C.A. No. 23-01110
CONSOLIDATED WITH
C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

HOLY ORDER OF MOTHER EARTH,
Plaintiff-Cross Appellant,

-and-

TRANSNATIONAL GAS PIPELINES, LLC,
Plaintiff-Cross Appellant,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Plaintiff-Appellee.

On Appeal from the Federal Energy Regulatory Commission in docket no. TG21-616-000, Commissioners Jane D. Clark, Chairwoman; Scott P. Williams, Timothy S. Child, and Wendy L. Bankman

Brief of Appellee, FEDERAL ENERGY REGULATORY COMMISSION

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JURISDICTIONAL STATEMENT

The Holy Order of Mother Earth (HOME) and Transnational Gas Pipelines, LLC (TGP) appeal from an April 1, 2023 order granting a Certificate of Public Convenience and Necessity (CPCN) and a May 19, 2023 Order denying petitions for rehearing and affirming the CPCN. FERC had jurisdiction to review the petitions filed under Docket No. TG21-616-000 for rehearing pursuant to the Natural Gas Act (NGA). 15 U.S.C. § 717r(a) (application for rehearing by a party aggrieved by a Commission order). The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 15 U.S.C. § 717r(b), which grants review of FERC orders to the United States Court of Appeals.

STATEMENT OF ISSUES PRESENTED

I. Whether FERC properly granted a Certificate of Public Convenience and Necessity for the American Freedom Pipeline because the project's benefits outweigh its residual adverse effects on third parties.

II. Whether FERC's approval of the AFPs' construction and eminent domain through HOME property violates the RFRA's protection of HOME's free exercise of religion.

III. Whether FERC's decision to attach GHG mitigating conditions to the construction of the AFP was within its statutory authority under the Natural Gas Act.

IV. Whether FERC properly exercised agency discretion when determining that upstream and downstream GHG emissions were not required by public convenience and necessity.

STATEMENT OF THE CASE

I. The American Freedom Pipeline could supply enough natural gas to heat up to two million homes and multiple other domestic needs.

The American Freedom Pipeline (AFP) is a proposed 99-mile-long interstate natural gas pipeline that, despite being only 30 inches in diameter and $599 million, would provide enough

liquid natural gas (LNG) to heat over 2,000,000 homes—more than all of the homes in Los Angeles. *See* Record at 1, 10; Lindsay Wilson, Average Natural Gas Usage Per Month, SHRINK THAT FOOTPRINT (estimating the average U.S. monthly residential natural gas usage at 70-90 therms per month); U.S. Census Bureau, Los Angeles County, California, U.S. CENSUS BUREAU QUICKFACTS. Transnational Gas Pipelines, LLC (TGP)—a New Union natural gas company—applied to construct and operate this pipeline on June 13, 2022. Record at 1. TGP has already submitted precedent agreements representing 100% of AFP's capacity. *Id.* at 11, 26. Beyond financial self-sufficiency and community engagement, the AFP serves multiple domestic needs:

1. Delivering 500,000 dekatherms per day (Dth/day);
2. Gas routed through the AFP would provide service to an area of New Union currently deprived of natural gas access;
3. Expanding both additional supply and redundancy for resilient national natural supply infrastructure;
4. Enabling a more competitive market to benefit both current and new customers;
5. Filling the under-capacity Northway Pipeline;
6. Protecting human and environmental health harmed by regional air quality in areas that still use dirtier fossil fuels by providing cleaner-burning natural gas. *Id.* at 27.

Likewise, TGP negotiated rights of way with almost 60% of landowners along the AFP's proposed route, negotiated mutually acceptable easement agreements, and made changes to over 30% of the proposed pipeline route to address their concerns. *Id.* at 41-42.

II. The American Freedom Pipeline would enable the profitable export of some natural gas without contributing to any domestic shortages.

The TFP Project would liquify and transport natural gas produced in Old Union's Hayes Fracking Field (HFF) from Jordan County, Old Union, to a proposed interconnection at an existing TGP facility in Burden County, New Union (the TGP Project). *Id.* at 1. All gas transported via AFP will cross state lines. Exhibit A. International Oil & Gas Corporation

(International) has agreed to purchase 450,000 Dth/day of this LNG. Record at 11. International's LNG would be diverted at the Burden Road M&R Station to the existing Northway Pipeline (currently operating below full capacity). *Id.* at 14. The Northway Pipeline will carry the LNG into the New Union City M&R Station, which International operates. *Id.* Because International's parent company is Brazilian, it plans to export all of this LNG—approximately 90% of the AFP's total—to Brazil. *Id.* at 24.

Currently, all of the natural gas produced at HFF is transported to states *east* of Old Union by the Southway Pipeline, so the precedent agreements do not project additional production at HFF, instead rerouting 35% of the HFF's current output from the Southway Pipeline to the AFP. *Id.* at 12-13. Demand for natural gas in the area served by the Southway Pipeline has been steadily declining due to a combination of factors, including population shift, efficiency improvements, and increasing electrification. *Id.* No party disputes TGP's assertion that, due to this shifting demand, the reduction in transport on the Southway Pipeline would not lead to gas shortages in that pipeline's service area. *Id.*

III. Current greenhouse gas analysis does not make clear whether the American Freedom Pipeline will cause an overall increase or decrease in upstream and downstream emissions.

The Council on Environmental Quality (CEQ) recently published interim guidance (CEQ Climate Guidance) for addressing climate change in environmental impact assessments under the National Environmental Policy Act (NEPA). *Id.* at 69. The CEQ Climate Guidance "*encourages* agencies to mitigate GHG emissions associated with their proposed actions to the greatest extent possible." *Id.* (emphasis added). While FERC is an independent agency not required by CEQ to follow its rules and regulations, it generally does so voluntarily. It is currently developing final GHG rules for review of pipeline applications. *Id.* at 70. Awaiting the final rules' publishing,

FERC required TGP to include in its Environmental Impact Statement (EIS) a lengthy evaluation of the TGP Project's GHG impacts. *Id.* at 70-71.

Whether the TGP Project will cause any significant increase in emissions upstream or downstream is unclear. *Id.* at 100. TGP's analysis found that if all 500,000 Dth per day were sent to combustion end uses, downstream end-use could result in about 9.7 million metric tons of CO2e per year. *Id.* at 72. However, this represents an upper bound based on the extreme conditions and does not incorporate three critical considerations. *Id.* First, TGP's analysis of downstream impacts (end use of LNG that the AFP transports) assumes that the AFP transports its maximum capacity all 365 days of the year—an unlikely assumption because projects are designed for peak day use. *Id.* Second, the LNG may displace other fuels with higher CO2e emissions—as well as air pollution impacts. *Id.* Third, it may also replace gas that otherwise would be transported via different means, resulting in no change in CO2e emissions. *Id.* Thus, it is unlikely that this total amount of CO2e emissions would occur, and emissions are likely to be lower than the above estimate. *Id.* Besides downstream impacts, FERC also estimates that the AFP's construction would produce 353,360 metric tons of CO2e over four years. *Id.* at 73.

IV. The Commission has already denied a rehearing for TGP's objections to the GHG Conditions on the TGP project.

FERC's criteria for project need and public interest are laid out in our Certificate Policy Statement. *Certification of New Interstate Natural Gas Pipeline Facilities* ("Certificate Policy Statement"), 88 FERC ¶ 61,227 (1999), clarified, 90 FERC ¶ 61,128, further certified, 92 FERC ¶ 61,094 (2000). On April 1, 2023, FERC issued an Order granting a Certificate of Public Convenience and Necessity (CPCN) for constructing the AFP. Record at 2. Based on those criteria, approval was contingent on certain conditions ("GHG Conditions") that TGP shall:

1. Plant trees in equal number to those removed for the TGP Project's construction;

2. Utilize, wherever practical, electric-powered equipment in the construction of the TGP Project, including vehicles, chainsaws, and other removal equipment;

3. Purchase only "green" steel pipeline segments produced by net-zero manufacturers;

4. Purchase all electricity used in construction from renewable sources, where available. *Id.* at 67.

On April 22, 2023, TGP sought rehearing from FERC to challenge the GHG Conditions. *Id.* at 6. On May 19, 2023, FERC issued an Order denying the petitions for rehearing and affirming the CPCN as originally issued (the "Rehearing Order"). *Id.* at 7.

V. The Commission has also denied a rehearing to HOME after previously requiring significant changes to the AFP to accommodate its religious exercises.

On April 20, 2023, The Holy Order of Mother Earth ("HOME")—a religious organization in Burden County, New Union owning some land that the AFP would cross—submitted a separate petition for review. *Id.* at 38. Through public comment, HOME brought to FERC's attention that it is a religious order that worships nature. *Id.* at 56. HOME's sprawling 15,500-acre property is just north of the proposed end point of the AFP, with its headquarters at the far western end, west of the AFP's proposed route. Exhibit A. One of HOME's core tenets is that humans should promote nature preservation over all other interests—including the economic welfare of those outside of their community. *See* Record at 47 (noting that "HOME['s] fundamental core tenet is that humans … promote natural preservation over all other interests, especially economic interests"). In addition, every summer and winter solstice, HOME members take part in the "Solstice Sojourn": a ceremonial journey from a temple at the western border of the property to a sacred hill on the eastern edge of the property, hold a religious ceremony for 15-year-old members, then journey back along a different path. *Id.* at 48. Because the proposed pipeline route crossed their path at two locations (one in each direction), HOME's religious beliefs and practices directly forbid it to use its land for transporting LNG, given the harmful

environmental effects of fracking, the environmental harm from building the pipeline, and LNG's GHG emissions. *Id.* at 49.

Out of respect for their religious practices and the desire to minimize any burden on their community, FERC included in the GHG Conditions that TGP must bury the pipeline over the entire span where it would cross HOME's property (including both intersections with the Solstice Sojourn path) to ensure the pipeline would not be visible nor a physical barrier on HOME property. *Id.* at 56. Likewise, to ensure the construction would not disrupt HOME's practice, FERC required TGP to complete all construction on HOME property to be completed within only four months between the summer and winter solstices (the Solstice Sojourn takes place six months apart). *Id.* at 60. TGP agreed to both of these conditions. *Id.* at 41. The proposed AFP would now pass underneath a mere two miles of HOME property. *Id.* at 38. Although construction requires the removal of 2,200 trees and smaller vegetation, we also included in the GHG Conditions that TFP must plant an equal number of new trees in other locations (new trees could not replace the removed new trees along the route for safety reasons). *Id.*

Nevertheless, HOME requested a rehearing focused on three aspects of the CPCN Order. *Id.* at 36. First, HOME objected to the CPCN Order finding of project need, arguing that because 90% of the gas transported by the pipeline will be exported to Brazil—which does not have a free trade agreement with the United States—there is insufficient public necessity for approval or eminent domain. *Id.* at 33. HOME based this argument on its belief that the Commission improperly balanced the AFP's public benefits and residual adverse effects. *Id.* at 40. Second, Home argues that—even if the benefits do outweigh the harms—routing the AFP underneath HOME's property violates the Religious Freedom and Restoration Act (RFRA). *Id.* at 54. Third,

HOME argues that it was arbitrary for the Commission to not require climate change mitigation measures for both upstream and downstream impacts. *Id.* at 93.

STANDARD OF REVIEW

Under the Natural Gas Act, FERC's factual findings are conclusive if they are supported by substantial evidence. 15 U.S.C. § 717r(b). Courts review FERC conclusions under the "arbitrary and capricious" standard. *City of Oberlin, Ohio v. FERC ("Oberlin I")*, 937 F.3d 599, 605 (D.C. Cir. 2019); 5 U.S.C. § 706(2)(a). A reviewing court must uphold the agency's conclusion when the agency "examine[s] the relevant considerations and articulate[s] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016). This is a "narrow" review. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The reviewing court may not "substitute its judgment for that of the agency." *Id.* A "presumption of validity" attaches to each exercise of FERC's expertise in recognition of Congress's decision to entrust regulation of the natural gas industry to FERC rather than reviewing courts. *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

ARGUMENT

I. FERC correctly issued a Certificate of Public Convenience and Necessity because the benefits of the AFP outweigh its harms.

A natural gas company may only construct or extend facilities for the transportation or sale of natural gas if FERC grants the company a Certificate of Public Convenience and Necessity ("CPCN"). 15 U.S.C. § 717f(c)(1)(A). FERC must grant a CPCN where the underlying project "is or will be required by the present or future public convenience and

necessity."[1] § 717f(e). FERC determines whether the public convenience and necessity require a project by balancing the project's public benefits against its unavoidable adverse effects.[2] *City of Oberlin, Ohio v. FERC ("Oberlin II")*, 39 F.4th 719, 722 (D.C. Cir. 2022).

Here, FERC correctly concluded that the public benefits of the AFP outweigh its harms, requiring FERC to grant a CPCN. *See* § 717f(e). AFP will create several present and future public benefits by driving economic growth, creating domestic jobs, reallocating existing natural gas resources to areas with greater demand, and expanding access to natural gas within the United States. *See* Record at 27, 34. These benefits outweigh the project's harms, including removing trees, using eminent domain, and HOME's religious objections. *See* Record at 38, 42, 49. FERC is thus required to grant TGP a CPCN. *See* § 717f(e).

A. FERC properly analyzed TGP's application under Section 7 because the AFP will carry natural gas in interstate commerce.

When Section 7 of the Natural Gas Act applies, FERC must grant a CPCN if the public convenience and necessity require the project. § 717f(e). Section 7 applies to "natural gas companies," which the Act defines as companies engaged in "the transportation of natural gas in interstate commerce." § 717a(6). The NGA defines interstate commerce as excluding international commerce. § 717a(7).

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[1] Section 7(e) also requires FERC to determine that "the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder" before granting a CPCN. § 717f(e). The parties do not dispute FERC's determination that TGP is able and willing to perform the service proposed or conform to FERC's rules and regulations, so this brief addresses only FERC's finding that the AFP is consistent with the public convenience and necessity.

[2] As a threshold matter, FERC must first determine "whether [a proposed pipeline] project can proceed without subsidies from [the company's] existing customers." *Oberlin II*, 39 F.4th at 722 (quoting *Certificate Policy Statement*, 88 FERC ¶ 61,745). In this case, however, the parties do not dispute that the construction of the AFP will not require subsidies from TGP's existing customers. Record at 21. This brief thus focuses entirely on FERC's identification of public benefits and harms and the agency's balancing thereof.

Here, 90% of the gas transported via the AFP will be exported to Brazil, but the AFP is still properly analyzed under Section 7 for two reasons. *See* Record at 24. First, all gas transported via the AFP will cross state lines, bringing it within the purview of Section 7. Exhibit A. The gas is extracted at the Hayes Fracking Field in Old Union and routed through the AFP into New Union, where it is eventually consumed by New Union residents or exported. *See id*.; Record at 34. Second, even the exported gas is considered "interstate gas" under the NGA because any gas "commingled" with interstate gas is itself interstate gas. *Okla. Natural Gas Co. v. FERC*, 28 F.3d 1281, 1285 (D.C. Cir. 1994).

B. FERC correctly identified the public benefits of the AFP, including export precedent agreements.

FERC has wide discretion to evaluate "all factors bearing on the public interest" when determining whether to grant a CPCN. *Atl. Refining Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 391 (1959). This is a "flexible inquiry" under which FERC may consider a "wide variety of evidence." *Oberlin I*, 937 F.3d at 605.

To promote consistency and reliability, FERC evaluates proposed interstate natural gas pipelines according to the criteria established in its Certificate Policy Statement. *See* 88 FERC ¶ 61,737. The Certificate Policy Statement eschews a "bright line" approach. *Id.* at 61,749.

1. FERC properly exercised its authority when it concluded that TGP's export precedent agreements demonstrated public benefits.

Precedent agreements are "always … important evidence of demand for a project." 88 FERC ¶ 61,748. Applicants need not submit contracts for any particular percentage of a pipeline's capacity. *Id.* FERC may grant export precedent agreements "the same weight" as purely domestic contracts when evaluating the present and future public convenience and necessity. *Oberlin II*, 39 F.4th at 727.

In *Oberlin II*, the D.C. Circuit Court of Appeals held that FERC properly considered export precedent agreements indicative of public need in part because they demonstrated various domestic benefits. *Id.* at 726. There, the Nexus Pipeline transported gas across state lines before any portion left the United States for export into Canada. *Id.* at 723. The applicant submitted precedent agreements accounting for 59% of the pipeline's total capacity. *Id.* at 723. Two precedent agreements, together accounting for 17% of total capacity, were with Canadian companies for Canadian consumption. *Id.* The court held that FERC properly recognized that the exported gas created various domestic benefits, including adding additional capacity to transport gas, contributing to economic growth, and supporting domestic jobs. *Id.* at 727. The court also held that FERC's reasoning was consistent with Congress's determination that, under Section 3 of the NGA, natural gas exported to a country with which the United States has a free trade agreement serves the "public interest" *per se. Id.* at 726; 15 U.S.C. § 717b(c).

Here, FERC correctly credited TGP's export precedent agreements as indicia of public need even though nearly 90% of gas transported via AFP will be exported to Brazil, a country with which the United States does not have a free trade agreement. *See* Record at 24. Since the two countries do not have a free trade agreement, exporting gas to Brazil does not automatically serve the public interest *per se*. *See* 15 U.S.C. § 717b(c). But FERC nonetheless retains discretion to conclude that exporting gas to Brazil serves the public interest. Congress's conclusion that exports to a country with which the United States has a free trade agreement serve the public interest *per se* does not preclude FERC from concluding that other exports also serve the public interest. *See* § 717b(c). Reviewing courts must presume that, in writing a statute, Congress "says … what it means and means … what it says." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). It is a "basic and unexceptional" rule that courts must give effect to the

"clear meaning of statutes as written." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992). The statutory text here is clear and unambiguous. Section 3(c) states only that gas exported to countries with which the United States has a free trade agreement is consistent with the public interest *per se*. § 717b(c). Congress could have, but did not, indicate that *only* gas exported to free trade countries serves the public interest. *See id*. Furthermore, Section 3(a) explicitly requires FERC to grant an order authorizing the export of gas to any nation when it is consistent with the public interest to do so. § 717b(a). By refusing to insert "only" or a similar word into Section 3(c), Congress gave FERC the discretion to consider whether the export of gas to non-free trade agreement nations serves the public interest—rather than the categorical approach HOME erroneously reads into the language.[3] *See In re Permian Basin*, 390 U.S. at 767 ("Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission," creating a strong presumption of validity in favor of each exercise of the Commission's expertise).

Exercising its proper discretionary authority under the NGA, FERC correctly concluded that the gas that will be exported to Brazil serves the public necessity. *See* § 717f(e). As the D.C. Circuit noted in *Oberlin II*, pipeline precedent agreements create important domestic benefits regardless of where the transported gas is eventually consumed, driving economic growth and supporting jobs in the natural gas industry. 39 F.4th at 727. Moreover, the AFP is distinguishable from *Oberlin II*, where the applicant submitted precedent agreements for only 59% of the

[3] The "public interest" standard of Section 3 is similar, but not identical to, the "public convenience and necessity" standard of Section 7. *Oberlin II*, 39 F.4th at 727. A finding that, as here, the export of gas is not inconsistent with the public interest under Section 3 does not compel a finding of public convenience and necessity under the balancing test required by Section 7. *See id.* The following sections of this brief explain why FERC correctly balanced the benefits and potential harms associated with the AFP as required by Section 7. *See* § 717f(e).

pipeline's capacity, because TGP submitted precedent agreements for 100% of the AFP's capacity. *See id.* at 723; Record at 11. This suggests that the benefits associated with the AFP are even more concrete than those of the Nexus Pipeline in *Oberlin II* because FERC need not speculate about future economic benefits since the pipeline is fully subscribed before construction begins. *See* 39 F.4th at 723; Record at 11.

2. FERC correctly concluded that the AFP would create additional domestic benefits by efficiently reallocating natural gas resources.

Beyond precedent agreements, public benefits may include "'meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015) (quoting *Certificate Policy Statement*, 88 FERC ¶ 61,748). "There is no floor" on the subscription rate needed to support the conclusion that a pipeline is in the public convenience and necessity. *Oberlin II*, 39 F.4th at 730.

In *Oberlin II*, the D.C. Circuit held that a pipeline is in the public convenience and necessity even if FERC does not consider export precedent agreements when the pipeline would allocate gas resources more efficiently than the status quo. *See id.* at 729. In that case, the Nexus pipeline "alleviate[d] a bottleneck" in the pipeline grid by adding more capacity to transport gas out of the Appalachian Basin. *Id.* In doing so, the pipeline also increased the supply of natural gas to Midwestern markets. *Id.*

Here, the AFP will similarly reallocate gas resources to make the grid system more efficient by diverting some gas away from a shrinking market and into a high-demand area. *See* Record at 13. Currently, all gas extracted at the Hayes Fracking Field in Old Union flows into Eastern states through the Southway Pipeline. Exhibit A. However, demand for natural gas in the

area served by the Southway Pipeline has been steadily declining due to a combination of factors. Record at 13. Meanwhile, the gas routed through the AFP would serve an area of New Union currently without access to natural gas. *Id.* at 27; *see also Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1332 (D.C. Cir. 2004) (recognizing that bringing "much-needed natural gas supplies" to an area for the first time supports a finding of public need). This "re-shuffling" of existing resources thus aligns supply and demand consistent with both primary purposes of the NGA: it "encourage[s] the orderly development of plentiful supplies of electricity and natural gas at reasonable prices" and "protect[s] consumers against exploitation at the hands of natural gas companies." Record at 29; *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976); *Oberlin I*, 937 F.3d at 602. While only 10% of gas transported through the AFP will ultimately be consumed in New Union, there is "no floor" on the subscription rate required for FERC to find that a project will serve a public need. Record at 27-28; *Oberlin II*, 39 F.4th at 730.

C. FERC correctly concluded that the AFP is in the public convenience and necessity because its benefits outweigh its minimal harms on affected landowners and the surrounding community.

An applicant for a CPCN must take steps to minimize the adverse effects of a pipeline on landowners and surrounding communities. *Certificate Policy Statement* at 61,745. If an applicant has appropriately minimized the adverse effects of their project, FERC considers the pipeline's residual adverse effects.[4] *Id.* at 61,747. FERC primarily considers economic interests at this stage, with environmental interests typically receiving consideration in the separate environmental review process required by the National Environmental Policy Act. *Id.* at 61,749.

[4] FERC also considers adverse impacts on the applicant's existing customers, as well as the interests of competing existing pipelines and their captive customers. *Id.* However, the parties do not dispute that the AFP will cause no adverse effects on these groups, so this brief examines only the AFP's potential impacts on HOME. *See* Record at 40.

An applicant can minimize adverse effects on landowners by acquiring as much right-of-way as possible through negotiation rather than eminent domain proceedings. *Id.* at 61,749. Balancing the harms and benefits of the project is an "economic test." *Myersville*, 783 F.3d 1301, 1309 (D.C. Cir. 2015). FERC "enjoys broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines." *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010).

In *Oberlin II*, the D.C. Circuit upheld FERC's decision to issue a CPCN in part because the pipeline's benefits residual adverse effects were "small" due to the applicant's negotiation of rights-of-way with 93% of affected landowners. 39 F.4th at 729. The applicant also reduced the harms to landowners and the surrounding community by incorporating route variations in response to public outreach. *Id.* at 724. The D.C. Circuit thus concluded that the pipeline was in the public convenience and necessity because its purely domestic benefits outweighed its minimal adverse effects on landowners. *Id.* at 729-30.

Here, TGP minimized the economic effects on landowners by negotiating rights of way with almost 60% of landowners along the AFP's proposed route. *See* Record at 42. While the applicant in *Oberlin II* negotiated rights of way with a greater percentage of affected landowners, the negotiation there was more important because the applicant secured precedent agreements for only 59% of the pipeline's capacity. *See Oberlin II*, 39 F.4th at 729. Because the AFP's benefits are far more evident, with TGP having submitted precedent agreements for 100% of the pipeline's capacity, TGP is not statutorily required to eliminate as many harms as the applicant in *Oberlin II*. *See* Record at 11, 39 F.4th at 729. While TGP will need to exercise eminent domain to acquire land from about 40% of affected landowners, using eminent domain under a CPCN does not create cognizable adverse effects on landowners per se. *See* Record at 42. Congress

explicitly authorized recipients of a CPCN to exercise eminent domain to acquire necessary rights of way. *See* 15 U.S.C. § 717f(h).

Additionally, TGP took further steps to minimize the adverse effects on landowners, including HOME. *See* Record at 41. TGP agreed to bury the AFP throughout the entirety of HOME's property and to complete construction within four months. *Id.* Since HOME's "Solstice Sojourn" occurs every six months, TGP could construct the AFP through HOME's property entirely between Sojourns, ensuring that the construction will not interfere with its religious practices. *See* Record at 41, 48. HOME's further arguments about its religious beliefs and practices are best addressed through HOME's RFRA claim (addressed in the following section) because religious interests fall outside the scope of FERC's CPCN analysis under the NGA. *See Env't Defense Fund v. FERC*, 2 F.4th 953, 961 (D.C. Cir. 2021) (noting that under Section 7 of the NGA, "adverse effects may include increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property").

Finally, HOME's argument that removing 2,200 trees and other vegetation would be a significant adverse impact fails for two reasons. *See* Record at 38. First, the environmental argument is instead addressed during the NEPA analysis later in the evaluation process. *See Certificate Policy Statement* at 61,748 (noting that in the context of balancing benefits and harms for a CPCN application, "landowner property rights issues are different in character from other environmental issues considered under [NEPA]" and that such balancing "precede[s] the environmental analysis"). Second, any greenhouse gas impacts associated with the loss of vegetation will be offset by planting new trees in other areas as required by the conditions FERC attached to the CPCN. *See* Record at 38.

II. Routing the AFP through HOME property did not violate RFRA.

Congress's intent for the RFRA was to create the statutory equivalent of the *Yoder-Sherbert* strict scrutiny standard for the free exercise of religion. 42 U.S.C. § 2000bb; *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629 (7th Cir. 2000). Courts apply a two-step burden-shifting analysis. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (holding that to "establish a *prima facie* RFRA claim, a plaintiff must present evidence sufficient to allow a trier of fact rationally to find … [that] the government action must 'substantially burden' the plaintiff's exercise of religion") (citations omitted). First, the claimant's *prima facie* RFRA claim must show that their compliance would substantially burden their religious practice. Second, the federal agency must establish that the law is the least restrictive means to protect a compelling government interest. Many appellate cases make clear that this is the approach that courts use to evaluate RFRA claims against FERC. *See, e.g., Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 194 (3d Cir. 2018) (noting that RFRA governs FERC when plaintiffs oppose a pipeline through their property on religious grounds). HOME fails to meet the first step of showing that the pipeline would substantially burden its members' free exercise rights. Moreover, even if the court were to rule in favor of HOME on the first step, FERC has carefully tailored its requirements for the AFP to ensure that it is the least restrictive means of furthering the compelling government interest in national energy security.

A. HOME fails to make a prima facie RFRA claim that the AFP is a substantial burden because its members are not forced to choose between their free exercise and either receiving a governmental benefit or avoiding legal sanctions.

For a *prima facie* RFRA claim, a law must "first *burden* the exercise of religion and then do so *substantially*." *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214 (9th Cir. 2008) (emphasis added). While there is no canonical definition of "substantial burden," courts make

clear that it occurs "*only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or [avoiding] the threat of civil or criminal sanctions (*Yoder*)." *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957, 964 (E.D. Mich. 2014); *Navajo Nation*, 535 F.3d at 1069-70. Any burden on the free exercise of religion less than this is not considered "substantial" under RFRA, ending the analysis at the first step. *Id.*

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court first held that courts must be cautious to avoid determining whether religious beliefs are reasonable. 573 U.S. 682, 724 (2014). Second, it confirmed RFRA's definition of "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief … construed in favor of a broad protection … to the maximum extent permitted by the [Religious Land Use and Institutionalized Persons Act] and the Constitution." *Id.* at 696. The U.S. Department of Health & Human Services (HHS) required for-profit corporations to provide health insurance coverage for certain contraceptives while providing a cost-free alternative for religious nonprofit corporations. Hobby Lobby sued, citing its owners' religious objections to contraceptives. HHS argued that its regulations would not violate their sincerely held religious beliefs because providing the coverage would not directly destroy an embryo—it would be employees who chose to use the coverage and to purchase contraceptives that would destroy the embryos. *Id.* at 723. The Supreme Court disagreed. Because the government may not determine if an individual's beliefs are flawed or unreasonable, when a plaintiff believes they are burdened by compulsory behavior implicating an act immoral according to their religious beliefs, HHS and the courts cannot simply determine otherwise. *Id.* at 723. Thus, any law that makes it more costly for a for-profit corporation to reconcile its business practices and religious beliefs is a *substantial*

burden. More generally, a plaintiff is substantially burdened when it both subjectively believes a law burdens its free exercise and the burden is objectively substantial.

Snoqualmie Indian Tribe v. FERC demonstrates how this substantial burden standard applies to FERC's decisions. 545 F.3d 1207. The Snoqualmie tribe argued that FERC's decision to grant a license to a hydroelectric dam near a waterfall substantially burdened their religious exercise. The waterfall played a central role in the Snoqualmie's creation story, they believed that the waterfall's mist connected the earth to the heavens and a powerful water spirit lived in the pool below the falls. *Id.* at 1211. The waterfall also served as an important location for religious experiences such as group prayer, meditation, worship, contacting ancestors, and vision quests. *Id*. Continued operation of the hydroelectric project would "prevent the [Snoqualmie's] necessary religious experiences" by depriving their access to the falls for those religious experiences, eliminating the mist necessary for their religious experiences, and altering the sacred water flow over the falls. *Id.* at 1213. The Ninth Circuit confirmed that RCRA did not prohibit all incidental burdens on religious practices. *Id.* at 1214–15; *see also id.* at 1215 (clarifying that FERC's prior stronger standard—whether "the Government took some action which incidentally affected the quality of an individual's religious experience"—was erroneous because it was more protective of plaintiffs' free exercise rights than what RFRA requires). Instead, a *substantial* burden outside of the for-profit corporation context occurs "*only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Id.* (emphasis added). *See also Sebelius*, 991 F. Supp. 2d at 964 (clarifying that RFRA does not permit claims against government actions that merely burden the practice of religion without pressuring the plaintiff to violate his religious beliefs).

Thus, whether the dam would merely interfere with the tribal members' ability to practice religion was "irrelevant" to the substantial burden test under RFRA. *Snoqualmie*, 545 F.3d at 1214-15. Because this dam would neither force Snoqualmie to choose between practicing their religion and either receiving a government benefit or facing civil or criminal sanctions, it did not substantially burden their free exercise under RFRA.

FERC respectfully acknowledges that the AFP subjectively burdens HOME's sincerely held religious beliefs—however, this burden is not substantial under the meaning of RFRA. It is neither the place of FERC nor this court to question whether HOME's belief that the pipeline's operation under their property makes them complicit in environmental destruction is unreasonable. But in contrast to *Hobby Lobby*, AFP's mere presence would not make HOME's religious practice more expensive or burdensome. While the trees removed along the route of the AFP under its property would be an aesthetic harm, the AFP will create no physical barrier to its religious practices. Record at 12. HOME has also provided no evidence that this "bare spot" increases costs or otherwise seriously burdens its Solstice Sojourn. *Id.* Even if this Court were to find that RFRA's protections are even stronger than the pre-*Smith Yoder-Sherbert* standard, nothing in *Hobby Lobby* suggests that HOME is substantially burdened. *See Hobby Lobby*, 573 U.S. at 684-85 (suggesting that RLUIPA expands the scope of RFRA claims beyond the pre-*Smith* standard, but without clarifying how much broader).

Furthermore, like the Snoqualmie hydroelectric dam, the AFP could not be a substantial burden under the RFRA because it neither forces HOME's members to "lose a government benefit" nor "face criminal or civil sanctions" for practicing their religion. *See* 545 F.3dat 1214-15 (9th Cir. 2008). HOME does not contest that "[w]ith the pipeline underground and the construction expedited, there will be no long-term impediments to HOME's practices." Record at

12. While FERC respects HOME's subjective belief that they are substantially burdened by the AFP's presence underneath their land, RFRA requires the burden to be objectively substantial. *See Catholic Health Care System v. Burwell*, 796 F.3d 207 (2d Cir. 2015) (holding that courts use an objective test to determine whether the plaintiff's burden is substantial—not whether the plaintiff merely believes it has a substantial burden). However, HOME's burden meets neither the *Sherbert* nor *Yoder* prong of RCRA's substantial burden test.

Because the burden on HOME's religious practices is not substantial, it has no *prima facie* RFRA claim against the CPCN Order. Thus, the Court need not review our CPCN Order under the RFRA strict scrutiny standard before concluding its RFRA analysis.

B. Even if the AFP substantially burdens HOME, RFRA would still permit it as the least restrictive means of furthering the compelling government interest in national security through energy independence.

Federal government actions that substantially burden the free exercise of religion must meet strict scrutiny. 42 U.S.C. § 2000bb. In such a case, the government must first show that the law serves a compelling government interest. *Sherbert*, 374 U.S. at 403. Second, if the law or regulation is the least restrictive means of furthering the compelling government interest, it may continue to burden the plaintiff without entitling them to relief. *Wisconsin v. Yoder*, 406 U.S. 205, 205 (1972).

Wisconsin v. Yoder outlined some characteristics of "compelling" government interests. *See generally id.* Amish parents who did not send their children to public or private high school were convicted of violating Wisconsin's compulsory school attendance law. *Id.* Crucially for the Supreme Court's reasoning, these parents instead provided continuing informal vocational education to prepare their children for life in the rural Amish community. *Id*. at 229. The Court did not reason that free exercise categorically trumps the state's interest in protecting the children's right to secondary education. Instead, the Court reasoned that the parents' hybrid of

free exercise rights *combined with* controlling their children's upbringing jointly outbalanced the state's interest in the small *comparative* benefit of a few years of standard high school education over Amish vocational education. *Id*. at 219 (clarifying that "the State's requirement of compulsory formal education *after the eighth grade* would gravely endanger if not destroy the free exercise of respondents' religious beliefs") (emphasis added). This narrow ruling made clear that the "activities of individuals, even when religiously based, [can] often [be] subject to regulation by … the Federal Government in the exercise of its delegated powers." *Id*. at 220. It was simply that under these particular facts, the relatively small benefits were not a compelling government interest. *Id*. at 215, 221 ("By … recognizing the need for a sensible and realistic application of the Religion Clauses we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion.") (quotations omitted).

Cheema v. Thompson demonstrates how courts determine the "least restrictive" method to further a compelling government interest. 67 F.3d 883 (9th Cir. 1995). A public school with a total ban on weapons prohibited Khalsa Sikh schoolchildren from carrying ceremonial knives required by their religion. The children succeeded in their *prima facie* RFRA claim, correctly pointing out that they were forced to choose between violating a fundamental tenet of their religion or facing possible criminal prosecution. Yet, the Ninth Circuit also found that the school district had a compelling interest in campus safety, which the ban served. *Id.* at 885-886. The Court's key finding was that a *wholesale* ban was unnecessary to adequately protect student safety because there was a less restrictive alternative for which the school district had not provided any evidence to show as inadequate: the children could attend school with a dull blade, sewn tightly to its sheath, to be worn under the children's clothing. *Id.* In other words, when the

government demonstrates a compelling interest, a court should be mindful not to "overlook" less restrictive alternatives. *Id.* at 885-886 (criticizing the district court for "overlook[ing] this problem. When it denied the children's motion for a preliminary injunction, it simply declared that the absolute ban was necessary to protect the school district's compelling interest in, among other things, student safety. The district court's failure to consider RFRA's "no less restrictive alternative" requirement left us no choice but to reverse").

Ave Maria Found. v. Sebelius clarifies that the least restrictive means test also considers government costs. *Sebelius*, 991 F. Supp. 2d 957. Like Hobby Lobby, five nonprofit organizations challenged federal regulations requiring them to include coverage for contraceptives at no cost to their employees through health insurance plans. The plaintiffs had suggested several alternative means for the government to provide preventative services without burdening their religious exercise, but the government argued these would be too costly. *Id.* at 967. The argument failed because the government only pointed to entirely different alternatives it had considered, but it never quantified the plaintiff's proposals' effectiveness. *Id.* However, the court explicitly confirmed that comparing "the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the government activity" can determine whether a policy is necessary—and thus the least restrictive means. *Id; see also S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990) (reasoning that the state may show a policy is the least restrictive means for a compelling state interest with "a comparison of the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity.") (citations and quotations omitted).

The NGA requires the federal government to consider the compelling interest of energy security. *Sierra Club v. United States Dep't of Energy*, 867 F.3d 189, 203 (D.C. Cir. 2017) quoting 15 U.S.C.A. § 717b (recalling that "[t]he Natural Gas Act provides that the Department 'shall' authorize exports to non-FTA nations 'unless ... it finds that [it would] not be consistent with the public interest.' We have construed this as containing a 'general presumption favoring [export] authorization [absent] an affirmative showing of inconsistency with the public interest' … For its 'public interest' review, the Department considered … foreign policy goals (e.g., global fuel diversification and energy security for our foreign trading partners.)") (quotations and citations omitted). National security is the quintessential category of compelling government interest. *See Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) (reasoning "that a highly qualified, racially diverse officer corps is essential to national security"); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (noting that preventing "some substantial threat to public safety, peace or order" is a type of "compelling" government interest that may outweigh religious exercise interest). One of the few facts so uncontroversial that it remains a bipartisan consensus is that national energy independence is an intrinsic component of national security today. BUILDING AMERICAN ENERGY SECURITY ACT ONE PAGER, U.S. Senate Committee on Energy and Natural Resources (2023). The reason is twofold: first, reliance on foreign fossil fuels exposes the nation to geopolitical instability and foreign influence, potentially compromising the nation's independent foreign policy-making. Second, energy independence ensures greater economic stability by mitigating the risks of supply chain disruptions. Maintaining a healthy and resilient national LNG network furthers national energy security. Rachel Brasier, Andrea Pescatori & Martin Stuermer, *How Natural Gas Market Integration Can Help Increase Energy Security*, IMF BLOG (May 23, 2023). Should this Court have any doubts, concerns far less cataclysmic than national security have

been found compelling government interests. *See e.g., Indianapolis Baptist,* 224 F.3d 627 (holding a sound and efficient tax system was a compelling government interest); *Cheema*, 67 F.3d at 885 (determining that public school campus safety is a compelling government interest); *In re Newman*, 203 B.R. 468 (D. Kan. 1996) (holding that maintaining equitable system for protecting creditors and giving debtors a "fresh start" from overwhelming debt constituted a compelling governmental interest under RFRA); *National Capital Presbytery v. Mayorkas*, 567 F. Supp. 3d 230 (D.D.C. 2021) (holding that the government's interest in preventing fraud is "generally" a compelling government interest under RFRA). In summary, energy independence is so core to national security interests that projects promoting national energy independence meet the high standard of a compelling government interest under the strict scrutiny standard.

Likewise, FERC has thoughtfully and narrowly tailored the TGP to be least restrictive to HOME's religious practices because what matters is whether the government has such an interest in denying an exception to *this* specific plaintiff. *See Navy Seal 1 v. Austin*, 588 F. Supp. 3d 1276 (M.D. Fla. 2022) (clarifying that under RFRA strict scrutiny, what matters is not whether the government has a compelling interest in this policy generally, but whether it has such an interest in denying an exception to this plaintiff). It is undisputed that the Alternate Route would result in even more environmental harm, such as the tree clearing that HOME complains about. Record at 62. In contrast, the AFP will be entirely underground on HOME's property and have expedited construction, leading to no long-term impediments to HOME's practices. *Id.* at 41. Any short-term impact of construction will be minimized by timing construction entirely between solstices. *Id.* at 60. Because it would be nonsensical to suggest a route with an even greater "burden" to HOME's religious beliefs, and HOME has not identified any alternatives short of canceling the pipeline, FERC has met its evidentiary burden that this is the least restrictive option. Thus, any

additional re-routing of the AFP to avoid HOME property is too impractical, burdensome, and costly in light of the minimal impacts on HOME. *See id.* at 62. Moreover, that 90% of the natural gas passing through the AFP will be exported does not matter for strict scrutiny analysis because it is no greater restriction on HOME's religious freedom than if the pipeline was 10% of its size—the extra 90% helps pay for just, equitable.

Furthermore, the absurd cost of re-routing the AFP to avoid HOME's property demonstrates that the AFP in its current form is necessary for the compelling government interest in energy independence. TGP correctly points out that the alternate route is considerably more expensive while causing more environmental harm than the route approved in the CPCN Order through HOME's property. *Id.* at 62. To respect HOME's sincerely-held religious beliefs, the court should not order the AFP to take an alternative route that would cause more environmental harm than its current route. *See Indianapolis Baptist,* 224 F.3d 627 (holding that a uniformly applicable tax system was the least restrictive means of furthering the compelling government interest in a sound and efficient tax system).

Although we have already established that HOME fails to establish a *prima facie* RFRA claim, we have also shown that HOME still would not be entitled to relief under RFRA even if it were substantially burdened. FERC took special measures to ensure that the AFP is the least restrictive means of furthering the government's compelling interest in national energy security, meeting the burden of strict scrutiny anyway.

III. FERC's imposition of GHG mitigating conditions on the construction of the AFP is within its statutory authority under the NGA.

The NGA authorizes FERC to attach conditions mitigating greenhouse gas (GHG) emissions to the construction of the AFP. 15 U.S.C. § 717f(e). The NGA governs matters relating to the sale and transportation of natural gas. § 717a. Natural gas distribution is "affected

with public interest," and therefore federal regulation related to that distribution is "necessary in the public interest." *Id*. While the NGA grants FERC the power to grant a certificate approving construction of interstate natural gas pipelines, it also expressly empowers FERC to attach "reasonable terms and conditions" to the certificate as "the public convenience and necessity may require." § 717f(e); *Sierra Club v. FERC*, 867 F.3d 1357, 1364 (D.C. Cir. 2017).

However, in cases such as this, where "Congress has delegated broad authority to an agency with expertise and experience within a specific industry, and the agency action is confined, claiming no broader power to regulate the national economy," the court's review is "limited to the familiar questions of whether Congress has spoken clearly, and if not, whether the implementing agency's interpretation is reasonable." *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359, 365 (D.C. Cir. 2022), *cert. granted in part sub nom. Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).

A. The major-questions doctrine does not apply because FERC's decision is not one of political and economic significance.

Administrative decisions are reviewed under the major-questions doctrine only in "'extraordinary cases' in which the 'history and breadth of the authority that [the agency] has asserted' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia v. EPA,* 142 S. Ct. 2587, 2595 (2022) (alteration in original) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)). In those extraordinary cases, the agency "must point to 'clear congressional authorization' for the power it claims." *West Virginia*, 142 S. Ct. at 2609 (citation omitted).

Here, the mitigation measures imposed on the construction of an individual pipeline can hardly be considered to have economic and political significance. Even if the mitigation measures implicated the major-questions doctrine, FERC has a clear congressional authorization under Section 717f(e) to impose reasonable conditions to the certificate approving the pipeline's construction.

B. FERC's order does not have major and far-reaching economic consequences.

In *West Virginia*, the Supreme Court determined that the EPA did not have "clear congressional authorization" in the Clean Air Act to "restructure the American energy market" by requiring power plants to shift away from coal-fired electricity production. 142 S. Ct. at 2610. The EPA's established practice was to set emissions limits and improve the performance of individual energy producers. *Id.* However, citing authority in the Clean Air Act, the EPA sought to improve the performance of the "*overall power system*" and set an emissions limit that forced "a shift throughout the power grid from one type of energy source to another." *Id.* at 2611-12 (emphasis in original). Analyses of the new rule showed that it would "entail billions of dollars in compliance costs … require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors ... and would reduce GDP by at least a trillion dollars by 2040." *Id*.

By contrast, in *Loper Bright Enterprises*, the D.C. Circuit determined the National Marine Fisheries Service did not require clear congressional authorization to require the fishing industry to fund at-sea monitoring programs. 45 F.4th at 604-06. The Magnuson-Stevens Fishery Conservation and Management Act of 1976 authorized the National Marine Fisheries Service to implement measures "necessary and appropriate for the conservation and management of the fishery." *Id.* at 604-05 (citing 16 U.S.C. § 1853(a)(1)(a)). The court distinguished the case from *West Virginia*, holding that the agency action was confined to a specific industry and did not

attempt to regulate the national economy. *Id.* at 606. Although the statute did not "unambiguously resolve whether the [agency could] require industry-funded monitoring," the court determined the agency interpretation of the Magnuson-Stevens Act was reasonable. *Id.*

Here, FERC's conditions are narrowly tailored to a specific project and do not represent a sweeping regulation with nationwide economic effects. *See West Virginia*, 142 S. Ct. at 2611. Here, like in *Loper*, Congress has delegated authority to an agency with expertise in an industry and the action taken is confined to that industry. *See* 45 F.4th at 365. Although GHG emissions in general may implicate nationwide issues of economic and political significance, this case is focused on improving the performance of an individual project, not an entire system. *See West Virginia*, 142 S. Ct. at 2611-12, 2602 (referring to the EPA's finding that "carbon dioxide is an 'air pollutant' that 'may reasonably be anticipated to endanger public health of welfare' by causing climate change) (citation omitted). The GHG conditions applied to the AFP construction are proportionate to the project's scale and do not constitute a major economic overhaul.

The Natural Gas Act authorizes the GHG conditions attached to the approval of the AFP. Beyond the clear statutory authority included in Section 717f(e), FERC is not claiming to "discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *See id.* at 2610 (citing *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014)) (alteration in original). The courts have recognized FERC's authority to impose environmental conditions on similar projects. *See, e.g., S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1099 (9th Cir. 2010) (noting that "Congress has vested considerable discretion in FERC under the NGA" and holding that FERC did not abuse its discretion in approving a pipeline project with conditions meant to limit air pollutants.) In fact,

the D.C. Court of Appeals held that FERC *must* consider GHG emissions when granting a certificate of approval to a natural gas pipeline. *See Sierra Club*, 867 F.3d at 343.

FERC's order falls within its authority to attach to a certificate "such reasonable terms and conditions as the public convenience and necessity may require." FERC's order is not an extraordinary assertion of political and economic significance; therefore, the major questions doctrine does not apply.

C. The NGA authorizes FERC to attach reasonable GHG mitigation conditions to the approval of pipelines.

TGP alleges that FERC did not have clear statutory authority under Section 717f(e) to impose GHG conditions on the construction of the AFP. However, FERC's interpretation of the statute is reasonable and therefore entitled to deference.

When reviewing an agency's construction of the statute it administers, courts must apply the *Chevron* two-step. First, the court asks whether Congress has spoken clearly on the issue. whether the agency's construction of the authority is reasonable. *Chevron*, 467 U.S. at 843. If the court finds Congress has spoken clearly the inquiry ends. *Id.* However, "if the statute is silent or ambiguous with respect to the specific issue," the court determines whether the agency's interpretation is reasonable. *Id.*

Section 717f(e) clearly grants FERC authority to impose conditions on certificates of approval as long as they are required by public convenience and necessity. However, it does not define public convenience and necessity or mention whether emissions impact the consideration. Because the statute is ambiguous with respect to GHG mitigation conditions, the court should defer to FERC's reasonable interpretation. *See id*.

D. FERC's construction of the authority is reasonable and entitled to deference.

If a statute is clear and unambiguous, then "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Mobil Oil Expl. & Producing Se. Inc. v. United Distribution Companies*, 498 U.S. 211, 223 (1991). When determining whether "Congress had an intention on the precise question at issue," courts use "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. Although Congress clearly delegated to FERC the power to attach conditions, the NGA, like most statutes, contains ambiguity. Therefore, to find meaning in a statute, "words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA*, 529 U.S. at 133 (citation omitted).

The NGA grants FERC "the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). The Act does not directly define what "reasonable terms and conditions" the "public convenience and necessity" may require. When a statute is silent or ambiguous, Congress has created a statutory gap and granted implicit authority to the agency to fill it. *Chevron*, 467 U.S. 842-43.

Congress vested FERC with the primary authority to govern the approval and management of natural gas pipelines. *See* 15 U.S.C. § 717f(a) (giving FERC authority to determine whether extension of transportation facilities is "in the public interest"); § 717f(b) (requiring FERC approval to abandon natural gas facilities); § 717f(f) (authorizing FERC to determine the service area for facilities). Part of the authority to approve new pipelines includes attaching conditions to certificates of public convenience and necessity. § 717f(e). However, Congress was silent on whether GHG mitigating conditions could be implemented—only that conditions must be "reasonable" and implemented as "required by public convenience and

necessity." *Id*. To implement the statute, FERC established a policy of weighing "all factors bearing on the public interest," which has been affirmed by the Court. *See Updated Policy Statement on Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022); *see also Atl. Ref. Co.*, 360 U.S. at 391 ("[§ 717f] requires the Commission to evaluate all factors bearing on the public interest.").

TGP concedes that FERC has the discretion to require conditions mitigating "traditional" environmental harms, but it takes issues with the regulation of GHG. Record at 83. The distinction between GHG and the felling of trees is unnecessary because FERC considers both to be factors bearing on the public interest. *See Sierra Club*, 867 F.3d at 343 (noting that Section 717f(e) grants FERC legal authority to mitigate greenhouse gas emissions). The ambiguity in the NGA is an implicit congressional delegation allowing FERC to resolve which conditions the public necessity and convenience require. *See Chevron,* 467 U.S. 842-43. FERC's interpretation of conditions allowed by Section 717f(e) is "reasonably within the pale of statutory possibility" and should receive deference. *See Verizon Communications, Inc*. v. *F.C.C.*, 535 U.S. 467, 539 (2002). FERC's decision to impose mitigating conditions is within its statutory authority and should be affirmed.

IV. FERC's decision not to impose mitigation measures for upstream and downstream GHG impacts was within its discretion under the NGA.

A court may set aside an agency action only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow, and a court is not to substitute its own judgment for that of the agency." *Motor Vehicle Mfrs.*, 463 U.S. at 43 (1983). An agency's decision passes muster if it has "examined the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice

made." *Id.* (citation omitted). When the court reviews the agency's explanation, it must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id*. (citation omitted).

HOME contends that FERC's decision to impose GHG mitigating measures on construction but not on upstream and downstream emissions was arbitrary and capricious. However, NEPA does not require FERC to impose any specific mitigation measures. Even if it did, FERC considered the environmental impacts of upstream and downstream emissions but did not make a finding of significance. FERC's decision was rational and based on the relevant factors found in the EIS. Therefore, the Court should not set aside FERC's decision as arbitrary and capricious.

A. NEPA does not require FERC to implement specific mitigation measures.

NEPA "commands agencies to imbue their decision making, through the use of certain procedures, with our country's commitment to environmental salubrity." *Sierra Club*, 867 F.3d at 1357 (citation omitted). The act only requires agencies to "look hard at the environmental effects of their decisions, and not to take one type of action or another." *Id.* (citation omitted). The court's role in reviewing compliance with NEPA is accordingly limited. *Id*.

In *Sierra Club*, the petitioners argued that FERC's decision to approve the Sabal Trail project was arbitrary because it did not adequately consider environmental justice concerns. *Id.* at 1368. The D.C. Circuit found that FERC had considered the environmental effects in the EIS—and that this was all that was required. *Id.* The petitioners also raised an issue with FERC's failure to include a quantitative estimate of the pipeline's downstream GHG emissions in the EIS. *Id.* at 1372-73. The court agreed, holding that the EIS should have contained a quantitative estimate of downstream greenhouse emissions to allow FERC to engage in "informed decision making." *Id.* at 1374.

Here, FERC's decision to impose conditions on construction and not downstream pipeline function was informed by the detailed emissions analysis in the EIS. Record at 72. The EIS includes a quantitative estimate of downstream emissions as *Sierra Club* requires. *See* 867 F.3d at 1374; Record at 72. NEPA requires FERC to take a "hard look" at the environmental impacts caused by the AFP. However, it does not require FERC to take action on those impacts. In this case, FERC has decided to mitigate the direct emissions caused by the AFP's construction. HOME argues it is arbitrary to mitigate one and not the other. HOME is incorrect. FERC is still developing internal guidelines for addressing significant GHG impacts. Without a clear finding of significant downstream emissions levels, an action taken by FERC to mitigate them would not be rational.

FERC's decision to mitigate construction emissions is based on its estimation that those measures would reduce carbon emissions from 104,100 metric tons per year to 88,340 throughout construction. Record at 73. Because the gas being transported by the AFP is already in production, FERC did not find a foreseeable increase in upstream emissions. Record at 74. Additionally, it is unclear whether the AFP will cause any significant increase in downstream emissions. Record at 100. A decision to implement mitigating conditions without clear findings on upstream and downstream emissions would be arbitrary and capricious. In the NGA, Congress granted FERC the discretion to implement mitigating conditions that the public necessity and convenience may require. 15 U.S.C. § 717f(e) . Absent a clear finding that the upstream and downstream emissions would be significant, FERC determined the mitigation measures were not required by public necessity and convenience. FERC's decision in this case was a prudential exercise of agency authority based on the information available and should not be overturned.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court uphold its denial of TGP's request for rehearing and find that FERC properly issued a CPCN for the AFP because the pipeline is in the public convenience and necessity. The Commission further requests this Court affirm FERC's finding that RFRA cannot be interpreted to bar the AFP in its current proposed form from creating burdens on HOME that—although subjectively real—are less than substantial. Finally, FERC requests that this Court affirm the conditions attached to the CPCN without addition or modification.