

No. 23-01109

**In the United States Court of
Appeals for the 12th Circuit**

THE HOLY ORDER OF MOTHER EARTH, PETITIONER,

V.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

*Petition For Review Of Federal Energy
Regulatory Commission's Order Denying
Rehearing in consolidated docket number
23-01109*

**BRIEF FOR PETITIONER, TRANSNATIONAL GAS
PIPELINES, LLC.**

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STATEMENT OF JURISDICTION

On April 1, 2023, the Federal Energy Regulatory Commission (“FERC”) issued an Order granting a permit to Transnational Gas Pipelines, LLC (“TGP”) for construction of the American Freedom Pipeline (“AFP”), which included certain conditions to mitigate any harms that might be caused. FERC had authority to do this pursuant to the Natural Gas Act (“NGA”). 15 U.S.C. § 717. The Holy Order of Mother Earth (“HOME”) and TGP timely sought a rehearing from FERC. 15 U.S.C. § 717(r)(a). On May 19, 2023, FERC issued an Order Denying Rehearing to HOME and TGP and affirming its original decision (“Order”). TGP and HOME timely appealed to the United States Court of Appeals for the Twelfth Circuit. This Court has jurisdiction over these appeals under 15 U.S.C. § 717(r)(b), which provides that after seeking rehearing from FERC, affected parties may seek review of FERC’s orders in the Courts of Appeals of the United States.

STATEMENT OF ISSUES PRESENTED

- I. Was FERC’s finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as FERC found an important need in the transportation of gas for consumption abroad?
- II. Was FERC’s finding that the numerous benefits from the AFP outweighed some environmental and social harms arbitrary and capricious?
- III. Was FERC’s informed decision to route the AFP over HOME property a violation of the Religious Freedom Restoration Act (“RFRA”)?
- IV. Was FERC’s decision to regulate greenhouse gas (“GHG”) conditions beyond its authority, considering that the NGA does not explicitly give FERC that power?

- V. Was FERC's reasoned decision not to impose GHG Conditions addressing unknown downstream and upstream GHG changes arbitrary and capricious?

STATEMENT OF THE CASE

1. Statement of Facts

Section 717(f)(e) of the NGA allows FERC to grant a Certificate of Public Convenience and Necessity ("CPCN") if the project will fulfill a public convenience or necessity. Order 6-7. In doing so, FERC must evaluate factors bearing on the public interest. *Id.* at 7. The Certificate Policy Statement ("CPS") provides guidance by establishing criteria for determining project need and whether the project will serve the public interest. *Id.* The CPS has approximately six different criteria, but the criteria at issue are (1) project need, (2) impact on landowners and communities along the route, and (3) environmental impact. *Id.* For the second criteria, FERC considers whether the applicant has made *efforts* to eliminate or reduce its impact on landowners and communities. *Id.*

FERC approved construction of the AFP under Section 717(f)(e) of the NGA. *Id.* at 4. The approved route would cross through HOME's property, but avoid causing irreparable destruction to the Misty Top Mountains. *Id.* at 13. HOME is a religious organization that opposes construction of the AFP over their land and, thus, challenged FERC's approval of the AFP. *Id.* at 11. FERC cited a plethora of evidence for why it decided to approve TGP's project and its route. Though 90% of the liquified natural gas ("LNG") carried by the AFP will be exported to Brazil, FERC found a strong showing of public benefit because TGP executed binding precedent agreements for 100% of the design capacity. *Id.* at 8. The CPS establishes that precedent agreements are always significant evidence of project need. *Id.* Section 717(b)(c) of the NGA states that LNG exported to a country with whom the US has a free trade agreement with is evidence of a public necessity. *Id.* at 9. Brazil and the United States do not have a free trade

agreement, but FERC did not find this distinction meaningful. *Id.* FERC rejected HOME's argument that the Nexus Pipeline in *Oberlin* is distinguishable because only 17% of the precedent agreements were for exported gas. Order 9.

Further, the AFP serves the following domestic needs: (1) delivering up to 500,000 dekatherms (Dth) of natural gas, (2) providing natural gas to areas in New Union that currently do not have access to this service, (3) expanding access to sources of natural gas within the U.S., (4) creating a more competitive market for consumers, and (5) improving regional air quality by using natural gas compared to the more polluting fossil fuels. *Id.* at 9.

In terms of social impacts, TGP has made changes to over 30% of the proposed AFP route to address landowners' concerns and negotiate easements. *Id.* at 10. TGP has also agreed to bury the AFP under HOME's property and expedite construction. *Id.* TGP has already secured agreements with over half of the affected landowners, and the rest are subject to eminent domain under the NGA if no agreement is reached. *Id.* Ultimately, FERC found that TGP has taken sufficient steps to minimize the adverse effects on landowners and surrounding communities. *Id.*

In terms of environmental impact, HOME suggested an alternative route (Alternate Route 1) that would go through the Misty Top Mountains instead of through its property. *Id.* at 11. However, TGP countered—and HOME does not dispute—that Alternate Route 1 would cause more *objective* environmental harm by travelling an additional three miles through more sensitive ecosystems—as well as cost an additional \$51 million—thus FERC rejected this route. *Id.* Additionally, FERC approved TGP's proposal to route the AFP through HOME's property because it would not substantially burden HOME's religious practices. *Id.* at 13.

Despite the uncontroverted evidence weighing in favor of the less burdensome route proposed by TGP, HOME believes on rehearing before FERC that the RFRA suggests that

Alternate Route 1 should be used instead. Order 11. The RFRA only applies to government actions that “substantially burden a person’s exercise of religion.” *Id.* at 12. HOME practices what it calls the “Solstice Sojourn,” a journey through their land which culminates on a “sacred hill” in the Misty Top Mountains. *Id.* at 11. It is in the mountains—not HOME’s property—that the religious ceremony is performed. *Id.* The AFP route approved by FERC merely “crosses” the path of the Solstice Sojourn at two intersections over a short distance that covers 8% of HOME’s property—not the entire route. *Id.* at 10, 12. In fact, FERC noted that HOME could still walk a “clear-cut” path over the pipeline to the Misty Top Mountains for the Solstice Sojourn. *Id.* at 12.

FERC rejected HOME’s RFRA claims. *Id.* at 13. It reasoned that a full RFRA analysis was not necessary because HOME had failed to establish a prima facie RFRA case. *Id.* Accordingly, FERC affirmed its decision to approve TGP’s route for the AFP because any burden caused by its construction through HOME’s property had already been more than mitigated and was minimal. *Id.* at 13. No substantial burden on religion justifying the imposition of RFRA strict scrutiny review was present. *Id.*

The Council of Environmental Quality (“CEQ”) published interim guidance addressing climate change in the context of the National Environmental Policy Act (“NEPA”) which encouraged agencies to mitigate GHG emissions associated with their proposed actions. *Id.* at 14. FERC is not required to follow CEQ guidance. *Id.* FERC estimated that there would be no reasonably foreseeable significant upstream emissions from the AFP. *Id.* FERC decided not to impose conditions addressing upstream and downstream GHG impacts because FERC is conducting a generic proceeding to determine whether and how it will conduct significance determinations for GHG emissions going forward. *Id.* at 16. However, FERC did impose GHG conditions in the CPCN solely focused on mitigating construction impacts. *Id.*

2. Procedural History

On April 1, 2023, FERC issued an Order granting a CPCN to TGP to construct the AFP. *Id.* at 2. On April 20, 2023, HOME and TGP sought a rehearing regarding certain issues in the Order, but FERC denied these. *Id.* Consequently, TGP and HOME filed a petition for a review of FERC's denial with the U.S. Court of Appeals for the Twelfth Circuit. *Id.* at 1.

STANDARD OF REVIEW

Agency adjudications are reviewed using a substantial deference standard. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Courts should not replace reasonable agency decisions with their own interpretations of what is wisest under the regulatory scheme. *Id.* The agency's interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). FERC's factual findings, according to the NGA, are "conclusive" if supported by substantial evidence. 15 U.S.C. § 717(r)(b). Broad deference is especially warranted in the context of application of a "complex and highly technical regulatory program" which requires "significant expertise and entail[s] the exercise of judgment grounded in policy concerns." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991).

SUMMARY OF THE ARGUMENT

FERC's finding of public convenience and necessity was not arbitrary and capricious as to the exportation of natural gas. In fact, FERC's finding of public convenience and necessity was reasonably supported by substantial evidence. Additionally, FERC's finding that the AFP's benefits outweighed the social and environmental costs was not arbitrary and capricious.

FERC's decision to route the AFP through HOME's property did not violate the RFRA because the decision does not substantially burden HOME's exercise of religion and, even

assuming it did, the construction of the AFP satisfies strict scrutiny. FERC also appropriately rejected attempts to get it to regulate upstream and downstream GHG emissions. However, FERC exceeded its authorization by deciding to regulate GHG emissions from the construction of the pipeline. Such regulation flies in the face of congressional intent and judicial precedent.

ARGUMENT

I. FERC'S FINDING OF PUBLIC CONVENIENCE AND NECESSITY FOR THE AFP WAS NOT ARBITRARY AND CAPRICIOUS AND IT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE INsofar AS THE EXPORTATION OF GAS.

Under Section 717(f)(e) of the NGA, FERC must evaluate factors that impact the public interest prior to determining whether to issue a CPCN. 15 U.S.C. § 717(f)(e); *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959). FERC's CPS establishes the factors to be considered when determining whether a project bears on the public interest. Thus, the CPS criteria guides this Court's review of FERC's finding of public convenience and necessity. There are two standards of review when a court reviews an agency's decision: arbitrary and capricious and substantial evidence. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951). Under either standard, FERC did not err in finding public convenience and necessity as its decision was not arbitrary and capricious and was instead supported by substantial evidence.

A. FERC's finding was not arbitrary and capricious.

FERC did not err in granting the CPCN because it evaluated the facts presented by TGP and HOME per the NGA and CPS, thus FERC's decision was not arbitrary and capricious. Arbitrary and capricious is a standard of review in which a court may not set aside an agency action that is (1) within the scope of the authority delegated to it by a statute, (2) based on a consideration of relevant factors, and (3) rationally connected to the facts in the record. *State Farm*, 463 U.S. at

42. First, the NGA authorizes FERC to issue a CPCN according to criteria in the CPS. Precedent holds that so long as an agency's regulation is clear, then it is controlling, and here, the CPS explicitly lists the criteria to certify new construction. *Seminole Rock*, 325 U.S. at 414; *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Second, FERC considered the facts that HOME and TGP presented as they pertained to the criteria laid out in the CPS in making its final finding. Order 9. Third, there is a rational connection between the facts that FERC considered and its finding of public convenience and necessity because in the CPCN, FERC explained the factual basis for its granting. *Atl. Ref. Co.*, 360 U.S. at 391.

1. The granting of the CPCN was within the scope of FERC's mandate because FERC's own regulation is controlling.

FERC has the authority and responsibility to issue a CPCN under the NGA so long as public necessity requires it. Order 6-7. In order to determine whether a public necessity is present, public interest factors must be assessed. *Atl. Ref. Co.*, 360 U.S. at 391. Since FERC's review of pipeline construction applications is guided by their own regulation which elaborates on the factors to be considered (i.e., CPS), their regulation must be controlling so long as it is unambiguous. *Seminole Rock*, 325 U.S. at 414 (holding that a court must "necessarily look" to the agency's regulation as controlling unless the agency's interpretation of such regulation is plainly erroneous); *Auer*, 519 U.S. at 461 (holding that an agency's interpretation of their own regulation is controlling unless plainly erroneous).

Here, FERC decides whether to authorize construction of major projects based on specific criteria for determining project need and public necessity. Order 7. Because the criteria are explicitly stated in clear terms, the CPS is unambiguous. Additionally, since FERC faithfully evaluated each of the factors in the CPS (see section below), the CPS is controlling. *See Seminole Rock*, 325 U.S. at 414; *Auer*, 519 U.S. at 461.

2. FERC correctly considered the binding precedent agreements and domestic needs in deciding whether there was public need for the AFP.

FERC rightfully decided that there was a public need for the AFP based on binding precedent agreements and the fact that the AFP will serve a multitude of domestic needs per the CPS. The CPS requires that a CPCN order only be granted by balancing public benefits against adverse consequences. Order 7. While the CPS details a variety of factors to balance public benefits against potential adverse consequences, here, the criteria at issue in granting the CPCN are (1) project need, (2) impact on landowners and surrounding communities, and (3) environmental impacts. *Id.* For project need, precedent agreements fully satisfy the first criteria at issue.

In *City of Oberlin, Ohio v. FERC*, the D.C. Circuit held that export precedent agreements are allowed to be considered in the public convenience and necessity analysis. 39 F.4th 719, 724 (D.C. Cir. 2022). There, the City argued that natural gas bound for export cannot be considered for public convenience and necessity. *Id.* However, the D.C. Circuit decided the contrary. *Id.* at 726. The D.C. Circuit reasoned that precedent agreements were evidence that the pipeline would support the production and sale of natural gas which would help grow the domestic economy irrespective of where the gas would be exported to. *Id.* at 727.

Similarly, in *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, the D.C. Circuit decided that the mere presence of precedent agreements demonstrates market demand. 783 F.3d 1301, 1311 (D.C. Cir. 2015). A company submitted precedent agreements for 100% design capacity. *Id.* at 1310. However, those agreements were revised, and the updated agreements with information regarding capacity were not submitted to FERC. *Id.* Nonetheless, the court held that despite lacking those updated agreements, the company demonstrated project need. *Id.* at 1311.

Similar to the City in *Oberlin*, HOME incorrectly argues that precedent agreements cannot be factored into the public necessity analysis. HOME distinguished the pipeline in *Oberlin* from the AFP in that only 17% of the precedent agreements in the *Oberlin* pipeline were meant to be exported, whereas 90% is meant to be exported here. Order 8-9. However, in *Oberlin* there were precedent agreements for 59% of the pipeline’s capacity, whereas here, the precedent agreements account for 100% of the capacity, thus serving more of a public convenience. The D.C. Circuit’s reasoning that precedent agreements demonstrate public need is applicable here as TGP’s precedent agreements cover almost double the capacity of the *Oberlin* pipeline. 39 F.4th at 723; Order 8. FERC explicitly stated in the CPCN that it found a “strong showing” of public benefit because 100% of the AFP’s design capacity is met by such agreements, and the CPS states that precedent agreements will always be significant evidence of project demand. Order 7.

HOME errs in asserting that the AFP serves minimal domestic needs. The AFP will provide natural gas to areas without access to it within New Union and generally expand access to natural gas in the U.S. *Id.* This is not a negligible domestic need, rather, the AFP will provide Americans in a rural area with a way to power their lives. *Id.* at 8. Furthermore, the Americans that benefit from this expanded access will acquire natural gas at a cheaper price because the AFP will optimize existing systems of supply by creating a more competitive market. *Id.* at 7. The AFP serves a major domestic need by making a basic necessity—natural gas—more affordable for an underserved population—rural Americans. *Id.* at 8. As such, FERC considered only relevant factors identified in the CPS when finding that there was a project need.

3. There is a rational connection between the facts FERC had and its issuance of the CPCN.

FERC, in the CPCN, considered the fact that 90% of LNG would be exported, yet came to the conclusion that there was a public need based on precedent agreements and domestic use. Under the arbitrary and capricious standard, an agency must examine relevant data and explain the rational connection between the facts and the decision it made. *State Farm*, 463 U.S. at 43. As such, FERC had a rational basis for issuing the order.

An agency must examine relevant data and articulate a satisfactory explanation for its action. *State Farm*, 463 U.S. at 30. The purpose of a passive restraint requirement was to ensure automatic protection in the case of a motor vehicle accident, either through airbags or automatic seatbelts. 463 U.S. at 46. When the National Highway Traffic Safety Administration (“NHTSA”) determined that detachable automatic seatbelts would not attain marginal safety benefits because Americans would detach the mechanism, the NHTSA did not analyze the effectiveness of airbags. *Id.* at 48. Nonetheless, the agency opted for the detachable automatic seatbelts and failed to justify an abandonment of an airbag requirement with factual findings, analysis, nor the basis on which the NHTSA exercised its expert discretion. *State Farm*, 463 U.S. at 43.

Here, unlike the agency in *State Farm*, FERC explained why the AFP satisfies public convenience and necessity by assessing the data. First, FERC made a strong showing of project benefit by making precedent agreements using 100% design capacity for the AFP. Order 8. These precedent agreements are *always* significant evidence of project demand, even though 90% of LNG will be exported. *Myersville Citizens for a Rural Cmty.*, 783 F.3d at 1311; Order 8. Precedent agreements embody a demand for natural gas, and since precedent agreements use 100% of capacity here, there is evident demand. Order 8. Additionally, FERC found that the AFP would improve regional air quality by using natural gas instead of more polluting fossil

fuels. Order 8. By assessing the domestic needs and demand for the AFP, FERC correctly found a rational connection between the aforementioned data and the need for the AFP.

B. FERC's finding was supported by substantial evidence such that a reasonable mind would find it adequate to support its conclusion.

FERC based its finding of public convenience and necessity on the entirety of the record, including opposing evidence, to come to a well-reasoned conclusion supported by substantial evidence. Substantial evidence is a standard of review in which courts must base their decision on evidence adequate to support a conclusion. *Universal Camera Corp.*, 340 U.S. at 477. The reviewing court must consider evidence in the *entire* record to meet the substantial evidence requirement. *Id.* at 490. Administrative agencies have technical expertise that the courts do not. *Id.* at 113. Thus, it is not the court's duty to make its own factual findings, nor identify alternative findings that may be supported by substantial evidence. *See id.*

FERC had substantial evidence to issue the CPCN because it considered the evidence presented by both TGP and HOME. First, FERC considered TGP's assertion of project need based on precedent agreements as well as HOME's argument that the AFP merely serves a Brazilian need for LNG because 90% of the natural gas will be exported abroad. Order 8. FERC considered TGP and HOME's assertions, but ultimately agreed with TGP in deciding there was project need as precedent agreements are *always* significant evidence of demand for a project. *Myersville Citizens for a Rural Cmty., Inc.*, 783 F.3d at 1311. Additionally, FERC found that the exportation of LNG to Brazil serves the public interest based on the NGA despite the two countries not having a free trade agreement. 15 U.S.C. § 717(b)(c). The international demand is the focal point that FERC emphasizes in considering project need, not the distinction of whether there is a free trade agreement between the nations.

Second, this Court is limited to FERC's findings in addressing TGP and HOME's competing domestic need arguments and must accept FERC's factual findings. *Universal Camera Corp.*, 340 U.S. at 490. HOME argued that the AFP serves a negligible domestic need, and instead serves a Brazilian need for LNG given that the vast majority will be exported. Order 8. However, FERC lists six different domestic needs, including increasing rural access to natural gas service, that the AFP fulfills in reaching the factual conclusion that the AFP serves the American people despite most of the LNG being exported. *Id.* Because the agency made its decision based on substantial evidence from both HOME and TGP, this Court should defer to FERC's finding of project need.

II. FERC'S FINDING THAT THE BENEFITS OF THE AFP OUTWEIGHED ITS SOCIAL AND ENVIRONMENTAL COSTS WAS NOT ARBITRARY AND CAPRICIOUS.

FERC's finding that the AFP's benefits outweigh the costs was not arbitrary and capricious. First, regarding the scope of the agency's authority, aside from public need, FERC may also grant a CPCN based on an assessment of the other two CPS criteria at issue: impact on landowners and surrounding communities and environmental impacts. These CPS criteria require FERC to assess the social and environmental costs of a project prior to granting a CPCN. Order 7. Second, FERC considered the economic benefits that TGP asserted balanced against the environmental and social harms that HOME maintained in making its final finding. *Id.* at 8-10. Third, there is a rational connection between the facts that FERC considered and its finding of public convenience and necessity. *Atl. Ref. Co.*, 360 U.S. at 391. Thus, FERC properly balanced the benefits and harms for the AFP and its decision was not arbitrary and capricious.

A. FERC’s finding was within the scope of its authorized delegation to consider social and environmental factors as stated in the CPS.

Like in the case of public need, FERC’s granting of a CPCN to TGP is guided by the CPS. Order 7. The CPS is controlling so long as it is unambiguous. *Seminole Rock*, 325 U.S. at 414; *Auer*, 519 U.S. at 461. Per the CPS, FERC is required to consider social and environmental harms in order to grant a CPCN as such factors bear on the public interest. Order 7. This places the weighing of costs and benefits firmly within FERC’s authority. The purpose of FERC as an administrative agency is to consider the benefits and harms of a natural gas pipeline, therefore, FERC’s cost-benefit analysis is within the scope of its authorized delegation.

B. FERC considered HOME and TGP’s social and environmental harm arguments in deciding that the benefits of the AFP outweigh the costs.

FERC considered the factors that affect the impact on landowners and communities and environmental harms—the second and third CPS criteria—when deciding to grant the CPCN, so FERC was intentional and thorough in making a proper assessment of the AFP. The reviewing court is responsible for ensuring that the agency considered relevant factors in making a decision. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974).

Even in the absence of ideal clarity, the reviewing court must uphold an agency’s decision if such agency’s path can be reasonably determined. *Bowman*, 419 U.S. at 285. In *Bowman*, the Court held that the Interstate Commerce Commission’s (“ICC”) decision to issue a CPCN to a motor carrier was consistent with public convenience and necessity based on the relevant factors related to customer satisfaction of current service. *Id.* There, the ICC considered the appellee carriers’ showing that existing service was satisfactory (e.g., time in transit of selected shipments), the appellant carriers’ showing of fitness (e.g., comparable transit times), as well as their interaction with each other (e.g., potential short-run business losses for existing carriers, increased traffic, and increased competition). *Bowman*, 419 U.S. at 286, 289, 292-94. In

taking all these factors into account, the Court had an adequate basis to decide whether a carrier was qualified to obtain a CPCN. *Bowman*, 419 U.S. at 293. Even though the ICC was inconsistent in responding to the evidence appellee-carriers provided, the Court decided there was a rational basis for the agency's decision. *Id.* at 290.

Here, FERC considered a variety of factors that contribute to the AFP's impact on landowners, communities, and the environment in deciding to grant the CPCN. *See* Order 10. In assessing the impact on landowners and communities, FERC examined whether TGP made efforts to eliminate or minimize adverse effects along the route of the AFP. *Id.* FERC has made changes to more than 30% of the route to address landowners' concerns. *Id.* Additionally, TGP has agreed to bury and expedite construction of the AFP under HOME's property in order to minimize disruption. *Id.* While TGP has not made easement agreements with over 40% of landowners, FERC's responsibility in evaluating a project's impact on landowners and communities is simply that an applicant has made *efforts* to reduce any adverse impact. *Id.* Here, FERC decided that TGP has taken "sufficient steps" to minimize the adverse impacts on landowners and communities along the route. *Id.*

In assessing environmental impact, FERC acknowledged that the AFP requires the removal of 2,200 trees and other forms of vegetation. *Id.* FERC also took into account HOME's suggestion of Alternate Route 1 in which the AFP would circumvent HOME property. *Id.* However, TGP demonstrated that Alternate Route 1 would actually result in more environmental harm by adding three miles to the pipeline that would run through more sensitive ecosystems in the Misty Top Mountains. *Id.* at 11. In addressing environmental impact, FERC rejected HOME's suggestion of an alternate route and enacted GHG Conditions against TGP's request—it took both arguments into account in deciding how to ameliorate environmental harms. *Id.* at

10, 11. Like the agency in *Bowman*, FERC heard arguments and counterarguments from TGP and HOME that addressed social and environmental impacts, and then granted the CPCN because it found the benefits outweighed the social and environmental impacts of the AFP.

C. There is a rational connection between the facts FERC had as to the social and environmental impacts of the AFP and its issuance of the CPCN.

FERC had a rational basis for granting the CPCN as it compared the benefits of granting the CPCN to its social and environmental harms to come to the conclusion that the benefits outweighed any adverse effects. Reapplying *State Farm*, an agency must examine relevant data and explain a rational connection between the facts and the decision it made. 463 U.S. at 43.

Here, FERC found that TGP adequately attempted to minimize any adverse effects by negotiating mutually acceptable easement agreements with landowners, as well as an agreement to bury the AFP under HOME's property to minimize any interference it might cause. Order 10. These efforts are rationally connected to FERC's finding that TGP tried to minimize the AFP's social impact on landowners and communities because TGP was proactively addressing landowners' concerns. *Id.* Moreover, FERC correctly rejected HOME's claim that any environmental harm or encroachment on their property be considered especially negative as FERC cannot treat landowners subjectively. *Id.* at 12.

There is also a rational connection between FERC's decision to grant the CPCN and addressing environmental impact. FERC recognized the environmental harm associated with the AFP's route through HOME's property, but ultimately rejected Alternate Route 1 due to the considerably greater environmental harm that it would cause. *Id.* at 11. Furthermore, though TGP disagrees with FERC's decision to enact GHG conditions as beyond its authority under the NGA, FERC considered the environmental harms that still existed with the original route and sought to minimize them via these Conditions. *Id.* at 10. This demonstrates that FERC

considered the environmental harms that construction and maintenance of the AFP presented. FERC explicitly stated the social and environmental factors that it considered to satisfy the CPS criteria, and these specific factors led FERC to the decision to grant the CPCN.

III. FERC'S DECISION TO ROUTE THE AFP THROUGH HOME'S PROPERTY DID NOT VIOLATE THE RELIGIOUS FREEDOM AND RESTORATION ACT ("RFRA").

To make a prima facie RFRA claim, a plaintiff must provide evidence showing the existence of two elements: (1) an actual "exercise of religion" and (2) that a government action will "substantially burden" that exercise. *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1068 (9th Cir. 2008); see 42 U.S.C. § 2000bb-1(a). If these elements are shown, the burden shifts to the government to prove that its action is in furtherance of a "compelling governmental interest" and is implemented by "the least restrictive means." *Navajo Nation*, 535 F.3d at 1068; see 42 U.S.C. § 2000bb-1(b). FERC's decision to route the AFP through HOME's property does not violate RFRA because the harmless underground construction of a pipeline is not a substantial burden on HOME's exercise of its religion. And even it were a substantial burden, FERC has shown a compelling interest in the construction of pipelines and that the current pipeline route is the least restrictive means of furthering that interest.

A. FERC's decision to permit the construction of the AFP does not substantially burden HOME's exercise of religion.

The construction of the AFP will not substantially burden HOME's ability to exercise its actual religious practices because it does not require HOME to modify or violate its beliefs. A substantial burden exists when government action puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." See, e.g., *Navajo Nation*, 535 F.3d at 1069 n.11 (citing *Thomas v. Rev. Bd. Of Ind. Emp. Sec. Div.*, 450 U.S. 707, 708 (1981)).

The Supreme Court and RFRA have identified two categories in which a substantial burden to religion will occur. First, forcing individuals to choose between abandoning the precepts of their religion or forfeiting a government benefit is a substantial burden on the exercise of religion. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding that the government was prohibited from conditioning unemployment benefits on an applicant’s abandonment of a religious exercise because of the potential reliance on those funds). Second, affirmatively compelling individuals through sanctions or criminal penalties to perform acts against their fundamental religious beliefs creates a substantial burden on their exercise of religion. *Wisconsin v. Yoder*, 406 U.S. 205, 218-19 (1972) (holding that the choice between abandoning a large part of one’s religion and a criminal sanction was a substantial burden on the exercise of religion).

Moreover, a wholly subjective religious burden, or the “diminishment of spiritual fulfillment—serious though it may be—is not a substantial burden on the free exercise of religion.” *Navajo Nation*, 535 F.3d at 1070. In *Navajo Nation*, Native American tribes sued a ski resort to prevent the subjectively sacrilegious use of artificial snow over the San Francisco Peaks, a space they deemed to be sacred. *Id.* at 1062-63. Only about one percent of the Peaks would be affected by the artificial snow and the water used in the artificial snow had been deemed “the highest quality of recycled wastewater recognized by Arizona law.” *Navajo Nation*, 535 F.3d at 1065. The court held that the sole effect of the artificial snow was on the plaintiffs’ subjective spiritual experience and, because it did not cause any physical barriers to the plaintiffs’ religious practices, it did not constitute a substantial burden under RFRA. *Id.* at 1063.

According to RFRA and Supreme Court precedent, HOME’s religious exercise is not substantially burdened by FERC’s approval of the AFP’s construction through its land. First, HOME is not being forced to abandon the benefit of using the Misty Top Mountains for their

religious practices. Similar to how in *Navajo Nation* a negligible portion of the San Francisco Peaks were affected, only about 8% of HOME's land is affected by the AFP's construction and it would not interfere with HOME's ability to continue its Solstice Sojourn practice after the project is completed. Order 10. This weighs in favor of affirming FERC's finding of no substantial burden. 535 F.3d at 1065. Furthermore, the AFP would not block HOME's ability to access the Misty Top Mountains for any religious practice—including the Solstice Sojourn—because it will be constructed underground. Order 11-12. Thus, the benefit of accessing public lands is not under threat. Moreover, following FERC's original approved route will cause significantly less destruction to the Misty Top Mountains and, indirectly, strengthen HOME's religious practice by preserving the location where the "sacred religious ceremony" of the Solstice Sojourn is actually performed. *Id.* at 11.

Second, HOME is not facing criminal or civil penalties for exercising its religion because the specter of eminent domain is not a sanction. Far from being a civil or criminal penalty, eminent domain is explicitly authorized under the NGA where necessary to construct a planned pipeline. 15 U.S.C. § 717(f)(h). In addition, as FERC recognized, use of eminent domain is a common practice in the construction of pipelines and TGP's negotiations for easement agreements show that TGP and FERC are cautious to exercise this power. Order 10-11. Thus, HOME is not being coerced to act under penalty of law because eminent domain is not a penalty and TGP has offered compromises which HOME refuses to engage with. Moreover, HOME has not demonstrated that it is facing an existential threat to its religion even if eminent domain were used. *Id.* at 13. Indeed, FERC has found that thanks to mitigating practices taken by TGP—i.e., the expedited, underground construction of the AFP—no long-term or short-term effects will be produced by allowing for the AFP's construction on HOME's property. *Id.* Therefore, even if

eminent domain were interpreted to be a sanction—which it clearly is not—its effects would still not produce a substantial burden on HOME’s ability to exercise its religion.

Lastly, any harm suffered by HOME is subjective in nature and, therefore, not a substantial burden. Like in *Navajo Nation*, only a fraction of property will be affected by the construction of the AFP, about 8% of HOME’s total land. Order 10. Furthermore, as members of HOME concede, they will not be physically prevented from continuing their practice of the Solstice Sojourn—they will merely *feel* like the AFP’s presence has changed their practice. *Id.* at 12. In fact, TGP has agreed to bury the AFP to ensure that HOME members are not barred from accessing the Misty Top Mountain, where they carry out their religious ceremony. *Id.* at 11. Additionally, FERC found that the AFP project could be completed between solstices—meaning it would not prevent HOME from practicing its Solstice Sojourn even once. *Id.* at 13. HOME members will be able to walk over a “clear-cut path” which they have always used for the Solstice Sojourn and gather at the limits of the Misty Top Mountains as HOME’s religious tradition has been done since its inception. Moreover, the facts only indicate that the pipeline will “cross” the Sojourn’s route at two points, not completely cover it. *Id.* at 11. Thus, there is no support for HOME’s assertions that the AFP will affect the significance of the Sojourn.

Accordingly, this Court should affirm FERC’s finding that HOME will not suffer a “substantial burden” on its religion sufficient enough to raise a RFRA claim. Its subjective belief of burden is not supported by the facts and the lack of government coercion weigh against finding substantial harm. This result is exactly why courts have continually dismissed religious objection claims where, as here, the petitioners are not pressured to act in any way. *See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (finding no substantial burden where agency has merely made a decision to permit timber harvesting and road construction);

Bowen v. Roy, 476 U.S. 693, 707 (1986) (no substantial burden in government requirement of Social Security number for benefits). HOME will be able to access the route it has always used for the Solstice Sojourn and practice the exact same ceremony it always has at the Misty Top Mountains at the same time it has since the tradition's origin. The construction of the AFP through HOME's land will thus not substantially burden its ability to exercise their religion.

B. FERC's decision to approve the AFP's route satisfies strict scrutiny.

Even if this Court finds that HOME will suffer a substantial burden on the exercise of its religion, its RFRA claim still fails because the AFP route that FERC approved satisfies strict scrutiny. If substantial burden is found, the government must prove that its action is in furtherance of a "compelling governmental interest" and is implemented by "the least restrictive means." *Navajo Nation*, 535 F.3d at 1068; *see* 42 U.S.C. § 2000bb-1(b).

1. The construction of pipelines serves compelling governmental interests.

Both Supreme Court precedent and congressional actions indicate that the construction of natural gas pipelines serves a compelling governmental interest. Congress was clear in the language of the NGA when it said that the "business of transporting and selling natural gas [domestically and internationally] . . . [is] necessary in the public interest." 15 U.S.C. § 717(a). The Supreme Court has also recognized a number of compelling governmental interests related to protection of the public interest in the context of religious exercise cases.¹ The construction of pipelines and the maintenance of a comprehensive pipeline licensing scheme are supported as compelling governmental interests under Court precedent and congressional mandate.

¹ *See, e.g., United States v. Lee*, 455 U.S. 252, 258-59 (1982) (recognizing the uniform administration of laws, such as federal tax schemes, as a "paramount" governmental interest); *Gillette v. United States*, 401 U.S. 437, 462 (1971) (recognizing public welfare as a paramount interest when enforcing the draft against those who found a war "unjust"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (recognizing public welfare as a paramount interest in denying tax exemptions to private religious schools with discriminatory practices).

Uniformity in the administration of a complex governmental program is a compelling interest. *Bowen*, 476 U.S. at 707. In *Bowen*, the Court held that a government’s decision to not grant exemptions on an individual basis is a policy decision that must be granted “substantial deference” before a court decides to question the validity of individual religious beliefs. *Id.* at 707. The Court also concluded that the government had a legitimate interest in avoiding the appearance of favoring those who are religious versus those who are non-religious. *Id.* at 707.

There is also a compelling interest in protecting the survival and effective implementation of national programs. *Lee*, 455 U.S. at 258-59. In *Lee*, the Court held that the national and comprehensive nature of the Social Security Act demonstrated that it served a compelling governmental interest. *Id.* at 258. The Court explained that the interest in the survival of an effective taxing system outweighed the burden on religious exercise because it would be “almost a contradiction in terms and difficult, if not impossible, to administer” the Act without appropriate taxes. *Id.* at 258-59.

FERC’s approval for the construction of the AFP through HOME’s property is justified because it serves two compelling governmental interests: (1) it ensures uniformity in the application of the NGA and (2) it ensures that the NGA will not become obsolete through the abuse of exemptions.

Here, there is a compelling interest in ensuring that the NGA, a complex regulatory scheme, be applied uniformly. The NGA does not contain any landowner exceptions, nor procedures to create exemptions—a policy decision like this should be granted “substantial deference.” *See Bowen*, 476 U.S. at 707. Furthermore, this deference is especially appropriate in this context where other affected non-religious property owners have negotiated with TGP and granted easements on their lands. Order 10. Furthermore, considering there are other property

owners who may have their lands subject to eminent domain, this Court should ensure FERC's ability to avoid the appearance of favoritism towards religious individuals by permitting uniform application of the NGA. Order at 12.

Here, the AFP serves a compelling governmental interest in ensuring the continued existence of the important nationwide service of transporting and selling natural gas. The NGA is very broad in scope, covering almost all transportation and sale of natural gas. 15 U.S.C. § 717(b). There are no exceptions within the NGA. Instead, it authorizes pursue eminent domain claims in federal court access to private property can't be negotiated for the transportation and sale of natural gas. 15 U.S.C. § 717(f)(h). This lack of procedure for the determination of exemptions highlights the congressional belief that allowing them would be too burdensome for the effective implementation of the NGA. *See Bowen*, 476 U.S. at 707. It would make the NGA almost impossible to administer if every time someone wanted to construct pipelines FERC had to consider exemptions for those who are opposed to its operation. It would also be a contradiction of the very terms of the NGA for this Court to require an exemption be made when elected representatives chose to not allow for such mechanisms. *Id.* Thus, FERC's determination regarding the construction of the AFP through HOME's property should be upheld because altering the complex regulatory scheme created by the NGA would endanger the validity of the Act and severely undermine its effectiveness. Accordingly, this Court should find that TGP has raised two compelling governmental interests: (1) uniform application of the NGA and (2) safeguarding the existence and effectiveness of the NGA.

2. Approval of the AFP's proposed route is the least restrictive means possible to accomplish the government's compelling interests.

FERC's approval of TGP's proposed AFP route is the least restrictive means of accomplishing the government's compelling interest because the burdens would be greater if

HOME's alternate route were adopted. Under RFRA, a balancing test is used to determine whether the least restrictive means is being applied. The balance inquiry weighs "the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the governmental activity." *S. Ridge Baptist Church v. Industrial Com'n of Ohio*, 911 F.2d 1203, 1206 (1990).

The government must show that its compelling interests will be burdened by exempting the application of a law to specific parties. *Thomas*, 450 U.S. at 719. In *Thomas*, a man was denied unemployment benefits after quitting his job due to his religious opposition to the direct manufacturing of armaments. *Id.* at 709-10. The Court ruled against the state because it had failed to provide evidence to support its claims that granting an exemption for Thomas, specifically, would lead to an excessive burden in implementing the government's unemployment program. *Thomas*, 450 U.S. at 719.

Similarly, the government must quantify burdens identified under *Thomas* and give a reasonable explanation for why it has rejected proposed alternatives. *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957, 967 (E. D. Mich. 2014). In *Ave Maria*, plaintiffs offered at least three alternatives to the government's proposed plan that would allegedly advance the government's interests without burdening their religious exercise. *Id.* The court there held that the government had failed to demonstrate it was applying the least restrictive means possible because it did not quantify the loss of effectiveness to its plan under the alternatives provided. *Id.* Therefore, the government's actions were not the least restrictive means because of the other possible options available to it and the various existing exemptions that could be applied under the present scheme. *Id.*

Here, the government has clearly shown and quantified that Alternate Route 1 will be much more burdensome to all parties. To begin, Congress’s decision to not include any exemptions in the NGA is an implicit recognition that exemptions will deter the effectiveness of the Act. It is not unreasonable for the government to assert that this practice would render the NGA essentially useless were it to allow exemptions. HOME does not practice a mainstream religion that has existed for centuries and the Solstice Sojourn, for example, has been practiced only since 1935. Unlike *Thomas*, where the religious practitioners are of a more established religion (Jehovah’s Witnesses) and easier to delimit, here, the religious practice is too broad, and it is too difficult to determine who its members might be. This opens the door for anyone who has used their land in a manner that will preserve nature to claim that it is a religious or “spiritual” belief, and thus claim the lands are exempt from being used for NGA purposes. Similarly, if HOME’s claims are affirmed, anyone who opposes the indirect effects of LNG transportation, such as war objectors or luddites, would also be entitled to exemptions if based on a religious belief. The Supreme Court has already rejected these kinds of challenges to federal regulatory schemes. *Lee*, 455 U.S. at 260 (explaining the rejection of the argument that if a religious adherent believes war is a sin, they can challenge any government action that can be traced to operations of war). Anything but use of the approved AFP route would thus compromise the NGA and the compelling government interest in maintaining a coherent natural gas pipeline permitting system.

FERC also considered quantifiable evidence of the burdens that would erupt if an exemption is granted. TGP provided an estimate—which HOME did not contest—of the cost of rerouting the AFP to not cross HOME’s property. Order 11. The report found that it would add over \$51 million in construction costs and cause more objective environmental harm to construct

the AFP over the alternate route. Order 11. Using Alternate Route 1 would travel an additional three miles through “more environmentally sensitive ecosystems” in the Misty Top Mountains.

Id. HOME does not contest the report’s findings and fails to submit evidence to show that its practice will be burdened. *Id.*

Aside from considering compelling evidence that the burden would be substantial, FERC worked with TGP to minimize any incidental burden caused to HOME and its religious practice. For example, the underground construction of the pipeline on an expedited timeline was adopted by FERC following a comment by HOME during the administrative process. *Id.* at 12. This would all but ensure that HOME’s Solstice Sojourn could occur unimpeded as it has since around 1935, when the practice first began. Therefore, TGP and FERC satisfied their burden of showing quantifiable evidence of why the construction of the AFP under HOME’s property is the least restrictive means possible to ensure the effective implementation of the NGA.

HOME has not stated a valid claim under RFRA. The construction of the AFP will not substantially burden HOME’s ability to exercise its religious practices because it does not pressure HOME into modifying or violating its beliefs. And even if TGP’s actions did substantially burden HOME’s religious exercise, the construction of the AFP should be upheld because it satisfies two compelling governmental interests, including the preservation of complex regulatory schemes, through the least restrictive means. Accordingly, this Court should affirm FERC’s finding that routing the AFP over HOME’s property does not violate the RFRA.

IV. THE MAJOR QUESTIONS DOCTRINE PROHIBITS FERC FROM REGULATING GHGs.

Under the Major Questions Doctrine (“MQD”), the Supreme Court has said Congress should speak clearly if it wishes an agency to handle decisions of economic and political importance. *West Virginia v. EPA*, 142 S.Ct. 2587, 2605 (2022). This is especially true when the

decision involves a radical or fundamental change to public policy. *West Virginia*, 142 S. Ct. at 2609. When dealing with an issue of economic and political importance, federal agencies must point to something more than a plausible textual basis for the agency action. *Id.* Agencies must instead cite clear congressional authorization for the power they claim to have. *Id.*

Using the NGA to regulate GHG emissions would violate the MQD. Congress did not provide clear instructions that would allow FERC to regulate GHG, and eighty years of judicial precedent have confirmed that regulation of GHG are not the primary purpose of the act. FERC is also the wrong agency to regulate GHG because it lacks expertise on the subject matter. Allowing FERC to start regulating GHG would also mean FERC could exercise power over wide swaths of the U.S. economy, even without congressional approval.

A. FERC cannot start regulating GHG emissions that come from the construction of the AFP because Congress did not give FERC that power.

In *West Virginia*, the Court ruled that the EPA could not consider generation shifting when determining power plant emissions reductions under the Clean Air Act. *Id.* at 2599-2600. The Court noted that generation shifting would represent a transformative expansion in the authority of the EPA. *Id.* at 2610. The Court criticized the EPA for determining it could create this generation shifting program based on a provision with vague language that had rarely been used in the preceding decades. *Id.* The Court stated that the EPA did not have the technical and policy expertise to develop system-wide change in areas such as electricity transmission and distribution. *Id.* at 2612. The Court further noted that Congress had repeatedly declined to enact a “generation shifting” program that the EPA had proposed. *Id.* at 2610.

Here, Section 717(f)(e) of the NGA authorizes FERC to attach “such reasonable terms and conditions as the public convenience and necessity may require” to the issuance of the CPCN to build a pipeline. While the statute uses general language, legislative history indicates

that this section primarily concerns economics. In 1942, when Congress approved the public convenience and necessity language, the House Report noted that the Federal Power Commission (“FPC”) (the precursor to FERC) should consider upstream and downstream impacts of pipeline development on producers of competing fuels and competitive transportation interests. *See* H.R. Rep. No. 1290-3 (1941). The Senate Report said the FPC should consider costs, finances, necessity, feasibility, and adequacy of proposed service when reviewing proposals for pipelines. *See* S. Rep. No 985-2 (1942). Neither chamber of Congress mentioned anything about the FPC considering pollution when reviewing proposals for pipelines.

Subsequent court cases have also confirmed that Section 717 primarily concerns economics. In *NAACP v. Fed. Power Comm’n*, the Supreme Court noted that the NGA does not give the FPC authority to promote the general welfare. 425 U.S. 662, 669 (1976). Instead, the Court ruled that the FPC must advance the goals of the NGA, which is developing plentiful supplies of natural gas at reasonable prices. *Id.* at 669-70.² Any mitigation measures proposed by the FPC (and now FERC) cannot conflict with this focus on keeping prices reasonable. *See Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs*, 941 F.3d 1288, 1289 (11th Cir. 2019) (holding that agencies may not contradict their animating statutes).

It is dubious to believe that Congress delegated an expansive authority like regulating GHG to FERC under the vague language of “public convenience and necessity.” *See West Virginia*, 142 S. Ct. at 2608-09. Energy regulation can impact vast swaths of the U.S. economy, making it a major economic policy decision. *Id.* at 2613. Like the power plant emissions in *West*

² *See, e.g. Pub. Utils. Comm’n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir 1990) (holding that the FPC must focus on factors relevant to the main purposes of the NGA); *Sunray Mid-Con Oil v. Federal Power Com’n*, 364 U.S. 137, 147 (1960) (holding that the purpose of the Act was to afford consumers protection from excessive rates and charges).

Virginia, because this is a major policy decision, it is highly likely that Congress itself would have wanted to assess the tradeoffs that come with regulating GHG associated with pipelines. *West Virginia*, 142 S. Ct. at 2613..

Allowing FERC to regulate GHG under the NGA would also be unprecedented. Congress has never granted FERC authority to regulate GHG. In fact, Congress has given that very authority to different agency—the EPA. *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007). As a creature of statute, FERC must abide by the specific authorities it receives from Congress. *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002).

Proponents of allowing FERC to regulate GHG are likely to point to courts finding that adverse environmental effects can be considered under the language of Section 717(f)(e). *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (finding that FERC should balance the public benefits against the adverse effects of the project, which include adverse environmental effects). But the *Sierra Club* decision concerns what effects FERC considered during the environmental impact statement (“EIS”) process, rather than a substantive policy issue. *Id.* at 1373-74. The *Sierra Club* decision also predates the Supreme Court’s introduction of the MQD in *West Virginia*, which has clarified the power of executive agencies like FERC to take on fundamental changes in public policy.

Proponents of allowing FERC to regulate GHG may also look to one line from *Atl. Ref. Co.*, which states that Section 717(f)(e) requires the Commission to evaluate *all* factors bearing on the public interest. 360 U.S. at 391. But the Supreme Court itself has said that the NGA does not give FERC sweeping authority to promote the general welfare. *NAACP*, 425 U.S. at 669. A close look at the legislative text of the NGA reveals what Congress meant by public interest, and it has nothing to do with GHG. Section 1 of the NGA notes that the transportation and selling of

natural gas to the public is “affected with a public interest” and federal regulation pertaining to transportation and sale of natural gas is “necessary in the public interest.” 15 U.S.C. § 717(a). The U.S. Senate report emphasized that the FPC should consider costs, finances, and adequacy of proposed service, but did not mention anything about regulation of emissions. *See* S. Rep. No 985-2 (1942). Thus, legislative intent shows that Congress intended public interest to be about ensuring supply and affordability, not some tangential activity like regulating GHG.

B. FERC lacks the scientific and political expertise that would enable it to regulate GHG.

In *West Virginia*, the Supreme Court expressed skepticism that Congress would assign decisions about how Americans would get their energy. *West Virginia*, 142 S.Ct. at 2612. The Court noted that the EPA itself had admitted that understanding and projecting system-wide trends in areas such as electricity transmission, distribution, and storage required technical and policy expertise not traditionally needed in EPA regulatory development. *Id.* The Court explained that when an agency has no expertise in making policy judgments, Congress presumably would not have asked it to make a policy judgment. *Id.* at 2612-13.

The Court also criticized the EPA for arguing that they had the power to decide basic and consequential tradeoffs, like when the United States should switch from coal to natural gas. *Id.* As the Court explained, these questions could have significant impacts on the economy. *Id.* And if Congress wanted the EPA to be making these decisions, they would not have done so in a cryptic and confusing manner. *Id.*

Similarly, FERC has no expertise that would allow it to regulate GHG and has even rejected well-established techniques to assess the impact of GHG emissions. Commissioners Christie and Phillips recently noted that the FERC lacks any analytical tool or framework to estimate the impact of emissions on the environment. *Tenn. Gas Pipeline Co. L.L.C.*, 178 FERC

¶ 61,199 (2022) (Christie and Phillips Concurrence at P 3); *Columbia Gulf Transmission*, 178 FERC ¶ 61,198 (2022) (Christie and Phillips Concurrence at P 3). While FERC has noted that GHG emissions are associated with pipeline development, they have refused to assess the significance of that contribution because of a lack of standard methodology.³ FERC has also refused to monetize climate damages from project-related emissions using the social cost of carbon.⁴ Despite the social cost of carbon being viewed as the best estimate of the costs imposed by climate change, FERC has claimed that the tool suffers from methodological limitations.⁵ Thus, FERC’s own writings suggest that the Commission lacks the capacity to regulate GHG.

Allowing FERC to regulate GHG could also create a significant impact on the U.S. economy. For one, FERC could start opposing pipeline projects simply because they allow for *any* emissions. This would undermine the central purpose of Section 717, which is to protect consumers against high prices for gas, not to ban gas projects all together. *See Sunray*, 364 U.S. at 147. FERC regulating GHG alongside the EPA would also introduce regulatory uncertainty. The end result would be higher costs, jeopardizing the ability of gas companies to provide affordable gas to consumers. If Congress wanted to amend the central goal of the NGA they would have done so at the time, or in the subsequent eighty years since the passage of Section 7. Without clear statutory language, there is no reason to believe that Congress wanted FERC to subvert the premise of the NGA – to ensure affordable natural gas. *See Sunray*, 364 U.S. at 147.

³ *See, e.g.* Romany B. Webb, *Climate Change, FERC, and Natural Gas Pipelines: The Legal Basis for Considering Greenhouse Gases Under Section 7 of the Natural Gas Act*, 28 N.Y.U. Environmental Law Journal 182, 214 (2020).

⁴ Webb, *Climate Change, FERC, and Natural Gas Pipelines* at 214.

⁵ *See, e.g.*, Richard L. Revesz et al., *Best Cost Estimate of Greenhouse Gases*, 375 Science 6352 (2017); Webb, *Climate Change, FERC, and Natural Gas Pipelines* at 214-15.

The pipeline at issue in this case also fits squarely within the MQD's because it is a project that would have political and economic significance. The pipeline would cross the state line between New Union and Old Union, would transport up to 500,000 Dth per day of firm transportation service, and some of the gas would be exported to Brazil. Order 1, 14. This suggests that the pipeline would impact politics and economics in New Union and Old Union, as well as internationally. Finally, if the Court agrees that FERC has the power to regulate GHG under the NGA on this project, it would be a tacit admission that FERC has the power to regulate GHG under the NGA on *any* project. And as the Supreme Court has already noted, questions about the optimal mix and regulation of energy sources nationwide are surely a question of great economic and political significance. *West Virginia*, 142 S.Ct. at 2613.

Proponents of allowing FERC to regulate GHG may also argue that this policy should not be analyzed under the MQD. Order 16. FERC's order notes that the decision to regulate GHG is confined to this proposed project, while the MQD addresses large scale measures taken by agencies through regulation. *Id.* However, nothing in the Supreme Court's reasoning about the MQD prevents it from being applied to specific projects. *See West Virginia*, 142 S.Ct. at 2608 (finding that the MQD can be applied based on the history and the breadth of the authority the agency has asserted as well as the economic and political significance of the authority the agency has asserted). Giving FERC the power to regulate GHG on even one pipeline would go well beyond the agency's knowledge and experience, prior power, previous precedent, and legislative intent. *See, e.g., S. Doc 92; Tenn. Gas Pipeline Co. LLC*, 178 FERC ¶ 61,199 (Christie and Phillips Concurrence at P 3); *Columbia Gulf Transmission L.L.C.*, 178 FERC ¶ 61,198 (Christie and Phillips Concurrence at P 3); *NAACP*, 425 U.S. at 669-70; *Sunray*, 364 U.S. at 147.

V. FERC'S DECISION TO NOT IMPOSE ANY CONDITIONS ON DOWNSTREAM AND UPSTREAM GHG IMPACTS WAS NOT ARBITRARY AND CAPRICIOUS.

Even if the Court believes that FERC does have the power to regulate GHG impacts upstream and downstream, its choice not to do so here was not arbitrary and capricious. Under the arbitrary and capricious standard, an action by FERC may be set aside if the agency has (1) relied on factors which Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) is so implausible it could not be ascribed to a difference in view or the product of agency. *Env't Def. Fund v. FERC*, 2 F.4th 953, 967 (D.C. Cir. 2021). The main question must be whether FERC's decisionmaking was reasoned, principled, and based on the record. *Env't Def. Fund*, 2 F.4th at 968. If the decision was based on a consideration of the relevant factors and substantial evidence, FERC's findings of fact are conclusive. *Myersville Citizens for a Rural Cmty. Inc.*, 783 F.3d at 1308; *Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 108 (D.C. Cir. 2022). Substantial evidence means something more than a scintilla, but possibly less than a preponderance of the evidence. *Del. Riverkeeper Network*, 45 F.4th at 108.

Here, FERC concluded that it was not required to mitigate upstream and downstream GHG impacts. Order 18-19. Under NEPA, federal agencies like FERC must fully consider the environmental effects of proposed major actions, including actions that an agency permits. *Del. Riverkeeper Network*, 753 F.3d at 1309. NEPA only requires that FERC take a "hard look" at potential impacts, which they did in the EIS. Order 19. To take a hard look at something, an agency must draft a statement that contains sufficient discussion of the relevant issues and opposing viewpoints and make sure the agency's decision is fully informed and well-considered. *Myersville Citizens for a Rural Cmty. Inc.*, 783 F.3d at 1324-25. NEPA does not mandate any specific outcome or mitigation measures. Order 19. As FERC noted, it is unclear whether the

pipeline will even cause any significant *increase* in emissions upstream or downstream. Order 19. Based partially on the uncertainty, FERC determined that it did not make sense to regulate downstream and upstream GHG. *Id.* Contrary to HOME’s claims, FERC also correctly noted that it could not impose conditions addressing upstream and downstream GHG impacts until it had drafted guidance to create a consistent policy. *Id.* While FERC’s rationale might not be HOME’s *desired* outcome, it is a rationale based only on evidence from the record. Therefore, the Court should defer to FERC.

If FERC started regulating downstream and upstream GHG impacts, it would have been contrary to the intent of Congress, and thus, arbitrary and capricious. The NGA itself is clear that the federal government can only regulate on “matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce.” 15 U.S.C. § 717. The Act specifically prevents FERC from regulating on production and gathering. *Id.* Additionally, courts have long ruled that upstream and downstream activities are regulated by states, not the federal government. *See Pub. Utils. Comm’n of Cal*, 900 F.2d at 277. (“[T]he state...has authority over the gas once it moves beyond the high-pressure mains into the hands of an end user.”).⁶ FERC must acknowledge that the NGA was written to allow states to continue to have a role in regulation. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 292 (1997).

The Supreme Court has said that Congress must enact clear language if it wishes to alter the balance between federal and state power. *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S.Ct. 2485, 2489 (2021). There is no evidence of that clear language in the NGA. It

⁶ *See also, e.g., Nw. Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 510 (1989); *see also ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002); *S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010).

would be arbitrary and capricious for FERC to infringe on the state power to accomplish something that Congress did not ask for.

CONCLUSION

HOME is urging this Court to overrule an agency that has a long track record of assessing applications for new pipelines. In this case, FERC made sure its recommendation was within the scope of authority designed to it by statute, FERC based its consideration on all relevant factors, and FERC connected its decision to the facts in the record.

But that is not enough for HOME. HOME wants to prevent the expansion of natural gas service to areas without access, ensure a less competitive gas market, and continue the use of dirtier fossil fuels. If HOME cannot win on the process of how FERC approved the pipeline, its last resort is to argue that the pipeline burden's HOME's free exercise of religion. However, HOME fails to offer any evidence that its religious practices would be burdened. In fact, TGP has worked with FERC to devise a pipeline route that would limit any burden to HOME.

While TGP appreciates that FERC approved the construction of the pipeline, it should not get off so easily. FERC made the right decision to avoid regulating upstream and downstream GHG emissions. But by using generic language to regulate GHG emissions from the construction of the pipeline, FERC makes a mockery of what Congress intended the NGA be used for.

This Court must oppose efforts by HOME to argue that FERC did not follow the law. And it must rein in an unaccountable federal agency from crafting regulations that is in no statute and that Congress has not asked for. Accordingly, this Court should affirm FERC's decision as it pertains to question four.