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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

The Government urges this Court to deny review on the surprising ground that it is "not clear" what standard the D.C. Circuit "actually applie[s]" in reviewing National Environmental Policy Act ("NEPA") cases. Gov. Br. 18. This assertion, if true, would be a compelling basis for immediate review given the disproportionate volume of administrative law litigation in the D.C. Circuit and NEPA's role in evaluating the Nation's most important infrastructure projects. But the actual basis for review is equally compelling: The D.C. Circuit's decision in 2019, clearly reaffirmed in this case, to substitute a more intrusive standard of review for that required by *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), and other circuits.

All this was clear enough to the district court, which believed the 2019 decision had sufficiently changed the law in the Circuit to require an environmental impact statement ("EIS"). And it was sufficiently clear for the Government to appeal *that* ruling to urge that the 2019 decision be confined to its facts, in a futile effort to render it consistent with the larger body of this and other courts' precedents.

Now that the D.C. Circuit has dug in its heels on that 2019 precedent, it is too late for a new administration to pretend that the basis for the ruling below is a Delphic mystery. There is even less of a basis in reality for Plaintiffs' outlandish claim that the panel merely "applied ordinary arbitrary and capricious review." Pls. Br. 22. Both are wrong. As the D.C. Circuit's opinion clearly states, the Army Corps of Engineers must prepare an EIS under NEPA because the Corps' exhaustive responses to criticisms failed to

"convince the court." Period. This is not review under *Marsh*, but usurpation of agency authority.

Nor is the Government correct that the decision below lacks "prospective significance." Gov. Br. 11. The D.C. Circuit's "convince-the-court" standard is not confined to the one NEPA "intensity" factor at issue here, which the Government poses might eventually be superseded after the regulatory-amendments dust settles; the details of any eventual change to those factors are irrelevant to the D.C. Circuit's fundamental disregard of its role in the review scheme. Even less persuasive is the notion that review could somehow be mooted because the Government expects to complete the EIS that the D.C. Circuit ordered by November 2022. *Id.* Whether an EIS *is* required *at all* is the question in the case. Had the D.C. Circuit performed its job properly, it would have answered that question in the negative. And because the D.C. Circuit's error in departing from *Marsh* and fundamental principles of arbitrary-and-capricious review is obvious, this Court can correct it long before November 2022, on an expedited basis if necessary.[1]

On the second question presented, Respondents claim that the decision "does not purport to announce a categorical rule requiring vacatur whenever an agency violates NEPA's procedural requirements." Gov. Br. 21. But whatever the panel "purport[ed]" to require, it articulated a test that yields only one outcome in cases of procedural error—vacatur. The D.C. Circuit has already invoked this test to foreclose remand without vacatur in other cases, gutting the

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[1] Indeed, the Government's estimates for completing an EIS have slided by more than fifteen months since an EIS was first ordered in this case.

more flexible approach that Respondents concede prevails elsewhere.

Finally, DAPL's continued operation is no reason to deny review. As trade association *amici* note, the decision below will be "wielded as a weapon to stop pipeline and any major energy or other infrastructure projects in their tracks." AFPM Br. 4. And even within the confines of this case, while *the Government* might now prefer a scenario it believes may permit it to shut the pipeline down if it chooses, states, workers, non-plaintiff tribes, and others who would suffer devastating economic *and* environmental harm from shutting down DAPL should not be left at the Government's mercy.

I. THIS COURT SHOULD REVIEW THE D.C. CIRCUIT'S ALTERNATIVE TO ARBITRARY-AND-CAPRICIOUS REVIEW

Respondents cannot paper over the decision's fundamental error: It decisively alters the review standard in NEPA cases. That error—in both the language and substance of the decision below—is fundamentally at odds with this Court's decision in *Marsh*, and it reopens a circuit split.

A. Plaintiffs' attempt to cast the panel's approach as mere "conventional 'arbitrary and capricious' review," Pls. Br. 2, is strange for an opinion that never uses the words "arbitrary" or "capricious" and never quotes, references, or cites the statutory standard of review (5 U.S.C. § 706(2)(A)). Instead, the panel invoked a rule fundamentally incompatible with that standard: Rather than "defer to 'the informed discretion of the responsible federal agenc[y],'" *Marsh*, 490 U.S. at 377, the decision required the Corps to "*convinc*[*e*] *the court* that it has materially addressed

and resolved serious objections to its analysis," App. 16a (emphasis added). And rather than engage in "narrow" review to "satisf[y] [itself] that the agency has made a reasoned decision," *Marsh*, 490 U.S. at 378, the court "*delve*[*d*] *into the details* of [Plaintiffs'] criticisms" to make its own determination of both their validity and the "strength of [the Corps'] response," App. 16a (emphasis added).

The Government's professed newfound uncertainty about the standard of review the court below applied is not credible. Plaintiffs won summary judgment below only by convincing the district court that the law in the D.C. Circuit had fundamentally changed in precisely this manner with Judge Tatel's decision in *National Parks Conservation Association v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019). According to Plaintiffs, *Semonite* had "significantly clarified the legal landscape governing … NEPA," D.E. 465, at 1, by imposing a heightened standard where "robust technical criticism" compels an EIS, requiring the agency to make "a convincing case" of "no significant impact," D.E. 433-2, at 11. The district court agreed, treating *Semonite* as "significant guidance," App. 777a, and relying on it to reverse its earlier determinations that the Corps had adequately considered topics of potential controversy, *compare*, *e.g.*, App. 386a-88a (originally concluding that EA adequately addressed leak detection), *with* App. 797a-801a (concluding the opposite). On appeal, Judge Tatel "relied primarily on [his] prior decision" in *Semonite* to affirm the district court's analysis. Gov. Br. 15. The decision below thus applied the same erroneous review standard for NEPA cases that Plaintiffs themselves characterized as more demanding than arbitrary-and-capricious review.

Plaintiffs nonetheless claim the D.C. Circuit has not changed the standard of review because a number of older D.C. Circuit NEPA cases recite the words "arbitrary and capricious." Pls. Br. 20. It would be surprising if any computerized search of D.C. Circuit cases did *not* turn up cases using that stock phrase. The question here is whether the D.C. Circuit is *applying* the law as this Court has instructed—reviewing agency action instead of usurping agency authority. The answer is no. In *Marsh*, this Court settled a circuit split by rejecting the then-prevailing D.C. Circuit rule that arbitrary-and-capricious review in NEPA cases includes a unique "convincing case" requirement that sets it apart from the ordinary version of that standard. *Gee v. Boyd*, 471 U.S. 1058, 1059 (1985) (White, J., dissenting from denial of certiorari). But with *Semonite* the D.C. Circuit returned to its old ways, and in this case the D.C. Circuit made clear that it means it, effectively crowning judges rather than agencies as the final arbiters whether an EIS must be prepared. Pet. 21-23.

The Government resists taking the panel at its word, however, ostensibly because the panel cited *Semonite*, and *Semonite* "recites the correct arbitrary-and-capricious" standard. Gov. Br. 15-16. But that misses the point. *Semonite* changed arbitrary-and-capricious review in NEPA cases by grafting on a new requirement: The agency must now convince the court that a project will not significantly affect the environment. Equating that with arbitrary-and-capricious review is the very problem warranting this Court's review.

Plaintiffs, for their part, try to distract from the rule the court applied by rehashing their criticisms of the Corps' environmental analysis. Pls. Br. 15-16.

But the panel's treatment of each confirms that the Corps *did* address all four issues on which the district court found deficiencies—just not in a manner that fully "convinced" the court. For example, the Corps addressed a spill under winter conditions, concluding that such conditions would "'have a mixed effect on efforts to contain an oil spill.'" App. 24a. The panel's complaint—that "estimat[ing]" the relative sizes of these mixed effects "might have been more forceful," *id.*—is precisely the type of micromanaging that *ordinary* APA review prohibits. Plaintiffs' invention of yet further ways the Corps' 300-page analysis could have been "more forceful," *id.*, is relevant only under a rule where a court is allowed to "delve into the details" and assess for itself the "strength of [the Corps'] response." App. 16a.

Tellingly, the Government does *not* accept Plaintiffs' characterization of the decision. Instead, it acknowledges—with considerable understatement—that the opinion "could suggest a more searching standard of review than what is prescribed by the Administrative Procedure Act." Gov. Br. 12. As the Government admits in the end, if the D.C. Circuit meant what it said, its standard "would conflict with this Court's recognition" in *Marsh* "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.'" *Id.* at 12, 16. The D.C. Circuit has now reversed in two high-profile cases based on that standard. It is obvious that they mean it, and that the rule is important enough to merit review.

B. Respondents also oppose review because the Government "significantly amended its NEPA regulations during the course of this dispute and eliminated

the 'highly controversial' factor" that the Government claims "was the basis for the decision below." Gov. Br. 18. But the issue here runs deeper than the NEPA regulations, and goes to the D.C. Circuit's attempt to shift the final word on environmental analysis from the expert agencies to the court. The ultimate issue under NEPA is whether the project may "significantly" impact the environment, thus requiring an EIS. 42 U.S.C. § 4332(2)(C). "[H]ighly controversial" is merely one of many factors in that decision. 40 C.F.R. § 1508.27 (2019). Plaintiffs themselves pointed out in the district court that after *Semonite*, it is the ultimate "finding of no significant impact" that must be "'convincing.'" D.E. 433-2, at 11.[2]

Similarly, the Court should not treat the ongoing EIS process as reason to deny review. Gov. Br. 20; Pls. Br. 27-28. Respondents do not explain how the Court would ever answer the question here under that reasoning, because it arises only when a court improperly requires an EIS. Regardless, the supposed imminence

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[2] In any event, it is wrong to assert that the "highly-controversial" factor "will have no effect going forward." Pls. Br. 26. The previous administration removed the "highly-controversial" factor in 2020, and the new administration has embarked on rulemaking to reverse some or all of the 2020 changes. CEQ has a multi-phase plan "to reconsider and revise the 2020 NEPA Regulations." *National Environmental Policy Act Implementing Regulations Revisions*, 86 Fed. Reg. 55,757, 55,759 (Oct. 7, 2021). It "intends to … propose further revisions" and "more broadly revisit the 2020 NEPA Regulations" in subsequent rulemakings, which could include the "highly-controversial" factor. *Id.* In the end, despite that fact that the "flux" the Government references, Gov. Br. 19, is largely within its own control, the Government does not represent that its rulemaking will—or could—somehow overrule the requirement that agencies convince courts on the NEPA factors, including whether a project's effects are highly controversial.

of an EIS here is overstated. The Government has pushed back its estimated completion date from "mid-2021," D.E. 507, at 2, to September 2021, D.E. 561, at 10, to March 2022, D.E. 601 ¶ 1, to September 2022, D.E. 610, at 4, and, most recently, to November 2022, Gov. Br. 20. Moreover, if the Corps' original analysis satisfied NEPA, then the district court wrongly vacated the easement, and the Corps would have no need to prepare an EIS.

Finally, Plaintiffs note that they raised other challenges to the Corps' NEPA analysis. *See* Pls. Br. 27. But the questions presented would fully address the district court's grounds for summary judgment and vacatur (App. 776a-854a) as well as the D.C. Circuit's decisions affirming those orders. This Court also regularly decides cases that it later remands "for further proceedings" consistent with its opinion, including allowing courts below to reassess their prior holdings under the correct legal standard. *See*, *e.g.*, *Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, 141 S. Ct. 1951, 1961, 1963 (2021); *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020). It is unremarkable that the district court might reach other questions on remand.

II. THE COURT SHOULD REVIEW THE D.C. CIRCUIT'S RULE EFFECTIVELY COMPELLING VACATUR WHENEVER AN AGENCY USES THE WRONG PROCESS

Respondents likewise dismiss as fact-bound the panel's affirmance of the district court's vacatur of DAPL's easement. But they again gloss over the lower court's fundamental rewriting of the controlling legal standard.

The parties agree that whether to vacate agency action pending remand is a matter of judicial discretion governed in most circuits by two factors articulated in *Allied-Signal, Inc. v. NRC*: "'the seriousness of the order's deficiencies'" and "'the disruptive consequences'" of vacatur, 988 F.2d 146, 150-51 (D.C. Cir. 1993); *see* Pls. Br. 29; Gov. Br. 20-21. Respondents cast the panel's decision as a routine application of this broadly recognized standard. But the panel's reasoning eviscerates the *Allied-Signal* test by predetermining the outcome on both factors—effectively requiring vacatur in the event of procedural error.

As to the first factor, the panel found it *irrelevant* "whether the [agency's] ultimate action could be justified" on remand. App. 35a. Instead, it held that if an agency violates the APA by "bypass[ing] a fundamental procedural step," it must "justify its decision to skip that procedural step" to avoid vacatur. *Id.* Neither Respondent explains how an agency could *ever* avoid vacatur under that standard when the court has already found that the agency could *not* justify skipping the same procedural step.

As to the second factor, the district court adopted a categorical legal rule that considering the "significant economic harm" of potentially shutting down the pipeline would "subvert NEPA's objectives." App. 33a. The panel found "no basis" to challenge that rule, and instead endorsed its premise that withholding vacatur would "giv[e] substantial ammunition to agencies" to "build first" and complete "procedural prerequisite[s]" like notice-and-comment rulemaking and NEPA review later. *Id.* at 35a.

These rulings, taken together, leave no way to meet either *Allied-Signal* factor in cases of procedural error. The Government disagrees, pointing to the fact

that the district court "remanded *without* vacatur at an earlier juncture of this case." Gov. Br. 21. At that stage, however, the court did not rule that the Corps must follow the different "procedure" of preparing an EIS on remand. Instead, it found a "likelihood" that the Corps could "substantiate" its decision using the *same* procedural mechanism it had used already: an environmental assessment. App. 486a.

The panel's application of an "abuse of discretion" standard of review, Pls. Br. 34, in no way diminishes the need to review the *legal* error below. Courts always abuse their discretion by misapplying the law. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Here the panel made express legal holdings while affirming the district court's categorical legal rule. The D.C. Circuit has already cited these holdings to support vacatur, *Env't Def. Fund v. FERC*, 2 F.4th 953, 976 (D.C. Cir. 2021), undercutting Plaintiffs' assertion that the decision is "'cabin[ed] … to [its] facts,'" Pls. Br. 37. Indeed, that decision's reliance on the panel decision here is now the subject of another petition pending before this Court. *See* Cert. Pet. 20, *Spire Mo., Inc. v. Env't Def. Fund*, No. 21-848 (U.S. Dec. 3, 2021).

Nor can Plaintiffs avoid review of the categorical rule adopted below by suggesting *other* reasons that might have supported vacatur on their own, such as the Corps' alleged failure to cure errors following a prior remand predating *Semonite*. Pls. Br. 29. The court below did not make the ruling that Plaintiffs now hypothesize; instead, it rested its decision on legal error. Similarly, the district court's discussion of disruptive consequences, *id.* at 34, does not cure the error; rather, *despite* acknowledging how harmful a shutdown following vacatur might be, the court still

categorically refused to remand without vacatur, App. 841a-51a.

Respondents never meaningfully dispute that "[s]uch a categorical rule would be unsound," Gov. Br. 21, and out of step with other circuits. As Plaintiffs concede, other circuits apply a "fact-specific test" that can "produce varied results" under both factors even in cases involving procedural error, such as "deficient notice and comment" procedures. Pls. Br. 30, 35. That some of these cases found procedural errors "harmless," *id.* at 31, just proves the point: In other circuits, vacatur is inappropriate if the additional procedure required on remand will not likely change the agency's decision. A rule compelling vacatur for procedural error is the antithesis of this fact-specific inquiry.

Finally, that DAPL is currently operating does not diminish the disruptive consequences of vacatur or remove the need for this Court's review. Gov. Br. 21-22; Pls. Br. 35-37. Until the decisions below, DAPL operated according to a lawfully granted easement. Without one, the Government asserts that DAPL continues to operate only at the grace of the Corps—grace that the Government claims it can withhold at any time. *See* Pet. 35; D.E. 609, at 2; D.E. 610, at 3-4; D.E. 612, at 3. The Government may prefer that arrangement, but Petitioner and the many others who rely on the pipeline have the right to insist on the correct application of legal rules that would restore DAPL's property right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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