakota Access Pipeline, an approximately 1200-mile oil pipeline from North Dakota to Illinois. Pet. App. 7a-8a. Small portions of the pipeline cross waters of the United States—including a 1.7-mile segment that crosses

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* The regulations cited here were also published in the 2020 edition of the Code of Federal Regulations, which preceded the effective date of the 2020 rulemaking. See 85 Fed. Reg. at 43,304. For clarity, this brief refers to the regulatory regime predating the 2020 rulemaking as the "pre-2020 regulations."

beneath Lake Oahe, an artificial reservoir on the Missouri River created by the federal government's construction of the Oahe Dam. *Id.* at 7a; see Pet. 5. "The dam's construction and Lake Oahe's creation flooded 56,000 acres of the Standing Rock Reservation and 104,420 acres of the Cheyenne River Sioux Tribe's trust lands." Pet. App. 7a. Those tribes now rely on Lake Oahe for many important purposes, including "agriculture, industry, and sacred religious and medicinal practices." *Ibid.*

The U.S. Army Corps of Engineers (the Corps) operates the Oahe Dam, and petitioner was required to obtain an easement and certain permissions from the Corps in order to construct the portion of its pipeline crossing beneath Lake Oahe. See Pet. App. 8a, 365a. Granting such easements and permissions can be a "major Federal action[]" for NEPA purposes. 42 U.S.C. 4332(2)(C); see 40 C.F.R. 1508.1(q)(3)(iv). In December 2015, the Corps published for public comment a draft environmental assessment of the proposed crossing, including a draft finding of no significant impact. Pet. App. 8a. Two other federal agencies—the U.S. Department of the Interior and the U.S. Environmental Protection Agency—both submitted comments raising concerns with the Corps' draft environmental assessment. *Id.* at 9a-10a. In July 2016, the Corps finalized its environmental assessment and, consistent with the earlier draft, made a finding of no significant impact. *Id.* at 10a. In light of that finding, the Corps declined to prepare an environmental impact statement. *Ibid.*

The Standing Rock Sioux Tribe brought this action against the Corps shortly after the Corps issued its July 2016 final environmental assessment. Pet. App. 10a. The Cheyenne River Sioux Tribe later intervened as a

co-plaintiff, petitioner intervened as a co-defendant, and the case was consolidated with similar actions brought by two other tribes (the Oglala and Yankton Sioux Tribes). *Id.* at 782a-783a. The plaintiff tribes contended, among other things, that NEPA required the Corps to prepare an environmental impact statement for the proposed crossing. See *id.* at 783a.

On January 18, 2017, while the litigation was ongoing, the Department of the Army published a notice of its intent to prepare an environmental impact statement. Pet. App. 11a; see 82 Fed. Reg. 5543, 5544 (Jan. 18, 2017). Following the change in Administrations, President Trump directed the Secretary of the Army to reconsider that decision, and the Department of the Army subsequently published a notice that it no longer intended to prepare such a statement. Pet. App. 12a; see 82 Fed. Reg. 8661 (Jan. 24, 2017) (presidential memorandum); 82 Fed. Reg. 11,021 (Feb. 17, 2017) (notice). In February 2017, the Corps issued the necessary easement to petitioner. Pet. App. 783a. Petitioner then completed the portion of the pipeline that crosses under Lake Oahe, and the pipeline has been operational since March 2017. *Id.* at 831a.

3. In June 2017, the district court granted partial summary judgment to the tribes, finding that the Corps had failed to adequately consider three issues in its NEPA analysis before making a finding of no significant impact: "whether the project's effects were likely to be 'highly controversial,' the impact of a hypothetical oil spill on the Tribes' fishing and hunting rights, and the environmental-justice effects of the project." Pet. App. 12a (citation omitted) (court of appeals' summary); see *id.* at 359a-465a (district court's opinion). The court remanded to the Corps for additional consideration of

those matters, without vacating the easement or permissions that the agency had already granted. *Id.* at 435a-437a. The Corps concluded its analysis on remand in August 2018, again finding no significant impact and declining to prepare an environmental impact statement. *Id.* at 12a; see *id.* at 500a-775a. The tribes then renewed their NEPA challenge to the Corps' action. *Id.* at 777a.

In March 2020, the district court again granted partial summary judgment to the tribes, finding that the Corps' NEPA analysis on remand was flawed and that the Corps was required to prepare an environmental impact statement. Pet. App. 776a-825a. The court addressed only the "highly controversial" factor, without reaching the other two issues on which it had remanded. *Id.* at 789a. As explained above, the pre-2020 NEPA regulations directed agencies to consider the "degree to which the effects [of a proposed action] on the quality of the human environment are likely to be highly controversial." 40 C.F.R. 1508.27(b)(4) (2019). The court acknowledged that an agency is not required to prepare an environmental impact statement merely because "some people may be highly agitated and * * * willing to go to court" and that "something more is required." Pet. App. 791a (citations omitted). But the court perceived the requisite "something more" here, in the form of unresolved controversy raised by "subject-matter expert[s]." *Id.* at 816a (quoting *National Parks Conservation Ass'n* v. *Semonite*, 916 F.3d 1075, 1086 (D.C. Cir.), reh'g denied, 925 F.3d 500 (D.C. Cir. 2019) (per curiam)).

The district court focused on what it regarded as four points of controversy: (1) the effectiveness of the pipeline's leak-detection system, Pet. App. 797a-801a; (2) the

performance history of the pipeline operator, *id.* at 801a-803a; (3) the effect of harsh winter weather on response efforts in the event of a spill, *id.* at 803a-806a; and (4) the hypothetical worst-case discharge from a spill, *id.* at 806a-816a. The Corps had considered the issues raised by the tribes' experts, but the court found that the Corps' responses had failed to "do away with the controversy." *Id.* at 816a; see *id.* at 799a-805a.

In its March 2020 decision, the district court ordered a remand to the Corps to prepare an environmental impact statement but also invited additional briefing on "the status of the easement—and ultimately, the oil—in the meantime." Pet. App. 824a. In July 2020, the court vacated the easement that the Corps had granted to petitioner for crossing Lake Oahe and ordered that the pipeline—which had been in operation since March 2017—be "shut down within 30 days." *Id.* at 853a-854a; see *id.* at 826a-854a.

4. a. Petitioner and the Corps appealed and sought an emergency stay of the district court's shutdown order from the court of appeals. The Corps argued, among other things, that even if the easement for the pipeline to cross under Lake Oahe were vacated, the result would merely be that the pipeline is encroaching on federal property, and the Corps may consent to such an encroachment in appropriate circumstances under its regulations. See Gov't C.A. Stay Mot. 13-14. On August 5, 2020, a motions panel of the court of appeals granted a partial stay pending appeal. Pet. App. 855a-857a. Specifically, the panel stayed the district court's order "to the extent" that the order required petitioner "to shut down the Dakota Access Pipeline and empty it of oil." *Id.* at 856a. The panel concluded that the district court had failed to "make the findings necessary" for

such relief under "'the traditional four-factor test'" for granting an injunction, which applies in NEPA cases. *Ibid.* (quoting *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 158 (2010)). The panel left open the possibility that the district court might make those findings in the future, and it otherwise declined to stay the district court's order. *Ibid.*

b. A differently constituted merits panel of the court of appeals largely affirmed, in a unanimous decision issued on January 26, 2021. Pet. App. 1a-40a.

Like the district court, the court of appeals viewed the matter as primarily controlled by its earlier decision in *National Parks*, *supra*, which had also involved the Corps. See Pet. App. 14a-15a. The court of appeals explained that, under *National Parks*, a "decision is 'highly controversial'" for purposes of the applicable, pre-2020 NEPA regulations "if a 'substantial dispute exists as to the size, nature, or effect of the major federal action.'" *Id.* at 13a-14a (quoting *National Parks*, 916 F.3d at 1083) (emphasis omitted). The court further explained that "not just any criticism" will suffice and that "'*something more* is required for a highly controversial finding besides the fact that some people may be highly agitated and be willing to go to court over the matter.'" *Id.* at 14a (quoting *National Parks*, 916 F.3d at 1083). But the court viewed *National Parks* as having "clarified what more is required" in this context by establishing that the presence of significant controversy may trigger a requirement to prepare an environmental impact statement when an agency "confronts but fails to resolve serious outside criticism, leaving a project's effects uncertain." *Id.* at 14a-15a.

In *National Parks*, the Corps had not prepared an environmental impact statement before granting a

permit for the construction of electrical transmission towers across the James River, near historic Jamestown. 916 F.3d at 1077-1081. The court of appeals in *National Parks* found the effects of the project to be "highly controversial" within the meaning of the pre-2020 NEPA regulations because several federal and state agencies with expertise in historical conservation had criticized the Corps' assessment of the impact of the project on Jamestown and its environs. *Id.* at 1083-1085; see *id.* at 1085 (describing the objections as not merely "hyperbolic cries of * * * not-in-my-backyard neighbors," but rather "the considered responses * * * of highly specialized governmental agencies and organizations"). The Corps had addressed and attempted to resolve those criticisms. The court nonetheless concluded that the relevant question "is not whether the Corps attempted to resolve the controversy, but whether it succeeded." *Id.* at 1085-1086.

Here, the court of appeals rejected the Corps' arguments for distinguishing *National Parks* on the merits, including the argument that criticisms lodged by the tribes and their retained experts should not be equated with the views of the "disinterested public officials" at issue in the earlier case. Pet. App. 16a (citation omitted); see *id.* at 15a-18a. And the court concluded that, under the reasoning of *National Parks*, the "unresolved scientific controversies" identified by the district court sufficed to trigger a requirement to prepare an environmental impact statement. *Id.* at 18a; see *id.* at 18a-28a (discussing the leak-detection system, the operator's safety record, the effect of winter weather on response times, and the Corps' modeling for a worst-case discharge scenario).

With respect to remedy, the court of appeals agreed with the view—already endorsed by the motions panel—that the district court had erred in enjoining operation of the pipeline, but otherwise affirmed. Pet. App. 37a-40a. In particular, the court of appeals held that the district court had not abused its discretion in vacating the easement while remanding to the agency. *Id.* at 31a. The court of appeals stated that, under its precedent concerning vacatur of an agency's action, "two factors govern[ed] that exercise of discretion: 'The decision whether to vacate depends on the seriousness of the order's deficiencies * * * and the disruptive consequences of an interim change that may itself be changed.'" *Id.* at 32a (quoting *Allied-Signal, Inc.* v. *United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993)). In the court's view, the district court's conclusion in this case that those factors tipped against a remand without vacatur was not an abuse of discretion, particularly where that court had already remanded to the agency without vacatur once before to address some of the same points of controversy. *Id.* at 32a-37a. In addition, the court of appeals noted that "[petitioner's] assessment of vacatur's consequences is undercut significantly by the fact that [the court] agree[d] that the district court's shutdown order cannot stand." *Id.* at 37a. Like the motions panel, however, the merits panel left open the possibility of an injunction against operation of the pipeline in the absence of an environmental impact statement. See *id.* at 39a.

5. In May 2021, the district court denied the tribes' renewed motion for an injunction that would have required shutting down the pipeline during the remand to the Corps. Pet. App. 858a-894a. The court found that the tribes had failed to demonstrate any irreparable

harm from continued pipeline operations, noting that available federal data "reflect but a single, 1.7-barrel leak between 2010 and 2020 on any crude-oil pipeline installed using" the same horizontal drilling technology used for the pipeline's crossing under Lake Oahe. *Id.* at 876a; see *id.* at 874a-891a. The tribes did not appeal that denial of their renewed request for an injunction barring operation of the pipeline.

ARGUMENT

Petitioner contends (Pet. 15-27) that the court of appeals applied an incorrect legal standard in determining that the U.S. Army Corps of Engineers was obligated to prepare an environmental impact statement and that the decision below reflects a division of authority in the courts of appeals concerning the "highly controversial" factor in the pre-2020 NEPA regulations. That contention does not warrant further review.

The court of appeals' decision need not be read to adopt the heightened standard that petition attacks, and the court's fact-bound determination that the Corps failed to respond adequately to concerns raised by commenters does not present a basis for certiorari. This Court's review is also unwarranted because the decision below has limited prospective significance, for two reasons. First, the court of appeals' decision rested on the "highly controversial" factor in the pre-2020 regulations, but that factor has been removed from the regulations and is relevant only for the closed and diminishing set of agency actions governed by the pre-2020 regulations. Second, the Corps is preparing an environmental impact statement on remand and anticipates completing that statement by November 2022. When the Corps finalizes an environmental impact statement,

the question whether the pre-2020 NEPA regulations *required* it to do so will be largely academic.

Petitioner further contends (Pet. 27-32) that the court of appeals erred in concluding that the district court did not abuse its discretion in ordering vacatur of the Corps' grant of the easement to petitioner. That issue likewise does not warrant review. Petitioner errs in asserting that the court of appeals adopted a categorical rule requiring vacatur whenever a reviewing court finds that an agency committed certain procedural errors. Instead, the court concluded that the district court did not abuse its discretion by ordering vacatur in the circumstances of this case. And subsequent developments have made clear that the vacatur order has limited practical significance. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioner contends that the court of appeals did not apply the correct arbitrary-and-capricious standard in reviewing the Corps' decision and instead applied a "heightened 'convince the court' standard." Pet. 16 (capitalization and emphasis omitted); see Pet. 16-23. Petitioner relies on language in the court's opinion that, read in isolation, could suggest a more searching standard of review than what is prescribed by the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* But the decision below did not clearly adopt such a heightened standard or purport to overrule circuit precedent applying the correct APA standard. And in any event, this Court's review would not be warranted given the 2020 amendments to the NEPA regulations.

a. The pre-2020 NEPA regulations directed federal agencies to consider, as part of their decision-making process for determining whether to prepare an environmental impact statement, the "degree to which the

effects" of a proposed agency action "on the quality of the human environment are likely to be highly controversial." 40 C.F.R. 1508.27(b)(4) (2019). Those pre-2020 regulations did not define the term "controversial." The lower courts interpreted "controversial" in this context to refer to a substantial dispute about "the size, nature, or effect of the major federal action," *Town of Cave Creek* v. *FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003) (citation and emphasis omitted)—not to "whether or how passionately people oppose" the action as a matter of policy or preference, *Wild Wilderness* v. *Allen*, 871 F.3d 719, 728 (9th Cir. 2017). The pre-2020 "highly controversial" factor therefore did not create a "heckler's veto," in which an agency is disabled from making a finding of no significant impact whenever "some people may be highly agitated and be willing to go to court over the matter." *Fund for Animals* v. *Frizzell*, 530 F.2d 982, 989 n.15 (D.C. Cir. 1975) (per curiam). "Otherwise, opposition, and not the reasoned analysis set forth in an environmental assessment, would determine whether an environmental impact statement would have to be prepared." *North Carolina* v. *FAA*, 957 F.2d 1125, 1133-1134 (4th Cir. 1992).

When an agency considers the evidence before it and determines that an environmental impact statement is not necessary, the agency's determination is subject to judicial review "under the deferential 'arbitrary and capricious' standard," *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2569 (2019) (citing 5 U.S.C. 706(2)(A)). Indeed, in *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989), this Court described an agency's NEPA analysis—there, a decision not to prepare a supplemental environmental impact statement in light of additional data—as a "classic example of a

factual dispute the resolution of which implicates substantial agency expertise," subject to review under the APA's arbitrary-and-capricious standard. *Id.* at 376; see *id.* at 376-377 & n.23 (rejecting arguments for a heightened standard of review). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As long as the agency "examined 'the relevant data' and articulated 'a satisfactory explanation' for [its] decision, 'including a rational connection between the facts found and the choice made,'" the agency's decision should not be set aside. *Department of Commerce*, 139 S. Ct. at 2569 (quoting *State Farm*, 463 U.S. at 43).

Moreover, this Court has already made clear in the specific context of NEPA that, when "specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378. Accordingly, the fact that there might be evidence "supporting a different scientific opinion does not render the agency's decision arbitrary and capricious." *Wetlands Action Network* v. *United States Army Corps of Eng'rs*, 222 F.3d 1105, 1120-1121 (9th Cir. 2000), cert. denied, 534 U.S. 815 (2001). Such disagreements are "part of the everyday existence" of expert agencies like the Corps, and the "highly controversial" factor in the pre-2020 NEPA regulations did not demand "scientific unanimity" before an agency could prepare an environmental impact statement. *Indiana Forest Alliance, Inc.* v. *United States Forest Serv.*, 325 F.3d 851, 861 (7th Cir. 2003). The agency needed only to "examine the

relevant data" and "articulate a satisfactory explanation for its action," through which its analytical "'path may be reasonably discerned.'" *State Farm*, 463 U.S. at 43 (citation omitted).

b. Here, the court of appeals did not articulate a precise standard of review. The court instead relied primarily on its prior decision in *National Parks Conservation Ass'n* v. *Semonite*, 916 F.3d 1075 (D.C. Cir.), reh'g denied, 925 F.3d 500 (D.C. Cir. 2019) (per curiam), which had also involved the Corps' consideration of the "highly controversial" factor in the pre-2020 NEPA regulations. See Pet. App. 18a (stating that *National Parks* established "the proper legal framework"); see also pp. 8-9, *supra*.

In *National Parks*, the court of appeals recognized that its role in reviewing an agency's decision not to prepare an environmental impact statement "is a limited one," 916 F.3d at 1082 (citation omitted), and that the court is "[r]esponsible for determining whether the [agency's] decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" *ibid.* (quoting 5 U.S.C. 706(2)(A)). The court equated that standard with the question "whether the [agency] is 'able to make a convincing case for its finding' of no significant impact." *Ibid.* (quoting *Sierra Club* v. *United States Dep't of Transp.*, 753 F.2d 120, 127 (D.C. Cir. 1985)). And, in response to the Corps' argument in *National Parks* that the agency had adequately considered and responded to commenters' concerns, the court stated that the relevant question "is not whether the Corps attempted to resolve the controversy, but whether it succeeded." *Id.* at 1085-1086. The court repeated that observation in this case, see Pet. App. 15a-16a, adding that "[t]he decisive factor is not the volume

of ink spilled in response to criticism, 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.

Petitioner asserts (Pet. 20) that by requiring an agency to "succeed[]" in "resolv[ing]" a purported controversy among experts, Pet. App. 16a (quoting *National Parks*, 916 F.3d at 1086), the court of appeals demanded that the agency address the matter in a manner that persuades the court that the serious objections lack merit. Construing the pre-2020 "highly controversial" factor to impose such a requirement would conflict with this Court's recognition that an agency "must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378. Requiring an agency to dispositively settle all scientific or expert controversy in order to make a finding of no significant impact would also threaten to render the environmental-assessment process "meaningless," because challengers could always seek to "create a controversy," and would have every incentive to do so, by "filing suit and supplying an affidavit by a hired expert." *Greenpeace Action* v. *Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1993).

The court of appeals' decision need not, however, be read to adopt such a heightened standard. The court's earlier decision in *National Parks*, on which the court relied in this case, recites the correct arbitrary-and-capricious standard, see 916 F.3d at 1082, and the court had applied the arbitrary-and-capricious standard in numerous earlier NEPA cases, which the panel here did not purport to overrule, see, *e.g.*, *Town of Cave Creek*, 325 F.3d at 327; *Citizens Against Burlington, Inc.* v.

Busey, 938 F.2d 190, 201 (D.C. Cir.) (Thomas, J.), cert. denied, 502 U.S. 994 (1991). Petitioner focuses (Pet. 16) on the court's statement that an agency must "*convince*[] the court that it has materially addressed and resolved serious objections to its analysis." Pet. App. 16a (emphasis added). But similar language appears in earlier decisions, and the court has generally equated the requirement to make a convincing case with a requirement to offer analysis that satisfies traditional arbitrary-and-capricious review. See, *e.g.*, *Sierra Club* v. *Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2012) (stating that, notwithstanding having "frequently * * * repeated the phrase 'convincing case' since" its origin in a 1973 decision, "our scope of review is in fact the usual one" under the APA).

Moreover, in conducting its review of the record in this case, the court of appeals pointed to what it regarded as a failure by the Corps to address the objections and supporting evidence or to do so adequately. See Pet. App. 19a, 20a, 21a, 22a, 23a, 25a-26a, 27a-28a. Whether or not the court was correct in its assessment, a failure to explain is an accepted basis for setting aside agency action under the traditional arbitrary-and-capricious standard endorsed in *Marsh*. See, *e.g.*, *State Farm*, 463 U.S. at 43-44.

For these reasons, the decision below can be read to be based on a determination by the court of appeals that the Corps had acted arbitrarily and capriciously by failing to take a "hard look" at the criticisms advanced by the tribes. *National Parks*, 916 F.3d at 1077; see *Marsh*, 490 U.S. at 385. And any case-specific error in the court of appeals' review of the record or its application of the arbitrary-and-capricious standard to this particular agency action does not warrant further

review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

Petitioner also contends (Pet. 23-27) that the decision below conflicts with decisions of other courts of appeals addressing the "highly controversial" factor. But petitioner does not identify any court of appeals in which the outcome of this case—in which other federal agencies and tribes with subject-matter expertise raised significant concerns about the Corps' analysis, and the court found that the Corps had failed to respond adequately to those concerns, see pp. 4-5, 9, 17, *supra*—would have necessarily been different. And petitioner's purported circuit split is largely derivative of its claim that the D.C. Circuit applied a heightened standard of review. See, *e.g.*, Pet. 26 (contrasting the D.C. Circuit's approach with "'hard look' review" in other circuits). As discussed above, it is not clear that the court of appeals actually applied the standard petitioner attributes to it.

c. In any event, further review is not warranted for two reasons independent of whether petitioner's characterization of the decision below is correct.

First, CEQ significantly amended its NEPA regulations during the course of this dispute and eliminated the "highly controversial" factor that was the basis for the decision below. 85 Fed. Reg. at 43,357-43,376. In the preamble to that rulemaking, CEQ explained that the new regulations "eliminate most of the [intensity] factors in favor of a simpler, more flexible approach for agencies to assess significance." *Id.* at 43,321-43,322. CEQ further explained that the new regulations eliminate the "highly controversial" factor, in particular,

"because the extent to which effects may be controversial is subjective and is not dispositive of effects' significance." *Id.* at 43,322; see 40 C.F.R. 1501.3(b). The revised regulations apply to "any NEPA process begun after September 14, 2020." 40 C.F.R. 1506.13.

Following the change in Administrations, CEQ published a notice explaining that it was "engaged in a comprehensive review of the 2020 NEPA Regulations to ensure that they provide for sound and efficient environmental review of Federal actions, including those actions integral to tackling the climate crisis." 86 Fed. Reg. 55,757, 55,759 (Oct. 7, 2021). CEQ did not propose to restore the "highly controversial" factor, see *id.* at 55,768-55,769 (text of proposed amendments), but it did state that it planned to propose further revisions at an appropriate time in the future, see *id.* at 55,759 (stating that, in a later phase, "CEQ intends to issue a second [notice of proposed rulemaking] to more broadly revisit the 2020 NEPA Regulations"). CEQ also explained that the 2020 regulations had been challenged in five pending lawsuits "on a variety of grounds," and that those suits have been largely stayed pending further rulemaking. *Id.* at 55,758.

The regulations thus remain in flux to some extent. But in their current form, they do not contain the "highly controversial" factor that was the basis for the decision below (and *National Parks*). See Pet. App. 13a-18a. And even if CEQ were to restore a similar factor in a future rulemaking, the agency could do so in terms that would eliminate or diminish any continuing significance of the decision below—for example, by making clear that an agency must take into account any controversy about the size, nature, or effect of its action, but that the agency retains its authority under ordinary

principles of administrative law to make its own finding of no significant impact.

Second, the Corps is in the process of preparing an environmental impact statement for the agency action at issue here. The Corps has solicited public comment, see 85 Fed. Reg. 55,843 (Sept. 10, 2020), and presently expects to complete the statement by November 2022. The question whether NEPA obligated the Corps to prepare such a statement will lack any substantial importance after the Corps in fact prepares one.

2. Petitioner separately contends (Pet. 27-32) that the court of appeals erred in affirming the district court's decision to vacate the easement issued by the Corps during a remand to the agency. The government argued below that a remand without vacatur would be appropriate. See Pet. App. 31a-32a. But petitioner again fails to demonstrate that any error in the decision below warrants certiorari.

As the court of appeals recognized, a reviewing court has discretion "to leave agency action in place" during a remand to the agency. Pet. App. 32a. And circuit precedent sets forth "two factors governing the exercise of [that] discretion: 'The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Ibid.* (quoting *Allied-Signal, Inc.* v. *United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993)). The district court correctly identified those factors, see Pet. App. 835a (describing the *Allied-Signal* factors as "the operative test"), and the court of appeals found no abuse of discretion in the district court's application of them to this dispute, see *id.* at 32a-33a.

Petitioner is correct (Pet. 27) that this Court has never directly addressed "what standard governs decisions to grant or deny vacatur pending remand under the APA." Petitioner is also correct (Pet. 28) that the D.C. Circuit's *Allied-Signal* factors have become the "predominant test" applied in most courts of appeals. But those observations together suggest that the D.C. Circuit's reliance on *Allied-Signal* here does not conflict with any decision of this Court or another court of appeals. Petitioner contends (*ibid.*) that the "panel * * * grafted onto [the *Allied-Signal*] test a categorical rule that effectively deems procedural error too serious to warrant remand without vacatur." Such a categorical rule would be unsound. But the decision below does not purport to announce a categorical rule requiring vacatur whenever an agency violates NEPA's procedural requirements. Indeed, the district court had remanded *without* vacatur at an earlier juncture of this case, see Pet. App. 473a-497a, and the court of appeals discussed that earlier exercise of discretion—one that would be difficult to square with the categorical rule that petitioner perceives—in finding no abuse of discretion in the district court's decision to vacate the easement this time around, see *id.* at 32a.

In any event, as the court of appeals explained, the practical significance of the parties' dispute about vacatur was "undercut significantly" by the merits panel's decision to adhere to the view, first adopted by a motions panel in granting a partial stay pending appeal, that "the district court's shutdown order cannot stand." Pet. App. 37a; see *id.* at 37a-38a. Vacating the easement renders the existing pipeline an encroachment on federal lands but does not in itself require that the pipeline be shut down—a circumstance that "makes this case

quite unusual" and "cabins [the decision below] to the facts." *Id.* at 39a. And after the decision below, the district court denied the tribes' renewed motion for a permanent injunction against operation of the pipeline. See *id.* at 858a-894a. Particularly in light of those developments, the fact-bound question whether the district court abused its discretion in vacating the Corps actions in the circumstances of this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2021