No. 21-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The National Environmental Policy Act ("NEPA") requires that, before taking any "major Federal action[] significantly affecting the quality of the human environment," a federal agency must first prepare a "detailed" environmental impact statement ("EIS"). 42 U.S.C. § 4332(2)(C). The agency first prepares a shorter environmental assessment to determine whether the action's environmental impacts are "significant." If so, the agency prepares an EIS; if not, it prepares a finding of no significant impact.

In *Marsh v. Oregon Natural Resources Council*, this Court held that when reviewing an agency's decision to forgo an EIS, courts must "defer" to the agency's "'informed discretion'" even when they "find contrary views more persuasive." 490 U.S. 360, 377-78 (1989). In the decision below, however, the D.C. Circuit deviated from that approach. It asked whether the U.S. Army Corps of Engineers had "convinced the court" it was unnecessary to prepare an EIS—on top of the hundreds of pages of environmental analysis the Corps already performed—for the Corps' decision to grant an easement for a pipeline that crosses a narrow strip of federally owned land. App. 15a-16a. Because the panel was not convinced by the Corps' response to criticisms of the pipeline, it upheld the district court's orders requiring the Corps to prepare an EIS and vacating the easement.

The questions presented are:

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; and

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

PARTIES TO THE PROCEEDING

The parties to the proceedings below were as follows:

Dakota Access, LLC. Dakota Access, LLC was an intervenor-defendant before the district court and appellant in the D.C. Circuit.

The Standing Rock Sioux Tribe; Yankton Sioux Tribe and Robert Flying Hawk, Chairman of the Yankton Sioux Tribe Business and Claims Committee; and Oglala Sioux Tribe were plaintiffs before the district court and appellees in the D.C. Circuit.

The Cheyenne River Sioux Tribe and Steve Vance were intervenors-plaintiffs before the district court and appellees in the D.C. Circuit.

The United States Army Corps of Engineers was defendant before the district court and appellant in the D.C. Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, counsel for petitioner certify as follows:

Dakota Access, LLC is a nongovernmental entity formed to construct and own the Dakota Access Pipeline. Dakota Access, LLC is owned 75% by Dakota Access Holdings, LLC and 25% by Phillips 66 DAPL Holdings LLC.

These companies are in turn owned as follows:

1. Dakota Access Holdings, LLC is wholly owned by Bakken Pipeline Investments LLC, which is owned 51% by Bakken Holdings Company, LLC, and 49% by MarEn Bakken Company LLC (a joint venture between MPLX LP and Enbridge Inc.).

2. Bakken Holdings Company LLC is owned 60% by ET CC Holdings LLC and 40% by Permian Express Partners LLC, which in turn is owned 87.7% by Sunoco Pipeline L.P. and 12.3% by Mid-Point Pipeline LLC (an indirect subsidiary of Exxon Mobil Corporation).

3. Sunoco Pipeline L.P. is a wholly owned, indirect subsidiary of Energy Transfer LP ("ET").

4. ET CC Holdings LLC is a wholly owned subsidiary of ET.

5. Phillips 66 DAPL Holdings LLC is owned 100% by Phillips 66 Partners Holdings LLC, which, in turn, is 100% owned by Phillips 66 Partners LP.

The following are parent companies, subsidiaries, or affiliates of Dakota Access, LLC, which have any outstanding securities in the hands of the public:

1. Phillips 66 Partner LP. Phillips 66 Partner LP holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries.

2. ET. ET holds an ownership interest in Dakota Access, LLC through several privately held subsidiaries. ET is a publicly traded partnership and is listed on the NYSE under the ticker symbol "ET." ET also owns the general partner interest and certain limited partner interests in Sunoco LP (NYSE: SUN) and USA Compression Partners, LP (NYSE: USAC).

3. MPLX LP, Enbridge Inc., and Exxon Mobil Corporation have several publicly traded entities.

RULE 14.1(b)(iii) STATEMENT

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are related to this case:

- *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 1:16-cv-01534-JEB (D.D.C.).

- *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, Nos. 20-5197, 20-5201 (D.C. Cir.) (judgment entered Jan. 26, 2021; rehearing petition denied Apr. 23, 2021).

- *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 17-5043 (D.C. Cir.) (injunction denied Mar. 18, 2017; appeal voluntarily dismissed May 15, 2017).

- *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-5259 (D.C. Cir.) (injunction denied Oct. 9, 2016; appeal dismissed Jan. 18, 2017).

Petitioner is aware of no additional proceedings in any court that are directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dakota Access, LLC respectfully requests a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The panel opinion (App. 1a-40a) is reported at 985 F.3d 1032. Pertinent district court opinions (App. 359a-499a, 776a-854a) are reported at 255 F. Supp. 3d 101, 282 F. Supp. 3d 91, 440 F. Supp. 3d 1, and 471 F. Supp. 3d 71, respectively. All other pertinent opinions, orders, and administrative decisions (App. 41a-358a, 500a-775a, 855a-96a, 913a-1160a) are unreported.

JURISDICTION

The D.C. Circuit entered judgment on January 26, 2021. Petitioner's timely petition for rehearing was denied on April 23, 2021. This Court's March 19, 2020 and July 19, 2021 orders extend the filing deadline for this petition to 150 days from that order (September 20, 2021). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Pertinent provisions of the Administrative Procedures Act, 5 U.S.C. §§ 702, 706; the Mineral Leasing Act, 30 U.S.C. § 185(a), (b), (f), (h); the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C); and the Council on Environmental Quality's National Environmental Policy Act Implementing Regulations, 33 C.F.R. pt. 325, App. B(7) (2019); 40 C.F.R.

§§ 1501.4, 1508.27 (2019), are set forth in the Appendix at 897a-912a.

STATEMENT

The National Environmental Policy Act ("NEPA"), requires federal agencies to evaluate the environmental effects of "major Federal actions" that will "significantly" impact the environment. 42 U.S.C. § 4332(2)(C). If the expected impact is significant, the agency must prepare a "detailed" environmental impact statement ("EIS"), *id.*, which often involves a years-long process that can delay important infrastructure projects if even a small part of the project requires federal authorization.

Congress tasked agencies—not the courts—with deciding which environmental impacts are "significant," requiring an EIS. Thirty years ago, this Court rejected several circuits' efforts to seize control of that decision. Rather than requiring agencies to "convinc[e]" the court "that the impact was insignificant," as the D.C. Circuit required at the time, *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983), this Court directed courts to defer to agency expertise "even if … a court might find contrary views more persuasive," *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989).

Decades later, the D.C. Circuit has charted a circuitous return to the "convincing case" standard *Marsh* rejected. The panel held that NEPA requires an EIS whenever environmental impacts are "highly controversial," and that this, in turn, requires the agency to "convinc[e] the court" that it has "resolved serious objections to its analysis." App. 15a-16a. Both premises conflict with decisions from multiple circuits. And their net effect—expressly substituting the

court's judgment for the agency's—turns *Marsh* on its head, reviving the long-settled circuit split it resolved.

The context of that holding deepens the need for this Court's review. The panel held that the U.S. Army Corps of Engineers ("Corps") violated NEPA when it issued an easement—based on hundreds of pages of environmental analysis prepared under two consecutive administrations—to allow the Dakota Access Pipeline ("DAPL") to pass under a narrow strip of federal land at Lake Oahe in North Dakota. App. 18a-29a. Following the Corps' issuance of an environmental assessment and grant of the easement, DAPL's construction was completed in March 2017, App. 377a, and it has subsequently safely transported nearly 1 billion barrels of crude oil cross country without a single spill on its mainline, Dist. Ct. Dkt. Entry ("D.E.") 520-3 ¶ 24; D.E. 543-2 ¶ 20. Despite this safety record, the panel was not convinced that the pipeline's safety features and construction method made the risk of an impactful spill too remote to warrant an EIS.

Compounding the problem, the panel held that this purported error warranted vacating the easement. The removal of the easement potentially leaves the pipeline vulnerable to a shutdown. The panel refused to consider (i) the likelihood that the Corps would reinstate the easement on remand; (ii) the multi-billion-dollar, thousands-of-jobs economic impact to North Dakota and neighboring states resulting from a crippling of North Dakota oil production; or (iii) the environmental impact of replacing even a fraction of DAPL's carrying capacity with rail transport. App. 30a-37a. The result is, in effect, a per se rule that even curable procedural errors under

NEPA always warrant vacatur, disruptive consequences be damned. This creates a further circuit split over the remedy for NEPA violations. The Court should grant review to resolve these conflicts and ensure DAPL's continued operation.

1. Agencies evaluate the significance of potential environmental impacts by preparing an environmental assessment ("EA"), 40 C.F.R. § 1501.4(b) (2019): a preliminary analysis that "normally should not exceed 15 pages," 33 C.F.R. pt. 325, App. B(7)(a) (2019). Under the Council on Environmental Quality ("CEQ") regulations applied here, an agency must assess the context of the proposed action plus ten intensity factors, including the impact on "public health or safety" or endangered species, and "[t]he degree to which the effects" are "likely to be highly controversial." 40 C.F.R. § 1508.27 (2019).[1] The agency must balance "the consequences of the harm" with "the likelihood of its occurrence." *New York v. NRC*, 681 F.3d 471, 482 (D.C. Cir. 2012).

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[1] In July 2020, the CEQ issued a final rule that eliminated this list of factors for new projects. *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,304, 43,352 (July 16, 2020). Four challenges to that rule are currently pending in federal court, but each is stayed while the CEQ reconsiders the rule. *See* Stipulation & Consent Order Staying the Proceeding, *Envtl. Justice Health All. for Chem. Policy Reform v. CEQ*, No. 1:20-cv-6143 (S.D.N.Y. Feb. 16, 2021) (ECF No. 65) (noting stays in three pending actions and granting stay in fourth); *see also* Notice of Appeal, *Wild Va. v. CEQ*, No. 3:20-cv-45 (W.D. Va. July 30, 2021) (noticing appeal from order dismissing fifth action); *Fact Sheet: List of Agency Actions for Review*, WhiteHouse.gov (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review (noting Biden Administration review of 2020 CEQ rule).

If the EA shows that a full EIS is unnecessary, the agency prepares a finding of no significant impact ("FONSI"). 40 C.F.R. § 1501.4(e) (2019). Otherwise, the agency completes an EIS, *id.* § 1501.4(c)-(d)—an "onerous" process, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 159 (2010), that takes 4.5 years on average.[2]

2. This case is about environmental analysis of a 1.7-mile segment of a 1,172-mile pipeline. For more than four years, DAPL has annually transported 200 million barrels of crude oil from the Bakken oil fields in North Dakota, through South Dakota and Iowa, to the Patoka oil terminal in Illinois.

That sounds like a lot of oil because it is. DAPL brings to market around 4 percent of the country's daily oil supply and 40% of the oil produced in North Dakota, which produces more oil than any other state except Texas. D.E. 520-4 ¶¶ 4, 16. The economic benefit is astounding: In North Dakota alone, DAPL generates as much as $2.5 billion in annual tax revenue and has helped create upwards of 24,000 jobs. Ct. App. Appendix ("A") 702; D.E. 596-1 ¶ 5(d)(iii), (viii). Three Native American tribes—the Mandan, Hidatsa, and Arikara Nations—rely on DAPL to transport 60 percent of their oil production, accounting for nearly half of their annual budget. D.E. 593-1 ¶¶ 6, 9.

Plaintiffs—four other Native American tribes—challenged the Corps' decision under the Mineral Leasing Act, 30 U.S.C. § 185, to grant an easement allowing DAPL to cross two narrow strips of federally owned lands abutting Lake Oahe in North Dakota.

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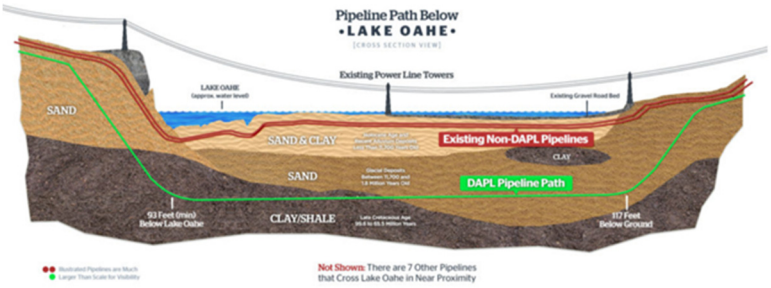
[2] Exec. Office of the President, CEQ, *Environmental Impact Statement Timelines*, at 1 (June 12, 2020), https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.

The Lake Oahe segment stretches 1.73 miles between two valves, each equipped with built-in, state-of-the-art pressure sensors linked to a system capable of detecting even a pinhole-sized leak well before it could cause any environmental harm. D.E. 520-3 ¶¶ 5, 6, 9; D.E. 543-2 ¶ 23.

The drilling method (horizontal directional drilling) used at Lake Oahe—illustrated below—"'virtually eliminat[es] the ability of a spill to interact with the surface water.'" A1830 (alteration in original). Leaked oil would follow the underground path of the pipeline to land on either side of the lake, rather than rise 92 feet to the lakebed through dense clay and other sediments. D.E. 520-1 ¶ 15; D.E. 520-3 ¶ 41; A1830. Indeed, horizontal directional drilling is so safe that federal data show only a *single*, 1.7-barrel leak reported on any crude oil pipeline installed using this method between 2010 and 2018. D.E. 520-1 ¶ 13; D.E. 543-2 ¶ 20; A1836.



D.E. 520-1 ¶ 9 fig. 1.

3. The Corps' initial environmental review under the Obama administration—culminating in an EA and FONSI in July 2016—was extensive. At 163 pages, plus 700 pages of appendices, the EA alone far exceeded the contemplated 15 pages. App. 41a-358a.

To satisfy NEPA's requirements for issuing the Lake Oahe easement and a permit to construct the Lake Oahe crossing, the EA comprehensively addressed efforts to preserve historical and cultural resources and other issues related to the environment and environmental justice—including cumulative impacts and twenty-five distinct aspects of the environment, App. 86a-252a. The Corps also analyzed six alternatives to the Lake Oahe crossing, including no crossing, App. 47a-86a, and included an entire section detailing the Corps' substantial effort—far "exceed[ing]" its legal obligations—to consult with local Native American tribes, including Plaintiffs. A211. The Corps carefully tracked the tribes' concerns—ranging from the risk of a spill, potential damage to Lake Oahe, and environmental justice—to ensure the EA addressed each concern. A611-14, A621-34; *see also* D.E. 209-8, at 146-61; D.E. 482-10, at 584-614.

The EA examined the likelihood and consequence of potential spills ranging from fewer than four barrels to thousands. App. 141a-43a. The analysis included project-specific models of a hypothetical worst-case spill at Lake Oahe calculated in accordance with Pipeline and Hazardous Materials Safety Administration ("PHMSA") regulations. App. 240a-42a. No scenario suggested material risk of a significant environmental impact. Although hypothesized large spills into Lake Oahe could have serious consequences, the Corps found their *likelihood* "extremely low" given "the engineering design, proposed installation methodology, quality of material selected, operations measures and response plans." App. 230a-31a. Based on this judicially approved "high consequence, but low likelihood" mode of reasoning, *see New York*, 681 F.3d at 478-79, the Corps determined through a FONSI

that an EIS was unnecessary and issued a construction permit.

4. Plaintiffs responded immediately—before the Corps could even issue the easement that became the focus of this lawsuit. Within days of the permit, they sought an injunction to halt construction. They also mobilized fierce opposition to the pipeline, including highly politicized protests and lobbying of political appointees. App. 782a; A164, A279-80.

Plaintiffs' legal efforts went nowhere. They did "*not* claim that a potential future rupture in the pipeline could damage their reserved land or water." A213. Instead, invoking the National Historic Preservation Act, they asserted that *construction* "might damage or destroy sites of great cultural or historical significance." *Id.* Both the district court and the D.C. Circuit refused to enjoin the construction. A196, A221; D.C. Cir. No. 16-5259, Doc. 1640062 (Oct. 11, 2016). Plaintiffs later sought to enjoin construction under the Religious Freedom Restoration Act—again without success. App. 360a; D.C. Cir. No. 17-5043, Doc. 1666652 (Mar. 18, 2017). Plaintiffs never sought preliminary injunctive relief under NEPA.

Plaintiffs' lobbying efforts fared significantly better: The Obama administration abruptly reversed course in September 2016, announcing it would reexamine the Corps' NEPA obligations. App. 782a. In October, the Corps reaffirmed it was simply reviewing its "decision making to confirm compliance," A231, and in December, an Army political appointee agreed that "the Corps' prior reviews and actions have comported with legal requirements," App. 375a. Nonetheless, the appointee used her position of authority to keep the Corps from issuing the easement. App. 374a-75a. Then, after the presidential election and in the

administration's final days, the Army (without agreement from the Corps itself) bowed to Plaintiffs' pressure and announced plans to prepare an EIS. App. 782a.

Once President Trump took office, however, the Corps completed its review of voluminous additional materials submitted even *after* it had completed the EA and FONSI and after it issued the construction permit. It found, with detailed supporting analysis, that none "would require supplemental NEPA documentation." A273-75. On February 8, 2017, the Corps announced that it would deliver the easement—restoring its original, expert judgment. App. 12a, 376a. Pipeline operations began on June 1, 2017. App. 377a.

5. Having failed to halt the pipeline's construction, Plaintiffs' shifted their focus to arguing that issuing the easement without preparing an EIS violated NEPA.

In June 2017, the district court granted the Corps and Dakota Access partial summary judgment on Plaintiffs' NEPA claim. App. 360a-61a. The court held that the Corps had "substantially complied with NEPA," App. 360a, and it affirmed the Corps' "top-line conclusion that the risk of a spill is low," App. 392a. The court also agreed that the Corps had complied with its tribal-consultation obligations. App. 453a-64a.

The court remanded to the Corps with instructions to address only three discrete issues that, in the court's view, the EA did "not adequately consider": (1) whether the project's effects were likely to be "highly controversial"; (2) the impact of a hypothetical oil spill on Plaintiffs' fishing and hunting rights; and (3) the environmental-justice effects of the project.

App. 360a, 498a-99a. The court limited the first issue to the Corps' engagement with criticisms Plaintiffs submitted *after* the EA was published. App. 396a-97a. "Aside from the[se] discrete issues," "the Court conclude[d] that the Corps complied with its statutory responsibilities." App. 464a.

Given the "significant likelihood of" the Corps "being able to substantiate its prior conclusions" on remand, including with respect to the "highly controversial" issue, the district court refused to vacate the easement and allowed DAPL to continue operating. App. 477a, 485a-86a, 498a-99a.

6. As with the original EA, the Corps' remand process went far beyond what NEPA requires. For example, the Corps asked Dakota Access to prepare extensive additional spill modeling taking "into account the pipeline as constructed," A445-47, and further addressing the impact of a hypothetical worst-case spill calculated using the PHMSA-approved method. The modeling confirmed that even an extremely large spill would have no impact on Plaintiffs' water intakes, and only "temporary" and "limited" effects on Plaintiffs' use of the Lake. *E.g.*, App. 501a, 647a-48a.

The Corps acknowledged there "may be other methods for predicting oil spill effects" beyond the extensive models the agency employed, but it concluded that it was "not likely that employing further methods will result in substantively different views or information that is more comprehensive." App. 1160a.

In August 31, 2018, the Corps completed its 280-page remand analysis, which reaffirmed that an EIS was unnecessary. App. 500a-775a, 913a-1160a. With respect to the "highly controversial" factor, the remand was the Corps' first opportunity to address all

339 of Plaintiffs' post-EA criticisms. It addressed each in great detail, App. 913a-1160a, plus all three issues the district court identified, App. 503a-775a. It ultimately concluded that "the effects of the federal action here are not 'likely to be highly controversial.'" App. 502a.

7. Plaintiffs again challenged the Corps' decision to forego an EIS, arguing *inter alia* that DAPL's environmental impact remained "highly controversial." App. 784a-85a. The district court agreed, and in March 2020, it ordered the Corps to prepare an EIS. App. 824a.

The court based its analysis on "recent" and "significant guidance" from *National Parks Conservation Association v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019)—issued six months *after* the Corps completed the remand. App. 777a, 793a-94a. In *Semonite*, the D.C. Circuit held that an agency action's environmental impact is "highly controversial" if it generates "consistent and strenuous opposition" from entities "with subject-matter expertise," and the agency does not "succee[d]" in "resolv[ing] the controversy." 916 F.3d at 1085-86 ("The question is not whether the [agency] attempted to resolve the controversy, but whether it succeeded.").

Applying *Semonite*, the district court found the pipeline's impact "'highly controversial'" because, in the court's view, the Corps had "not 'succeeded'" in "'resolving'" four of Plaintiffs' numerous criticisms, App. 815a:

> (1) the "efficacy" of "DAPL's leak-detection system" in detecting slow leaks, App. 797a-801a;

> (2) the safety record of DAPL's operator, Sunoco, on *other* pipelines, including while under prior management, App. 801a-03a;
>
> (3) the effect of winter weather on spill-response efforts, App. 803a-06a; and
>
> (4) the Corps' assumptions, in calculating the worst-case discharge at Lake Oahe, for how quickly Dakota Access could detect a full-bore rupture of the pipeline and shut it down, App. 811a, and the risk of "human or machine error," App. 813a.

Rather than remand to allow the Corps to apply *Semonite* and "resolv[e]" these outstanding criticisms, the court took it upon itself to conclude that the pipeline's impact were "highly controversial" and that this, standing alone, mandated an EIS. App. 816a-17a.

The court sought supplemental briefing on whether to vacate the easement pending remand. The Corps, Dakota Access, fifteen states, and numerous industry members submitted briefs and expert declarations urging the court to preserve the easement. These filings made clear that a DAPL shutdown—the result Plaintiffs desired from vacatur—would have permanent, catastrophic consequences for the industry, the environment, and the country, including billions of dollars in lost tax revenues, tens of thousands of lost jobs, and increased spill risks, pollution, and fatalities caused by the shift from pipeline to rail transport. *E.g.*, D.E. 504; D.E. 507; D.E. 510; D.E. 514.

The district court nevertheless vacated the easement and also ordered Dakota Access to "shut down the pipeline and empty it of oil by August 5, 2020."

A138-39. The court recognized "the serious effects that a DAPL shutdown could have for many states, companies, and workers," but it reasoned that withholding vacatur on that basis would "subvert [NEPA's] structure" and deprive the statute of its "bite." App. 845a, 847a. Though the order enjoined continued pipeline operation, the court (like Plaintiffs) did not address the requirements for injunctive relief.

8. On August 5, 2020, the D.C. Circuit stayed the district court's shutdown order pending appeal. App. 856a. Following full briefing, the court reversed the shutdown order because the district court had failed to make any of the findings necessary to support an injunction. App. 37a-40a. It otherwise affirmed. App. 40a.

Judge Tatel authored the opinion, expanding on *Semonite*, which he also wrote. Rather than analyze whether the Corps' "decision not to prepare an EIS" was "arbitrary and capricious"—the "only" ground on which that decision "can be set aside," *DOT v. Pub. Citizen*, 541 U.S. 752, 763 (2004)—the panel held that the "highly controversial" factor of NEPA required the court "to delve into the details of [Plaintiffs'] criticisms," and obligated the Corps to "convinc[e] the court" that it has "resolved serious objections to its analysis." App. 15a-16a. Declaring itself unconvinced by the Corps' analysis on the four topics the district court identified, App. 18a-28a, the panel found each "highly controversial," App. 28a, and "ordered the Corps to prepare an EIS," App. 30a-31a.

The panel also upheld the order vacating the easement. App. 31a-37a. The panel agreed with the district court that withholding vacatur pending remand

based on "economic consequences" or the Corps' ability to "'substantiate its easement on remand'" would "subvert NEPA's purpose" by incentivizing agencies to "build first" and comply later. App. 33a-35a.

9. DAPL has continued to operate while the Corps prepares an EIS, a process the agency began in September 2020 and expects to complete by September 2022. U.S. Army Corps of Engineers, Omaha District Website, *Dakota Access Pipeline*, www.nwo.usace.army.mil/Missions/Dam-and-Lake-Projects/Oil-and-Gas-Development/Dakota-Access-Pipeline. With the easement vacated, the Corps claims it has authority to stop the flow of oil at any time. *See* D.E. 610, at 3-4; D.E. 612, at 3. But rather than exercise that authority, the Corps—under the third administration since this case began—has "actively tolerate[d] [the pipeline]'s continued operation." D.E. 607, at 29. In May 2021, the Corps advised the court that nothing it had learned in the first eight months of the EIS process suggested that Plaintiffs faced imminent risk of harm. D.E. 601, at 2.

Meanwhile, Plaintiffs returned to the district court where they failed, again, to secure an injunction against DAPL's operation. The district court held that Plaintiffs had failed "to demonstrate a likelihood of irreparable injury." App. 891a. The court found that "historical data" concerning similarly constructed pipelines and DAPL's own safety record, "when combined with the numerous safety measures in place at Lake Oahe, suggest that the chance of a spill at the crossing is especially unlikely." App. 876a-77a (citation omitted). Plaintiffs declined to appeal that ruling, and the pipeline remains in operation subject to the threat that the Corps, or a political appointee to

whom it must answer, will cease "tolerat[ing]" it. D.E. 607, at 29.

REASONS FOR GRANTING THE PETITION

The panel reviewed the Corps' decision not to prepare an EIS under a heightened standard of review that requires an agency to "convic[e] the court" of its responses to "serious objections" to its environmental analysis. App. 15a-16a. That standard shifts power from agencies to the courts, contradicting three decades of this Court's NEPA jurisprudence and reviving a long-settled circuit split that this Court resolved in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). The panel's justification for that standard—based on the requirement that agencies weigh the likelihood that their actions will be "highly controversial"—only deepens the split, as at least seven circuits approach that factor differently than the panel below.

Compounding the error, the D.C. Circuit adopted a categorical approach as to the remedy. If the agency fails to convince a court that an EIS is unnecessary, the D.C. Circuit requires vacating the underlying action while the agency prepares one, regardless of the disruptive economic and environmental consequences of vacatur and the likelihood that the agency will ultimately reapprove the identical action after preparation of the EIS. As with the standard of review, this approach to remedies is inconsistent with the APA and the decisions of several other circuits.

Together, these errors establish the D.C. Circuit as the preferred—and almost always available—forum for NEPA challenges. Important projects requiring federal authorization for any small aspect of con-

struction or operation—including critical infrastructure projects like DAPL—thus face the risk of being shut down at any time unless the approving agency delays the project for years in order to prepare an EIS. That is emphatically *not* the scheme Congress envisioned in NEPA, and it will impede important federally authorized projects. The devastating economic and environmental consequences of a potential shutdown of DAPL—including billions in tax revenues and tens of thousands of jobs for North Dakota and neighboring states—also warrant this Court's intervention.

To prevent these harms and bring the D.C. Circuit in line with other circuits and this Court's precedents, the Court should grant certiorari.

I. THIS COURT SHOULD REVIEW THE D.C. CIRCUIT'S HEIGHTENED "CONVINCE THE COURT" STANDARD FOR REVIEWING AN AGENCY'S DECISION TO FORGO AN ENVIRONMENTAL IMPACT STATEMENT

Thirty years ago, in *Marsh*, this Court held that agencies—not courts—are responsible for determining whether to prepare an EIS, and courts must "defer" to agencies' "'informed discretion'" even when they "find contrary views more persuasive." 490 U.S. at 377-78. Those holdings resolved a recognized circuit split, rejecting the D.C. Circuit's requirement that agencies make a "convincing case" to the courts that no EIS was required. *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983).

The decision below revives the deprecated "convincing case" standard, requiring agencies to prepare an EIS unless they "convinc[e] the court" they have "resolved serious objections to [their environmental] analysis." App. 15a-16a. Otherwise, the panel held,

the environmental effects remain "highly controversial," satisfying one of ten "intensity" factors that "should be considered" in assessing whether a project will have significant environmental effects. 40 C.F.R. § 1508.27(b)(4) (2019). And failing to satisfy the court on that one factor, according to the panel, is "'sufficient to require development of an EIS.'" App. 30a.

The panel's renewed "convince the court" requirement turns *Marsh* on its head and reopens the circuit split *Marsh* resolved by again shifting the agencies' ultimate authority to the courts. The "highly controversial" factor provides no basis for this impermissible end run around *Marsh*, and the panel's approach to that factor only deepens the circuit split. To protect this Court's longstanding precedent and restore clear direction to the circuits, this Court should grant certiorari.

A. The D.C. Circuit's Standard Flouts This Court's Longstanding NEPA Jurisprudence And Revives A Long-Settled Circuit Split

This Court already rejected the "convincing case" requirement in its *Marsh* decision. Reviving that requirement—and the circuit split it engendered prior to *Marsh*—cannot be squared with this Court's NEPA decisions.

1. Before *Marsh*, the D.C. Circuit applied a four-part test in reviewing agency decisions to forgo an EIS. One of those factors required agencies to "ma[ke] a convincing case that the [environmental] impact" of their actions "was insignificant." *Sierra Club*, 717 F.2d at 1413.

As four Justices of this Court recognized, other circuits applied "divergent standards." *Gee v. Boyd*,

471 U.S. 1058, 1059 (1985) (White, J., joined by Brennan and Marshall, JJ., dissenting from denial of certiorari); *see also Morningside Renewal Council, Inc. v. U.S. Atomic Energy Comm'n*, 417 U.S. 951, 954 (1974) (Douglas, J., dissenting from denial of certiorari). Four circuits applied the APA's deferential "arbitrary and capricious'" standard, *Gee*, 471 U.S. at 1059, which left "the decision not to prepare an EIS" to "the agency," *Providence Rd. Cmty. Ass'n v. EPA*, 683 F.2d 80, 82 (4th Cir. 1982) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)). Four circuits applied a "more stringent" "'reasonableness' standard," *Gee*, 471 U.S. at 1059-60, that instead charged "*the courts*[]" with ensuring that "all relevant environmental effects of the project be given appropriate consideration," *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973) (emphasis added). "This conflict [was] not merely semantic or academic"—it implicated the degree of "deferen[ce]" owed to the agency. *Gee*, 471 U.S. at 1060.

The D.C. Circuit's "four-part test" stood apart. *Gee*, 471 U.S. at 1059. Although the Circuit called its test "arbitrary and capricious" review, its NEPA-specific "convincing case" requirement shifted ultimate authority back to the courts. *Sierra Club*, 717 F.2d at 1413.

Marsh resolved the conflict, reaffirming the applicability of the deferential "arbitrary and capricious" standard and rejecting the argument that "reviewing court[s] must make [their] own determination of reasonableness." 490 U.S. at 375. Under *Marsh*, "[a]n agency's decision not to prepare an EIS can be set aside only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *DOT v. Pub. Citizen*, 541 U.S.

752, 763 (2004) (citing *Marsh*, 490 U.S. at 375-76). As the Court explained in *Robertson v. Methow Valley Citizens Council*—a companion case to *Marsh* decided the same day—"NEPA itself does not mandate particular results, but simply prescribes the necessary process." 490 U.S. 332, 350 (1989). *Marsh* made clear that this maxim applied equally to the decision "whether to prepare an EIS," and it required the courts to "defer to 'the informed discretion of the responsible federal agenc[y].'" 490 U.S. at 374, 377. Rather than the agency "convincing" the *court* "that the [environmental] impact was insignificant" (as the D.C. Circuit had required, *Sierra Club*, 717 F.2d at 1413), *Marsh* gave the *agency* "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*." 490 U.S. at 378 (emphases added).

2. The decision below marks a troubling return to the "convincing case" requirement.

Until recently, although the D.C. Circuit continued to "repeat[] the phrase 'convincing case'" after *Marsh*, in practice the circuit applied the "usual" "arbitrary [and] capricious" standard. *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1153-54 (D.C. Cir. 2011). The court thus generally upheld agency decisions to forgo an EIS, *e.g.*, *TOMAC v. Norton*, 433 F.3d 852, 861-64 (D.C. Cir. 2006), unless the agency failed to even analyze an environmental impact, *e.g., Idaho ex rel. Idaho Pub. Utils. Comm'n v. ICC*, 35 F.3d 585, 595 (D.C. Cir. 1994) (agency "'share[d] the parties' concern'" about environmental harm but "neither analyzed the potential harm nor weighed it against" the "benefits"). The "convincing case" requirement was rarely, if ever, dispositive.

In *National Parks Conservation Association v. Semonite*, 916 F.3d 1075 (D.C. Cir. 2019), and the decision below, however, that court breathed new life into the requirement by expanding the "highly controversial" factor. *Semonite* requires more from agencies than "acknowledg[ing] and try[ing] to address" opposition from commenters "with subject-matter expertise." *Id.* at 1085-86. "The question" is no longer "whether the [agency] attempted to resolve the controversy, but whether it succeeded" to the court's satisfaction. *Id.* "[S]ucceed[ing]" now means "convinc[ing] the court"—"through the strength of its response"—that any "serious objections" lack merit. App. 15a-16a. Otherwise, the action is "highly controversial" and requires an EIS. App. 15a-16a, 30a.

3. The panel's standard cannot be squared with this Court's decisions. Requiring an agency to "convinc[e] the court" that it has "resolved serious objections to its analysis" is incompatible with the deferential APA-style review required for agency decisions to forgo an EIS if the agency adequately "considered" the objections. *Marsh*, 490 U.S. at 374-78.

"NEPA creates no private right of action," *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007), so review is possible only under the APA's "'arbitrary and capricious' standard," *Marsh*, 490 U.S. at 375-76 (quoting 5 U.S.C. § 706(2)(A)). But the panel never even mentioned that standard.

The APA bars a court from "substitut[ing] its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Instead, courts must "defer" to agencies' "'informed discretion.'" *Marsh*, 490 U.S. at 377. But deferring to an agency only to the extent its views are "convinc[ing]," App. 16a, is no deference at

all. "If one has been persuaded … there is no room for deferral—only for agreement." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 24 n.6 (2011) (Scalia, J., dissenting); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2424 (2019) (Roberts, J., concurring in part) (noting "difference between holding that a court ought to be persuaded by an agency[]" and "holding that it should defer").

Marsh was clear, therefore, that the agency need *not* "persua[de]" the court. 490 U.S. at 378. Instead, the "agency must have discretion to rely on the reasonable opinions of its own qualified experts *even if … a court might find contrary views more persuasive*." *Id.* at 377-78 (emphasis added).

Indeed, persuading the court is precisely what the old "convincing case" requirement demanded before *Marsh* resolved the circuit split described in *Gee*. By contrast, the circuits that applied ordinary "arbitrary and capricious" review found it sufficient that the agency "address[ed] each of the concerns raised during the comment period," and "none of those issues had escaped attention." *Providence*, 683 F.2d at 82; *see also*, *e.g.*, *Nucleus of Chi. Homeowners Ass'n v. Lynn*, 524 F.2d 225, 231 (7th Cir. 1975) (agency "consider[ed]" the relevant impact at length and "conclude[d] that the project will have no significant adverse environmental impact"). Requiring the Corps to "resolve the controversy" rather than merely "acknowledg[ing] and try[ing] to address" it, *Semonite*, 916 F.3d at 1085-86, reignites the circuit split.

Just two examples illustrate the problem. First is the efficacy of the pipeline's leak-detection system, which Plaintiffs challenge based on a study of how certain leaks were detected on other pipelines. App. 18a. The Corps dismissed that study as irrelevant because

it was based on older pipelines that had less effective detection systems. A1990-91. The court was unconvinced because Plaintiffs *claimed* that modern systems fail at similar rates. App. 18a-19a. But Plaintiffs' argument lacked any record support whatsoever. And it was conclusively rebutted by PHMSA's data (on which the Corps relied), which confirms that, since 2010, *no* spill exceeding 5,000 barrels has escaped detection on *any* pipeline built in the last fifty years using the same leak-detection system as here. D.E. 520-2 ¶ 13. The court entirely ignored, moreover, the Corps' evidence and findings that any leak would follow the bore-hole path rather than rise 92 feet, through the lakebed, and into the Lake. This would facilitate prompt detection and minimize any leak's impact. A1830; App. 18a-21a.

The second example is the safety record of the pipeline's operator (Sunoco). The court expressly declined to accord the Corps' analysis *any* deference even though Plaintiffs provided no comparison of Sunoco's safety record to that of other operators under the relevant metric—spills per mile of pipeline. App. 21a-23a. Instead, the court drew its *own* conclusions based on data never put before the Corps. *Id.* As a result, when the court concluded that Sunoco's spill rate was above average, it erroneously compared Sunoco's *overall* spills per mile to the industry's rate of *significant* spills per mile. *Compare* D.E. 543-2 ¶¶ 7-8, *with* A1831-33. Under a correct apples-to-apples comparison, Sunoco "has consistently experienced fewer significant crude oil accidents per 1,000 miles than the industry average." D.E. 593-4, ¶¶ 4-10.

As these examples make clear, the panel erred because a court's "only role" in NEPA cases is "to insure

that the agency has taken a 'hard look' at environmental consequences." *Kleppe*, 427 U.S. at 410 n.21. By expressly "delv[ing] into the details of [Plaintiffs'] criticisms," App. 16a, usurping the agency's role, the court contravened this Court's precedent and reopened the circuit split.

B. The Panel's Approach To The "Highly Controversial" Factor Deepens The Circuit Conflict

To try to get around *Marsh*, the panel relied on the requirement that agencies "conside[r]" the "degree to which [an action's] effects" are "likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4) (2019). But this requirement—already adopted well before *Marsh*, 43 Fed. Reg. 55,978, 56,006 (Nov. 29, 1978)—cannot override the deferential standard set in *Marsh*. Instead, the panel's approach to this "highly controversial" factor strengthens the need for this Court's review because it puts the D.C. Circuit further at odds with its sister circuits in two ways.

1. The panel first broke new ground by holding that an agency must prepare an EIS whenever a court determines that some aspect of a federal action's potential environmental impact is highly controversial, even when the agency determines that the supposed controversy is insubstantial or immaterial.

The "highly controversial" factor is one of ten "intensity" factors that agencies "should … conside[r]"—along with the action's "context"—when determining whether a federal action will "significantly" affect the environment. 40 C.F.R. § 1508.27 (2019). By transforming this factor from one of many the *agency considers* into a *dispositive* factor that the *court* decides, the D.C. Circuit fundamentally shifted to the courts

the responsibility that NEPA assigns to expert administrative agencies, undercutting NEPA's basic design.

NEPA implements a "'rule of reason,'" not a rigid test. *DOT*, 541 U.S. at 767. It is up to "agencies"—not courts—to "determine whether" to prepare an EIS "based on the usefulness of any new potential information." *Id.* Courts must "defer to 'the informed discretion of the responsible federal agencies'" when *they* decide whether to prepare an EIS, and agencies, in turn, need only "'consider[] … the relevant factors'" and not commit "'a clear error of judgment.'" *Marsh*, 490 U.S. at 377-78. Under the controlling APA standard, *id.* at 375, "'review of agency decisions based on multi-factor balancing tests'" is "'quite limited,'" leaving no room for courts to "'substitute the balance [they] would strike for that the agency reached,'" *U.S. Postal Serv. v. Postal Regulatory Comm'n*, 963 F.3d 137, 141 (D.C. Cir. 2020).

The D.C. Circuit discarded this "rule of reason," reasoning that a single intensity factor suffices to "'trigge[r] the need to produce an EIS.'" App. 6a. Instead of requiring agencies to "conside[r]" the relevant factors, as the regulation and the APA prescribe, 40 C.F.R. § 1508.27 (2019); *Marsh*, 490 U.S. at 378, the court's test effectively gives a single factor *dispositive* weight if a *court* finds it present, regardless of whether the agency found it present. This divorces NEPA review from the statutory standard—"significan[t]" environmental effects, 42 U.S.C. § 4332(2)(C)—by compelling an EIS even though the agency found that the effects purportedly generating "high controversy" are too unlikely to be "significant." Contravening *Public Citizen*, this formalistic standard risks compelling an EIS even where, as here, it would "serve 'no purpose'" because the effects to be

studied are astronomically improbable. 541 U.S. at 767.

Treating the "highly controversial" factor as dispositive also cannot be squared with the history of the governing regulations. The CEQ's original interim NEPA regulations—promulgated in 1970—initially *did* provide that actions with highly controversial effects *always* require an EIS. 35 Fed. Reg. 7390, 7391 (May 12, 1970) ("Proposed actions the environmental impact of which is likely to be highly controversial should be covered in all cases."). But the CEQ downgraded this consideration in 1978 to one of many factors that "should be considered." 43 Fed. Reg. at 56,005-06. This "significant change in language" must be "presumed to entail a change in meaning." Antonin Scalia & Bryan A. Garner, *Reading Law* § 40 (2012). By eliminating the provision requiring an EIS for all highly controversial impacts, the CEQ plainly meant to eliminate any requirement giving that factor dispositive weight. *Cf. United States v. Wells*, 519 U.S. 482, 493 (1997) (where Congress "deliberately dropped the term 'materiality'" from a criminal statute, the "most likely inference" is that Congress did not "inten[d] materiality to be an element").

At least six other circuits squarely reject the D.C. Circuit's approach. The First, Third, Fourth, and Tenth Circuits have expressly recognized that "controversy" is "only one of the ten factors listed for determining if an EIS is necessary." *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 184 (3d Cir. 2000); *McGuinness v. U.S. Forest Serv.*, 741 F. App'x 915, 927 (4th Cir. 2018) (same). "[C]ontroversy is not decisive but is merely to be weighed in deciding what documents to prepare." *Town of Marshfield v. FAA*,

552 F.3d 1, 5 (1st Cir. 2008). Thus, even when "a project is controversial," that "does not mean the Corps must prepare an EIS." *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1181 (10th Cir. 2012). And the Fifth and Sixth Circuits have recognized more broadly that the "factors listed in the [CEQ] regulation 'do not appear to be categorical rules that determine by themselves whether an impact is significant.'" *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 233-34 (5th Cir. 2006); *see also Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402, 411 (6th Cir. 2016) ("[T]he [agency] was not required independently to evaluate these factors.").

2. The D.C. Circuit's standard for assessing *whether* agency action is highly controversial exacerbates a separate circuit conflict.

Other circuits recognize that the highly controversial factor calls for the same limited "hard look" review as in any case, lest the factor give critics a "'heckler's veto'" over the EIS decision. *Ind. Forest All., Inc. v. U.S. Forest Serv.*, 325 F.3d 851, 857, 860-61 (7th Cir. 2003); *see also Hillsdale*, 702 F.3d at 1182 ("all NEPA requires" is a "hard look"); *North Carolina v. FAA*, 957 F.2d 1125, 1134 (4th Cir. 1992) (similar); *WildEarth Guardians v. Conner*, 920 F.3d 1245, 1257, 1263 (10th Cir. 2019) (similar). Courts will not "'substitute [their] judgment … for the judgment of the agency.'" *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 339 (6th Cir. 2006) (Sutton, J.). And the "mere fact" of "disagreement" among "experts" "does not render the [agency] out of compliance under [the "'highly controversial'"] factor." *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 957 (7th Cir. 2003). This is true even as to criticisms from "other agencies," to which the reviewing agency "need not defer … when

it disagrees." *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58, 64 (4th Cir. 1991).

The D.C. Circuit's requirement that agencies rebut critics to the court's satisfaction squarely conflicts with these decisions and this Court's repeated admonition that deferential APA review applies. This Court should grant review to resolve these conflicts.

II. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS' RULES FOR REMAND WITHOUT VACATUR

The D.C. Circuit's decision to affirm the district court's remedy—vacatur of DAPL's easement pending an EIS—independently warrants this Court's review.

This Court has yet to address the critical, regularly recurring question of what standard governs decisions to grant or deny vacatur pending remand under the APA. That is reason enough to grant certiorari. And review is especially warranted in this case because the D.C. Circuit split with several of its sister circuits by adopting a rule that effectively compels vacatur when an agency commits procedural error.

1. The APA authorizes federal courts to "set aside" unlawful agency action. 5 U.S.C. § 706(2). At the same time, Congress specified that "[n]othing" in the APA "affects" courts' "power or duty" to "deny relief on any ... appropriate ... equitable ground." *Id.* § 702. The statute thus expressly preserves courts' "'duty' to ensure the propriety of the APA remedy." *Am. Bankers Ass'n v. NCUA*, 934 F.3d 649, 674 (D.C. Cir. 2019).

Eight circuits have accordingly recognized that "remand without vacatur is permitted under the APA." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015)

(citing cases from the First, Fifth, Ninth, D.C., and Federal Circuits); *see also NRDC v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015) (remanding without vacatur); *U.S. Steel Corp. v. EPA*, 649 F.2d 572, 574 (8th Cir. 1981) (same).

The D.C. Circuit announced the predominant test in *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993). It requires courts to consider: (1) "'the seriousness of the order's deficiencies,'" and (2) "'the disruptive consequences'" of vacatur. *Id.* at 150-51. These factors are "analogous" to those "considered in deciding whether to grant preliminary injunction," *Int'l Union*, *United Mine Workers of Am. v. MSHA*, 920 F.2d 960, 967 (D.C. Cir. 1990)—with the second factor focused on the disruptive consequences of vacatur (which Dakota Access proved, App. 845a) rather than the harm from the challenged agency action (which, in any event, Plaintiffs failed to prove here, App. 891a). Just as courts consider likely success on the merits for injunctions or stays, courts considering vacatur must address the likelihood that the "interim change … may itself be changed" by later agency action. *Int'l Union*, 920 F.2d at 967.

Other circuits have converged around the *Allied-Signal* test. *See*, *e.g.*, *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001); *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *Wood v. Burwell*, 837 F.3d 969, 976 (9th Cir. 2016); *Black Warrior Riverkeeper*, 781 F.3d at 1290; *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 260 F.3d 1365, 1380 (Fed. Cir. 2001).

The panel, however, grafted onto that test a categorical rule that effectively deems procedural error too serious to warrant remand without vacatur. The panel equated the decision not to prepare an EIS with

bypassing the APA's notice-and-comment rulemaking requirement, reasoning that an agency "obviously c[an]not ordinarily keep in place a regulation while it complete[s] that fundamental procedural prerequisite." App. 35a; *see also* App. 34a (contrasting such procedural errors with an agency's failure to adequately "consider certain public comments" or "explain" its "approach"). The court broke ranks here with other circuits on both *Allied-Signal* factors.

2. The first factor addresses the "possibility" the agency "may find an adequate explanation for its actions" on remand. *Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008). The lower court focused on procedural error, causing it to consider the wrong "action." Rather than consider the "ultimate decision" to grant an easement, the court asked whether the Corps could justify "skip[ping] th[e] procedural step" of an EIS. App. 35a. But that erected an insurmountable obstacle given the court's antecedent finding of "error"—it already held that the Corps could not justify skipping that step. App. 30a-31a.

Other circuits instead correctly focus on whether the agency can justify the ultimate action to be vacated, not antecedent procedural steps that a court has found unjustifiable. The Fifth Circuit, for example, recently held in *Texas Association of Manufacturers v. Consumer Products Safety Commission* that a federal agency "violated the APA by failing to allow proper notice-and-comment," among other errors. 989 F.3d 368, 389 (5th Cir. 2021). The court nonetheless remanded without vacatur because it found "a serious possibility" that the agency "w[ould] be able to remedy its failures" after "allow[ing] industry to comment." *Id.* The Ninth Circuit likewise considers "whether by

complying with procedural rules," the agency "could adopt the same rule on remand." *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015). It has thus held that potential "procedural error[s]" in an agency rulemaking—notice-and-comment failures that "might [have] violate[d] an interested party's right to meaningfully comment" on the rule—did not support vacatur because "any disadvantage" those parties "suffered can be corrected on remand when they will have an opportunity to comment meaningfully." *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993 (9th Cir. 2012).

Multiple circuits have also found that the agency's ability to cure its error warranted remand without vacatur in cases involving inadequate agency explanations or responses to criticism. *See*, *e.g.*, *Cent. Me. Power*, 252 F.3d at 44, 48; *Cent. & S.W. Servs.*, 220 F.3d at 692; *Black Warrior Riverkeeper*, 781 F.3d at 1290. The panel failed in trying to distinguish cases like these, *see* App. 34a, because "respond[ing] to significant comments" is a procedural requirement too, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). And the purported error here *was* fundamentally a failure to respond to criticism. *See* App. 30a-31a.

3. The D.C. Circuit's approach also precluded consideration of "disruptive consequences" under the second *Allied-Signal* factor. According to the court, allowing "economic consequences" to be a ground for remanding without vacatur would "subvert NEPA's purpose" by incentivizing agencies to "build first" and comply later. App. 35a. In this, the court echoed the district court's analysis discounting the potentially devastating consequences of vacating the easement as a necessary by-product of preserving "the structure of NEPA." App. 847a. The D.C. Circuit endorsed that

analysis as an appropriate exercise of discretion. But both analyses are a recipe for *never* invoking *Allied-Signal* to remand without vacatur, since they reduce the *Allied-Signal* inquiry to the question of whether the error was serious enough to require remand, which by hypothesis the court already found. Yet the question under *Allied-Signal* is what *remedy* is equitable and appropriate for that error. Vacatur always could be said to incentivize better compliance with applicable laws, but courts must *weigh* that factor against the potential "disruptive consequences," not make it the be-all-and-end-all factor.

The Eighth Circuit, for instance, declined to vacate certain Clean Air Act designations for which the agency "dispensed with the usual notice and comment requirements." *U.S. Steel*, 649 F.2d at 574. The Ninth Circuit similarly refused to set aside Clean Air Act designations the agency "promulgat[ed] … without prior notice and comment" because doing so would yield the "undesirable consequenc[e]" of "thwarting" the "operation of the Clean Air Act" during the remand. *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 812-13 (9th Cir. 1980); *see also Cook Inletkeeper v. EPA*, 400 F. App'x 239, 241 (9th Cir. 2010) ("leaving the permit in place during remand to avoid the disruptive consequences" despite "finding [the permit] was flawed because of a lack of meaningful opportunity for public comment"). These decisions directly conflict with the panel's categorical rule that procedural error requires vacatur and that the disruptive consequences of vacatur cannot alone justify declining to vacate the underlying agency action.

Nor is it the case that agencies will fail to comply with applicable laws unless "incentivized" in this fashion. To the contrary, this Court has explained that,

"in the absence of clear evidence to the contrary, courts presume" that public officials and agencies "properly discharg[e] their official duties." *United States v. Chem. Found. Inc.*, 272 U.S. 1, 14-15 (1926); *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). The D.C. Circuit's invocation of "incentives" to justify ignoring the disruptive consequences of vacatur thus conflicts with this Court's well-established presumption of regularity for executive action.

This Court's intervention is needed to enforce the plain language of the APA, restore uniformity among the circuits, and prevent agency procedural error from destabilizing hundreds of millions of dollars invested by private entities in reliance on the underlying agency actions.

III. THE QUESTIONS PRESENTED IN THIS CASE ARE EXCEPTIONALLY IMPORTANT

Certiorari is further warranted because this case carries enormous ramifications for the oil industry, its workers, and the nation.

1. If left uncorrected, the decision below would establish a novel precedent of breathtaking scope that could delay or thwart any number of other national infrastructure projects. Armed with the D.C. Circuit's "convinc[e] the court" requirement, opponents of pipelines and other necessary infrastructure projects would inundate agencies with technical, often-irrelevant comments in an effort to manufacture a high controversy and force the preparation of a time-consuming EIS. The lower court's distorted vacatur analyses provide litigants a weapon to shut down even long-operational, essential infrastructure projects that have

engendered massive reliance interests. Even unsuccessful efforts to force an EIS would bog down the agency's processes and delay critical infrastructure projects. The upshot will be unnecessary delays and immense costs to the government, the industry, and the public.

The danger is especially acute because the D.C. Circuit resolves a disproportionate number of cases involving agency decisions. *See* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 376-77 (2006). Opponents to infrastructure projects will be able to flock to the D.C. Circuit—the home of most federal agencies—to exploit its heightened, outlier standard for NEPA suits.

Indeed, the D.C. Circuit has already begun using the decision below to shut down important infrastructure beyond DAPL. In *Environmental Defense Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021), that court invoked its decision here in vacating FERC's grant of a certificate of public convenience and necessity for a natural gas pipeline. *See id.* at 976. As here, the court held that although "de-issuance of the Certificate" would cause disruption because "the pipeline is operational," remanding without vacatur "would give the Commission incentive to allow 'build[ing] first and conduct[ing] comprehensive reviews later.'" *Id.* (alterations in original) (quoting App. 35a). The decision below will thus continue to have an adverse impact on future infrastructure projects, including new electric transmission lines, and renewable energy projects like wind and solar, if the ruling remains intact.

2. The decision below leaves DAPL at a significant risk of being shut down, which would precipitate serious economic and environmental consequences.

The Corps, the Department of Energy, nineteen states, and multiple industry coalitions submitted briefs or declarations below attesting to the singular importance of DAPL to the oil industry, employment, and the public fisc. Shutting it down would cost the country billions of dollars and thousands of jobs, all while the national economy struggles to recover from the worst recession in more than a decade. *See supra*, at 12-13. In 2022 alone, North Dakota crude-oil producers would lose $4.3 billion to $9.9 billion in revenue. D.E. 596-1 ¶ 5(d)(i). And the State of North Dakota would miss out on $1.1 billion to $2.5 billion in oil and gas extraction and production tax revenues. *Id.* ¶ 5(d)(iii). The Mandan, Hidatsa, and Arikara Nation, known as the Three Affiliated Tribes, would likewise lose over $160 million over a one-year period in revenue-sharing funds and royalties from the exploration and development of oil production on their land, which DAPL's reliable and economical capacity has facilitated. D.E. 593-1 ¶ 10.

Shutting down DAPL would also increase risks to the environment and public safety, including spill risks, potential fatalities and injuries, and air pollution. Without DAPL, producers would need to shift oil to less environmentally friendly rail and truck transportation. Courts, academics, and government agencies alike have consistently recognized that "pipeline transportation of oil is safer than rail transportation" on a "volume-distance basis (i.e., per barrel-mile)." *Puntenney v. Iowa Utils. Bd.*, 928 N.W.2d 829, 842 (Iowa 2019); *see also* Strata, *Pipelines, Rail & Trucks: Economic, Environmental, and Safety Impacts of Transporting Oil and Gas in the U.S.* 6 (2017) ("Pipelines in particular have advantages in terms of safety, efficiency, and low environmental impacts."). For example, a 2018 PHMSA study found that pipelines

shipped over fourteen times more crude oil per incident than did rail. A725. Moreover, air pollution from crude oil trains is nearly twice that from operating a pipeline. *See* K. Clay et al., *External Costs of Transporting Petroleum Products: Evidence from Shipments of Crude Oil from North Dakota by Pipelines and Rail*, 40 Energy J. 55, 69 (2019).

Plaintiffs maintain that DAPL is operating unlawfully, and the Corps has claimed the authority to shut it down. *See* D.E. 609, at 2; D.E. 610, at 3-4; D.E. 612, at 3. DAPL's ongoing operation thus remains uncertain, with a substantial risk of a shutdown. This Court should intervene to eliminate this uncertainty and, by reversing the panel decision, restore Dakota Access's easement in order to ensure its continued operation and avoid the economic and environmental fallout of a shutdown.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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