Team 44

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH
Plaintiff-Appellant

-and-

TRANSNATIONAL GAS PIPLINES, LLC
Plaintiff-Appellant

v.

FEDERAL ENERGY REGULATORY COMMISSION
Defendant-Appellee

Petition for Review
Federal Energy Regulatory Commission

Brief of Petitioner, TRANSNATIONAL GAS PIPELINES, LLC

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Twelfth Circuit consolidated the two petitions for review filed by Transnational Gas Pipelines, LLC (TGP) and Holy Order of Mother Earth (HOME) both seeking review of multiple aspects of the Federal Energy Regulatory Commission's (FERC) authorization of the American Freedom Pipeline (AFP) project. Both HOME and TGP first sought re-hearing before FERC as required under the Natural Gas Act (NGA), before seeking a petition for review in the Twelfth Circuit. 15 U.S.C. § 717r(a)–(b).

The parties may seek review of FERC's order "in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located." 15 U.S.C. § 717r(b). Since TGP will become a natural gas company under the NGA and is organized and exists under the laws of the State of New Union, the Twelfth Circuit is a proper venue for review. Order at 5. Petitioners must also be "aggrieved" by FERC's order to properly petition for review. 15 U.S.C. § 717r(b). A party is "aggrieved" if its injury is present and immediate. *Pacific Gas & Elec. Co. v. FERC*, 106 F.3d 1190, 1194 (5th Cir. 1997) (citations omitted). TGP is "aggrieved" as FERC's order directly impacts the cost and construction of the AFP. HOME is also "aggrieved" by FERC's order as it has challenged the order under the National Environmental Policy Act (NEPA) and asserted an environmental harm. *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 273–74 (D.C. Cir. 2015). Thus, the Twelfth Circuit has jurisdiction to hear the consolidated petitions under the NGA. 15 U.S.C. § 717r(b).

STATEMENT OF THE ISSUES PRESENTED

1. 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 a project need where ninety percent of the gas transported by that pipeline was for export?

2. Was FERC's finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?
3. Was FERC's decision to route the AFP over HOME property despite HOME's religious objections in violation of the Religious Freedom and Restoration Act (RFRA)?
4. Were the GHG Conditions imposed by FERC beyond FERC's authority under the NGA?
5. Was FERC's decision not to impose any greenhouse gas (GHG) Conditions addressing downstream and upstream GHG impacts arbitrary?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

TGP filed an application under Section 7(c) of the NGA and Part 157 of FERC's regulations for authorization to construct and operate a pipeline that will transport Liquified Natural Gas (LNG) within the United States. Order at 4; 18 C.F.R. § 157 (2023). The AFP, an interstate pipeline, will be approximately ninety-nine miles long, extending from a receipt point in Jordan County, Old Union, to a new interconnection at an existing TGP gas transmission facility in New Union. Order at 4.

The AFP is designed to provide up to 500,000 dekatherms (Dth) per day of firm transportation service. *Id.* TGP has executed two binding precedent agreements with International Oil & Gas Corporation (International) and New Union Gas and Energy Services Company (NUG) to fill the design capacity of the AFP. *Id*. at 6. Currently, the natural gas that the AFP will transport is produced in the Hayes Fracking Field (HFF) in Old Union and is transported via a different pipeline to states east of Old Union. *Id*. The TGP precedent agreements do not consider additional production at HFF and would reroute approximately thirty-five percent of the output at HFF through the AFP. *Id*.

LNG demand in states east of Old Union has been declining, and market needs are better served by rerouting the LNG through the AFP. *Id*. There is no dispute that TGP can financially

support the project without subsidization from its existing customers. There are no known adverse impacts on existing customers or existing pipelines in the market. *Id*. at 7. The LNG to be purchased by International equates to about ninety percent of the total production. International will export the LNG to Brazil, a country with which the United States does not have a free trade agreement. *Id.* at 8–9.

HOME is a not-for-profit religious organization whose core tenet is "that humans should do everything in their power to promote natural preservation over all other interests, especially economic interests." *Id*. at 11. HOME owns 15,500 acres of property that is used as their headquarters and for religious practices. *Id*. at 5. The proposed AFP route crosses approximately two miles of the HOME property and will require the removal of about 2,200 trees and other vegetation from HOME's property. *Id.* at 9–10. As part of their religious practice, every summer and winter solstice, HOME members partake in "a ceremonial journey" across their property to the foothills of the Misty Top Mountains and then return to the temple via a different path through their property. *Id.* at 11. HOME refers to this practice as the "Solstice Sojourn." *Id*. While on the Sojourn, children partake in a sacred religious ceremony. *Id*. During the Solstice Sojourn, HOME members would have to cross over the buried AFP pipeline twice. *Id*. No parties dispute the sincerity of HOME's beliefs. *Id*.

TGP proposes that the AFP will serve many domestic needs such as: (1) delivering the full capacity of the AFP to the NUG Terminal and the undersubscribed NorthWay Pipeline; (2) providing natural gas to areas without access in New Union; (3) expanding access to sources of natural gas supply in the United States; (4) creating a more competitive market for new and existing customers; and (5) providing opportunities to improve regional air quality by using cleaner-burning fuels instead of dirtier fossil fuels. *Id.* at 8. The AFP will also provide gas to

domestic customers, transportation for domestically produced gas, and the potential to add additional capacity to pre-existing LNG stations. *Id.* at 9.

To minimize the impacts on landowners and community members along the route of the AFP, TGP participated in FERC's pre-filing process and is working to address concerns and questions from landowners. *Id*. at 10. Thus far, TGP has changed over thirty percent of the proposed AFP route to address concerns and reach easement agreements with landowners. *Id*. In response to HOME's concerns, FERC ordered, and TGP agreed to bury the AFP along the two miles of HOME property and to expedite construction to finish the project within four months to minimize any disruption to HOME. *Id*. Although TGP has not been able to reach mutual easement agreements with over forty percent of landowners along the route, the use of eminent domain is common and available in pipeline projects. *Id*.

Section 717f(e) of the NGA, was the basis for the following GHG Conditions. *Id*. at 14; 15 U.S.C. § 717f(e). In the Certificate of Public Convenience and Necessity (CPCN Order), FERC imposed certain conditions on TGP, including: (1) TGP shall plant approximately 2,200 trees to replace those removed in the construction of the AFP project; (2) TGP shall use, wherever practical, electric-powered equipment in the construction of the TGP Project; "(3) TGP shall purchase only 'green' steel pipeline segments produced by net-zero steel manufacturers;" and (4) TGP shall purchase renewably-generated electricity for construction where available. Order at 13–14. In four out of five subsequent CPCN Orders in other matters, FERC has imposed GHG Conditions. *Id.* at 16.

On January 9, 2023, the Council on Environmental Quality (CEQ) published interim guidance for addressing climate change in the context of NEPA. *Id*. at 14. The CEQ guidance recognizes the gravity of the "climate crisis in the United States and that there is little time to

avoid a dangerous . . . climate trajectory." *Id*. The CEQ guidance encourages agencies to mitigate GHG emissions in their actions based on national, science-based GHG reduction policies. *Id*. FERC is an independent agency and is not required to follow CEQ rules, regulations, and guidance. *Id.* Nevertheless, FERC is in the process of developing guidance on mitigating GHG impacts. *Id.*; *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197 (2022). The FERC guidance is not yet final. Order at 18.

TGP conducted an extensive analysis of the GHG impacts of the TGP Project in their Environmental Impact Statement (EIS). *Id.* at 15. TGP's analysis of the downstream emissions—the use of the LNG transported by the AFP—showed that if the AFP was at total capacity, downstream end-use could result in an estimated 9.7 million metric tons of CO2e per year. *Id.* TGP's estimate is likely higher than the actual amount because it assumes the AFP will be at total capacity every day of the year, which is highly unlikely. *Id.* Some of the LNG in the AFP may displace other fuels, which would reduce CO2e levels, and some of the LNG may also displace other gas that would be transported differently, thus resulting in no change in CO2e. *Id*. FERC estimated that an average of 88,340 metric tons of CO2e would be released annually over the four-year duration of the project if TGP were to adhere to FERC's conditions. *Id.* If no conditions were in place, an estimated average of 104,100 metric tons of CO2e would be released annually over four years. *Id.*

FERC did not find upstream emissions—those from the production of the gas—to be relevant in the consideration. *Id.* at 15. The LNG that would be transported by the AFP is already in production at HFF and would be transported to different locations. *Id*. FERC considers upstream emissions on a case-by-case basis, and it can be very challenging to quantify upstream emissions due to many unknown factors. *Id.*

FERC issued an Order granting a CPCN to TGP for the construction of the AFP, which included certain conditions on TGP. *Id*. at 2. HOME sought rehearing from FERC on (1) FERC's determination of public need, (2) FERC's determination that routing the AFP through HOME's property does not violate RFRA, and (3) FERC's determination does not require mitigation of upstream and downstream GHG impacts. *Id*. TGP sought rehearing on FERC's authority under the NGA to impose GHG Conditions on TGP. *Id*. FERC denied both petitions for rehearing and affirmed the original CPCN Order. *Id*. HOME and TGP then petitioned this Court for review which consolidated the cases under Docket 23-01109. *Id.* at 1. Under this Court's order, TGP submits this brief in support of FERC's determination of public need and that the AFP does not violate RFRA. *Id.* TGP requests rehearing on the extent of FERC's authority to impose GHG Conditions. *Id.*

SUMMARY OF THE ARGUMENT

FERC's finding of public convenience and necessity of the AFP was based on substantial evidence and thus not arbitrary and capricious for two reasons. First, FERC's determination of public need was based on the precedent agreements TGP has with International and NUG. Second, although ninety percent of the LNG may be exported, the AFP will achieve public convenience and necessity by providing multiple domestic benefits. FERC's determination of public convenience and necessity was not arbitrary and capricious because FERC's decision was based on substantial evidence and consistent with the public interest.

FERC's determination that the public benefits of the AFP outweigh the environmental and social harms was not arbitrary and capricious for a few reasons. First, FERC considered HOME's adverse interests. Notably, HOME presented only one example of environmental harm, which will be remedied by one of the conditions FERC imposed upon TGP. Second, FERC considered and disclosed the project's environmental impact, balanced the interests of the public

benefit with the environmental and social harms, and found that the social harms would be outweighed by the project's public benefit. Additionally, FERC considered how TGP was working with other landowners to resolve easement agreements and answer any questions from surrounding landowners. FERC adequately determined that one party's potential environmental and social harm was insufficient to outweigh the public benefit.

FERC's decision to route the AFP through HOME property does not violate RFRA because HOME is unable to prove that this decision substantially burdens its exercise of religion. There are two steps to a RFRA claim: first, HOME must establish a prima facie case, and only upon such showing, would FERC's decision be subject to review under the strict scrutiny standard. As HOME is unable to prove both elements of its prima facie case, its RFRA claim fails, and FERC's decision would not be subject to strict scrutiny. Even if HOME were able to show a substantial burden on its exercise of religion, its RFRA claim fails. FERC's decision withstands strict scrutiny because it furthers a compelling governmental interest by using the least restrictive means.

FERC does not have the authority under the NGA to impose GHG Conditions on the construction of the AFP. In making this claim of authority, the major-question doctrine (MQD) is implicated because the power that FERC claims is incredibly broad and is of economic and political significance. FERC will be able to affect significant portions of the nation's population and economy and is making policy choices best left to Congress. For the agency to impose GHG Conditions, the MQD doctrine requires FERC to point to a clear grant of authority by Congress to take such action. The section of the NGA that FERC points to in support of its claimed power is ambiguous and must be understood in the context of the Act's purpose, which does not support conditioning the approval of the AFP on GHG mitigation.

On the other hand, FERC's decision not to impose any GHG conditions addressing downstream or upstream GHG impacts was not arbitrary. Although FERC concluded that the GHG emissions resulting from construction were significant, it provided a rational explanation as to why it found that the downstream and upstream GHG impacts were not significant and did not require mitigation. This decision is within FERC's discretion until its guidance is finished. NEPA does not require FERC to take specific actions, such as requiring mitigation. NEPA and case law require FERC to consider the indirect impacts of GHG emissions that are reasonably foreseeable in the EIS, which FERC has done.

ARGUMENT

I. FERC's finding of public convenience and necessity was supported by substantial evidence and was not arbitrary and capricious because FERC considered all elements within the record and the final decision was reasoned from the body of evidence.

HOME's petition for review of the CPCN Order insofar as FERC's determination that TGP has demonstrated a public need for the AFP even though approximately ninety percent of the gas carried by the pipeline will be exported to Brazil should be denied because FERC's decision was based on substantial evidence and was not arbitrary and capricious. In section 706(2) of the Administrative Procedure Act (APA), Congress set forth, "[t]he reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious . . . [or]; (E) unsupported by substantial evidence." 5 U.S.C. § 706(2).

The D.C. Circuit has held, "[in our] application [of] the requirement of factual support, the substantial evidence test and arbitrary or capricious test are one and the same. The former is only a specific application of the latter . . . The 'scope of review' provisions of the APA, §7 are cumulative." *Ass'n of Data Processing Service Org., Inc. v. Board of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683–684 (D.C. Cir. 1984). When applying substantial evidence review, the court's review "encompasses the agency's evaluation of the evidence in the record

and its application of that evidence in reaching a decision." Martha S. Davis, A Basic Guide to Standards of Judicial Review, 33 S.D. L. REV. 469 (1988). In arbitrary and capricious review, "the focus is on the agency's explanation or justification of its decision and whether that decision can be reasoned from the body of evidence." *Id.* FERC's CPCN Order was supported by substantial evidence and was not arbitrary and capricious. Because FERC's decision was adequately reasoned from the record and FERC properly considered the whole record, this Court should uphold FERC's finding of public convenience and necessity.

A. FERC's finding of public convenience and necessity was supported by substantial evidence because FERC considered all evidence presented in the record, even that which cut against FERC's ultimate decision.

FERC's finding of public convenience and necessity for the AFP was based on substantial evidence because FERC evaluated the evidence presented in the record and considered all factors based on the record, including those that went against FERC's decision. The Court has ruled that "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951). This Court must ask whether the administrative record contains "sufficient evidence" to support FERC's decision. *Biestek v. Berryhill*, 139 S.Ct. 1148, 1151 (2019) (citations omitted). "[T]he threshold for such evidentiary sufficiency is not high. Substantial evidence . . . is more than a mere scintilla. It means . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citations omitted). "If supported by substantial evidence, FERC's findings of fact are conclusive." *B&J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004) (citing 15 U.S.C. § 717r(b)). In substantial evidence cases, "the question [this Court] must answer … is not whether record evidence supports [the petitioner's] version of events, but whether it supports FERC's." *Id*. at 77. "The court must ensure that the Commission's

decisionmaking is reasoned, principled, and based upon the record." *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010).

In *Myersville Citizens for a Rural Comty. Inc. v. FERC*, the court, in reviewing FERC's issuance of a certificate for public convenience and necessity for a natural gas compressor station, held that the determination was based on substantial evidence. 783 F.3d 1301, 1311 (D.C. Cir 2015). The court held that FERC's decision was based on substantial evidence through the precedent agreements presented to the agency. *Id*. at 1308. Even though the precedent agreements did not contain the most current gas contracts, they were enough to show market need and, subsequently, public convenience and necessity. *Id*. Therefore, considering all the facts taken together, and even though some specifics were missing, the court held the decision to be based on substantial evidence. *Id*.

This Court should deny HOME's petition for review because FERC based its decision of public necessity on the facts presented in the record. FERC considered the precedent agreements and the domestic needs proposed by TGP. TGP has two binding precedent agreements with two different companies that, together, equal the pipeline's total capacity. Order at 6. Unlike the precedent agreements in *Myersville*, TGP's precedent agreements were completed. Thus, the agreements show that TGP has a consumer basis for the LNG, which will contribute to the public convenience and necessity.

FERC considered the fact that almost ninety percent of the output would be exported. FERC also acknowledged the distinctions between the Nexus pipeline at issue in *City of Oberlin v. FERC*, 39 F.4th 719 (D.C. Cir 2022) and the pipeline at issue here. The court in *the City of Oberlin* held that "the fact that a proportion of the gas is bound for export does not diminish the benefits that flow from the construction of the pipeline." 39 F.4th at 727. Although some of the

LNG will be exported, the domestic benefits will still be significant and consistent with the public interest. The domestic benefits that the AFP will provide include broadening access to natural gas to other areas within New Union and the United States, enhancing current systems for all customers, fulfilling capacity to other pipelines, promoting a competitive market, and improving regional air-quality. Order at 8–9. The AFP will also transmit gas that may be purchased on the domestic market. *Id.* The AFP will domestically support the LNG market, which will, in turn, support the local economy and maintain jobs through the use and availability of LNG. *Id.* at 8.

HOME contends that the public need is not supported because the product will be exported. *Id.* Although the export amount is one factor for FERC to consider, FERC also must consider the domestic benefits and precedent agreements. Simply because some of the product will be exported does not mean there will be a lack of public convenience and necessity in the production of the LNG. Ultimately, FERC's decision that the pipeline would provide public convenience and necessity was supported by substantial evidence because FERC considered the completed precedent agreements and the proposed domestic need for the project. FERC's decision making was reasoned, principled, and based on the record and, therefore, supported by substantial evidence.

B. FERC's finding of public convenience and necessity was supported by substantial evidence and, thus, not arbitrary and capricious.

FERC's finding of public convenience and necessity for the AFP was supported by substantial evidence and, therefore, not arbitrary and capricious. FERC assessed the whole record when determining that even though ninety percent of the gas transported by AFP was to be used for export, there was still a public convenience and necessity.

The Court reviews FERC's orders under the "arbitrary and capricious standard and upholds FERC's factual findings if supported by substantial evidence." *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003); *see* 15 U.S.C. § 717r(b). If an 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 that it could not be ascribed to a difference in view of the product of agency expertise, the agency's decision is arbitrary and capricious. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). The Natural Gas Act provides that the Department "shall" authorize exports to non-FTA nations "unless . . . it finds that the proposed exportation . . . will not be consistent with the public interest." The Court has construed this as containing a "general presumption favoring [export] authorization." Thus, there must be "an affirmative showing of inconsistency with the public interest" to deny the application. *Sierra Club v. United States DOE*, 867 F.3d 189, 203 (D.C. Cir 2017) (citations omitted).

In *City of Oberlin v. FERC*, the Court held that FERC's justification for crediting the export precedent agreements was not arbitrary and capricious when some of the LNG would be exported. 39 F.4th at 727. FERC considered the domestic benefit that would result from the increase in transportation services, no matter where the end product would be consumed. *Id.* The pipeline in question in the *City of Oberlin* would also be used to export LNG. The court clarified that although some of the LNG would be exported, public convenience and necessity could still be found in the domestic benefits. *Id*. at 726. FERC concluded that the pipeline in *Oberlin* had the capacity to ship to other facilities, which provided domestic benefit, and the precedent agreements exemplified public demand. *Id*. at 278. Therefore, because FERC provided adequate

explanations for their findings, the decision of public convenience and necessity was not arbitrary and capricious. *Id.*

FERC's determination of public convenience and necessity was based on substantial evidence and thus was not arbitrary or capricious. Nevertheless, FERC has not relied on factors that Congress did not intend to consider, and this determination is within FERC's discretion. *Minisink Residents for Env't Pres. and Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir 2014). FERC has considered all aspects of the problem before making its decision. Order at 8–9. They even considered the potential adverse impacts that the project might have on surrounding property owners, including HOME. *Id*. at 9–10. FERC provided explanations for its decision supported by the evidence in the record and did not consider any extra elements not presented by the parties. *Id*. at 8–9.

Finally, FERC's decision was grounded in the record. This Court must provide some deference to the agency when the decision was not so implausible that it could not be ascribed to a difference in view of the product of agency expertise. *State Farm*, 463 U.S. at 43. FERC articulated explanations for its action, including rational connections between the facts and choices made. Additionally, HOME had to affirmatively show that the AFP was contrary to the public interest. HOME did not present such evidence for FERC to consider. Even though some of the LNG in the AFP would be exported, HOME failed to consider how the AFP would still provide domestic benefits through transportation services and maintaining the market.

FERC's finding of public convenience and necessity for the AFP was based on substantial evidence because FERC considered all elements that cut for and against its decision in the record. FERC's decision was one where a reasonable mind could make a connection

between the record and the result. Since the decision was based on substantial evidence, it shows that the decision was not arbitrary and capricious.

II. FERC's finding that the benefits from the AFP outweighed the environmental and social harms was not arbitrary and capricious because FERC identified and evaluated the environmental impacts.

FERC's finding that the benefits from the AFP outweighed the environmental and social harms was not arbitrary and capricious because FERC considered HOME's argument and the alternative solutions TGP presented to HOME. FERC made a reasoned decision that is squarely within its discretion.

Pursuant to the Court's standard in *State Farm* above, there are four factors this Court shall consider in its determination of whether FERC's decision was arbitrary and capricious. 463 U.S. at 43. "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Myersville Citizens*, 783 F.3d at 1323. FERC "enjoys broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines." *Minisink Residents for Env't Pres. and Safety*, 762 F.3d at 111 n.10. "A court's mandate is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious. A court should not flyspeck an agency's environmental analysis, looking for any deficiency no matter how minor." *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir 2017).

In *Myersville Citizens*, the court considered whether FERC appropriately balanced the adverse effects of constructing a natural gas compressor station with the public benefits. FERC determined that the project would produce "minimal adverse effects [that] were outweighed by the public benefits." 783 F.3d at 1309. FERC's determination was not arbitrary and capricious

because FERC considered both the potential adverse interest and the public benefit while balancing the proposed harms *Id*.

FERC's findings that the benefits from the AFP outweighed the environmental and social harms were not arbitrary or capricious because FERC adequately identified and evaluated any potential harm. FERC considered how TGP participated in FERC's pre-filing process and had been working to address the concerns of surrounding landowners. Order at 10. FERC acknowledged that to reduce potential harm, TGP agreed to bury the pipeline through HOME's property to minimize disruption. *Id*. FERC also considered that TGP provided an alternative route for the AFP to avoid HOME's property. It is undisputed that the alternative route would cause more significant environmental harm because it would travel through a vulnerable ecosystem. *Id*. at 11. It was within FERC's discretion to balance the potential environmental and social harm against the projected project benefits. Therefore, this Court should not "flyspeck" FERC's determination that the benefits outweigh the harms. *Sierra Club*, 867 F.3d at 1367.

FERC may not ascribe extra weight to specific social interests held by one of many potentially impacted parties. FERC did not question nor doubt the religious sincerity of HOME's beliefs. *Id*. at 12. Instead, FERC found that the religious beliefs of one organization along the path of the AFP were insufficient to cause TGP to reroute the pipeline, which would undisputedly cause more significant environmental and economic harm. *Id.* at 12. HOME argues that *Adorers of the Blood of Christ United States Providence v. Transcontinental Gas Pipeline Co.* is persuasive in holding that this Court should consider the alternative route. 53 F.4th 56, 61 (3rd Cir. 2022). The court in *Adorers*, only stated that they *may* have denied the conditions of the company's certificate if Adorers would have participated in the administrative process. *Id.* (emphasis added). HOME has been very active through the administrative proceedings and has

had adequate opportunities to ensure their arguments and concerns are heard. Order at 2. Additionally, FERC considered the alternative route presented and determined that the alternative was more environmentally harmful. *Id.* at 11.

The only specific environmental harm argued by HOME was the loss of trees; however, FERC adequately considered this fact by requiring TGP to plant the same number of trees lost. Order at 9–10. FERC cannot treat every landowner in a subjective manner and thus had to consider the arguments presented by HOME in a neutral way to not show any preference for religion. *Id.* FERC considered the adverse interests argued by HOME but found that the harms did not outweigh the benefits. FERC only needs to address the considerations for the decision not to be arbitrary and capricious, and FERC adequately met that burden here.

FERC's finding that the benefits from the AFP outweighed the environmental and social harms was not arbitrary and capricious because FERC adequately considered HOME's interests, relied on the powers Congress had granted to it to make the decision, based their decision on the record, and considered all relevant aspects of the issue.

III. FERC's decision to route the AFP over HOME property despite HOME's religious objections does not constitute a violation of RFRA because HOME has failed to show that the decision substantially burdens HOME's exercise of religion.

The decision by FERC to route the AFP through HOME property despite HOME's religious objections does not violate RFRA. Under RFRA, FERC shall not substantially burden HOME's exercise of religion "even if the burden results from a rule of general applicability, except … only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1. A RFRA claim consists of two steps: first, the plaintiff must establish a prima facie case, and second, upon such showing, the

government action is subject to review under the strict scrutiny standard. *Ave Maria Found. v. Sebelius*, 991 F.Supp.2d 957, 963 (E.D. Mich. 2014) (citations omitted).

To establish its prima facie RFRA case, HOME must prove two elements: (1) that the activities it claims to be burdened by the government action constitute an "exercise of religion" and (2) the government action at issue "substantially burden[s]" HOME's exercise of religion. *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1068 (9th Cir. 2008). If HOME fails to prove either element, FERC's decision is not subject to strict scrutiny, and the RFRA claim fails. *Id.* Conversely, if HOME were to establish a prima facie case, the burden of proof would shift to FERC to show a "compelling interest" using the least restrictive means. *Navajo Nation v. U.S. Forest Service*, 408 F.Supp.2d 866, 903 (D. Ariz. 2006) (citations omitted). Whether FERC has chosen the least restrictive means of furthering its compelling interest is a question of law. *Northern Arapaho Tribe v. Ashe*, 925 F.Supp.2d 1206, 1216 (D. Wyo. 2012) (citations omitted). Under RFRA, the least restrictive means inquiry involves comparing the cost to the government of altering the AFP route to continue unimpeded versus the cost to HOME's interest imposed by the decision to route the AFP through HOME property. *Ave Maria Found.*, 991 F.Supp.2d at 967.

FERC's decision to route the AFP through HOME property does not violate RFRA because HOME does not have a prima facie case that the decision substantially burdens HOME's exercise of religion. The religious exercise HOME claims to be burdened by FERC's decision of the AFP is its bi-annual Solstice Sojourn; on the Sojourn, HOME members take a sacred journey on the property, which would cross over the buried AFP twice. Order at 11. HOME can only show the first element of its prima facie case, and it is unable to show that FERC's decision substantially burdens the Solstice Sojourn. Without both elements, the burden of proof does not

shift to FERC to show that its decision meets the strict scrutiny standard. Even if HOME was able to show a substantial burden, FERC's decision would withstand strict scrutiny because it furthers a compelling governmental interest by using the least restrictive means. Only if FERC is unable to meet this burden should this Court find a RFRA violation. *Navajo Nation*, 535 F.3d at 1068.

A. HOME's Solstice Sojourn, which HOME claims is burdened by the AFP's route, is an exercise of religion.

The Solstice Sojourn, the activity HOME claims to be substantially burdened by FERC's decision to route the AFP through its land, is an exercise of religion under RFRA. Under RFRA, an "exercise of religion" is "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb–2(4); 42 U.S.C. § 2000cc–5(7)(A). Additionally, the "use … of real property for the purpose of religious exercise shall be considered to be religious exercise of the … entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc–5(7)(B). HOME has provided sworn testimony from its members about its religious practices, including the Solstice Sojourn, and the sincerity of these practices is not contested. Order at 11. The Sojourn is a ceremonial journey undertaken by members each summer and winter solstice on HOME's property since 1935. *Id.* The Solstice Sojourn falls under both of RFRA's definitions of a religious exercise because it consists of the use of HOME's "property for the purpose of religious exercise" and is pursuant to HOME's "system of religious belief." 42 U.S.C. § 2000cc–5(7)(B); 42 U.S.C. § 2000bb–2(4); 42 U.S.C. § 2000cc–5(7)(A).

Because the Solstice Sojourn is rooted in HOME's religious beliefs and involves the use of HOME's real property for the specific purpose of religious exercise, it constitutes an exercise of religion under RFRA and satisfies HOME's first element of its prima facie case.

B. HOME fails to show the second element of its prima facie case because FERC's decision to route the AFP through HOME property does not substantially burden the Solstice Sojourn.

Although HOME can prove that its Solstice Sojourn is an exercise of religion, it must also prove that FERC's decision substantially burdens it. FERC's decision to route the AFP through HOME property does not substantially burden the Solstice Sojourn. A substantial burden under RFRA is found "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*)." *Navajo Nation*, 535 F.3d. at 1070 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963)). "Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA and does not require the application of the compelling interest test set forth in those two cases." *Id.* at 1070. More simply, "RFRA offers no protection against [a] government action that encumbers the practice of religion but does not pressure a litigant to violate his religious beliefs." *Ave Maria Found.*, 991 F.Supp.2d at 964 (citations omitted). While walking over the buried AFP may be "unimaginable" for the Solstice Sojourn, it does not rise to the heightened level of a substantial burden under RFRA. Order at 12. As a result of FERC's decision, members of HOME are neither (i) forced to choose between following tenets of their religion and receiving a government benefit nor (ii) coerced to act contrary to their religious beliefs under threat of judicial sanctions.

In *Navajo Nation*, the 9th Circuit court relied on two sources of binding precedent, *Yoder*[1] and *Sherbert*[2], to define the standard for substantial burden under RFRA. 535 F.3d. at 1069. At issue in the case was the Forest Service's decision to permit the addition of artificial snow sourced from recycled wastewater in the Snowbowl Area of the Peaks. *Id.* at 1064–65. The introduction of recycled wastewater via artificial snow was offensive to the Indians' religious sensibilities. *Id.* at 1070. It would "spiritually desecrate [Plaintiffs'] sacred mountain," decreasing their spiritual fulfillment from practicing their religion on the mountain. *Id.* Although a decrease in spiritual fulfillment is serious, the "only effect of the propos[al was] on the Plaintiffs' subjective, emotional religious experience." *Id.* Accordingly, the Ninth Circuit found the decision did not substantially burden the Indians' exercise of religion under the *Sherbert* and *Yoder* standards. *Id.*

Decades before *Navajo Nation*, the Supreme Court held that government actions that would "diminish the sacredness" of the land and "interfere significantly" with Indians' ability to practice their religion are not "heavy enough" burdens to constitute a violation of the Free Exercise Clause. *Id.* at 1071 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447-449 (1988)). In *Lyng,* the Court held the government's road-building project that "would cause serious and irreparable damage to the sacred areas" did not deny the Plaintiffs "an equal share of the rights, benefits, and privileges enjoyed by other citizens." 485 U.S. at 442,

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[1] *Yoder*, 406 U.S. 205 (1972) (holding that the application of a compulsory school attendance law to Amish defendants who sincerely believed that sending their children to high school was "contrary to the Amish religion and way of life" "unduly burden[ed]" their exercise of religion by compelling the defendants under threat of criminal sanction to act contrary to "fundamental tenets of their religious beliefs.").

[2] *Sherbert*, 374 U.S. 398 (1963) (holding that South Carolina could not condition unemployment compensation so as to deny benefits to Sherbert because of the exercise of her faith because it unconstitutionally forced her "to choose between following … her religion and forfeiting benefits, on the one hand, and abandoning … her religion in order to accept work, on the other hand.").

449. That *Lyng* examines substantial burden under the Free Exercise Clause, not RFRA, has "no material consequence" in its interpretation. *Navajo Nation*, 535 F.3d at 1071 n.13.

Similar to the artificial snow in *Navajo Nation*, the AFP route through HOME's property primarily affects HOME members' "subjective, emotional religious experience." *Id.* Although the transport of LNG may decrease spiritual fulfillment and offend HOME members while participating in the Solstice Sojourn, it will not prevent HOME from practicing its religious beliefs. Order at 11–12. FERC and TGP have made significant efforts to minimize impacts on HOME and its practices, including burying the pipeline underground and expediting construction to occur entirely between solstices. *Id.* at 13. Like in *Navajo Nation*, these efforts reflect the agency's "guarantee[s] that religious practitioners would still have access to [spiritual grounds] for religious purposes." 535 F.3d. at 1070. FERC's decision neither forces HOME to choose between practicing and receiving government benefits (*Sherbert*) nor coerces them to act contrary to their religion under threat of civil or criminal sanctions (*Yoder*). *Id.* at 1070. Under *Lyng*, *Navajo Nation*, *Sherbert*, and *Yoder*, FERC's decision does not constitute a substantial burden under RFRA.

HOME may argue that the present facts distinguish *Navajo Nation* because FERC's decision involves the use of private, not federal, land. Although this observation is accurate, the fact that FERC's decision to route the AFP impacts HOME's use of its property does not make a difference in the substantial burden analysis. TGP has tried to negotiate an acceptable easement agreement with HOME but has yet to be successful in avoiding the unnecessary exercise of eminent domain in this case. Order at 10. The use of eminent domain is common in the construction of pipelines and may be exercised here, diminishing the relevance of HOME's argument. *Id.* at 11.

FERC's decision to route the AFP through HOME property does not violate RFRA because HOME is unable to prove that this decision substantially burdens its exercise of religion. HOME's Solstice Sojourn constitutes an exercise of religion under RFRA and satisfies the first element of its prima facie RFRA claim. Even though HOME can prove its first element, it is unable to show the second, that FERC's decision substantially burdens this exercise of religion. As HOME is unable to prove both elements, its RFRA claim fails, and FERC's decision would not be subject to strict scrutiny. Even if HOME were able to show a substantial burden on its exercise of religion, its RFRA claim fails. FERC's decision would withstand strict scrutiny because it furthers a compelling governmental interest by using the least restrictive means.

IV. The GHG Conditions imposed by FERC are beyond FERC's authority under the NGA.

This Court should find that FERC's action to impose certain GHG Conditions on the construction of the AFP is beyond its authority under the NGA. The major-question doctrine (MQD) applies here for three reasons. First imposing conditions to regulate GHGs has been considered and rejected by Congress. Second, GHG emissions are part of a larger national debate. Third, FERC's power to impose GHG conditions would have major economic and political impacts. The application of the MQD "counsels skepticism" toward the delegation of authority FERC claims to be lurking in the NGA, and correspondingly, FERC has failed to establish "clear congressional authorization" to impose the GHG Conditions at issue. *W. Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022) (citations omitted).

A. FERC's claimed authority to impose GHG Conditions addresses a "major question."

MQD cases are those extraordinary cases where the "history and breadth of the authority" an agency asserts and the "economic and political significance" of that assertion provides courts "a reason to hesitate before concluding that Congress meant to confer such authority." *Id.* at

2608 (citations omitted). The caution to "read into ambiguous statutory text" the delegation an agency claims stems from "both separation of powers principles and a practical understanding of legislative intent." *Id.* at 2609 (citations omitted). Thus, in these cases, courts should presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* (citations omitted).

The MQD "refers to an identifiable body of law" in which agencies have asserted "*highly consequential* power beyond what Congress could reasonably be understood to have granted." *Id.* (emphasis added). One example was when EPA claimed in *Utility Air Regulatory Group v. EPA* to have the authority to regulate GHG emissions of millions of small sources, asserting its power to regulate "air pollutants" extended to GHGs under the Clean Air Act (CAA). 573 U.S. 302, 310–14 (2014). The Court found that EPA was "laying claim to an extravagant statutory power over the national economy" and rejected the agency's interpretation of the term "air pollutants." *Id.* at 324. In *King v. Burwell*, the Court applied the MQD because the Affordable Care Act's tax-credit program involved "billions of dollars" and "affect[ed] millions of people." 576 U.S. 473, 485 (2015). In another MQD case, *Alabama Ass'n. of Realtors v. Dep't of Health and Hum. Serv.*, the Centers for Disease Control (CDC) extended and expanded the eviction moratorium temporarily put in place by the first COVID-19 relief act and extended by the second COVID-19 relief act beyond its expiration. 594 U.S. ——, ——, 141 S.Ct. 2485, 2486 (2021). Because at least eighty percent of the country fell within the proposed moratorium, the Court found the CDC's claimed authority "vast" and "breathtaking." *Id.* at 2489.

The consequential power asserted by the agency in MQD cases is often not just broad in scope but also of political significance. Multiple Supreme Court MQD cases have dealt with regulating GHG emissions, a topic of substantial political debate. *W. Virginia*, 142 S. Ct. at

2614; *Utility* Air, 573 U.S. at 323–24. In *West Virginia v. EPA*, the Court held that EPA lacked authority under the CAA to limit GHG emissions by directing power plants to shift from non-renewable to renewable energy sources. 142 S. Ct. at 2593, 2595. Congress's rejection of similar proposals, as well as "the importance of the issue" and presence of "earnest and profound debate," made EPA's action "all the more suspect." *Id.* at 2614 (citations omitted). In addition, the Court presumed that the tradeoffs involved in economic and politically significant decisions are "ones that Congress would likely have intended for itself." *Id.* at 2613. The Court further noted that "the last place one would expect to [such a conferral of authority]" would be in an ancillary and rarely used portion of the CAA. *Id.* It may also be a warning sign that the agency is acting beyond its authority when it attempts to "deploy an old statute focused on one problem to solve a new and different problem." 142 S. Ct. at 2623 (Gorsuch, J., concurring).

By imposing GHG conditions on the construction of natural gas pipelines, FERC asserts a highly consequential power that has significant political and economic impacts and will affect the nation's future. Although FERC contends that it "does not seek to broadly mandate industry-wide mitigation," its pattern of imposing GHG mitigation conditions in four of five subsequent CPCN orders effectively does so and evinces an unstated change in agency practice overall. Order at 16–17. While the proposed regulations in *Utility Air* were over many small sources, here, FERC's authority over a few large sources will have a far-reaching impact on a large and significant percentage of Americans. 573 U.S. at 310–14. In 2020, sixty-one percent of U.S. households used natural gas for heating or cooking. Kaili Diamond & Matthew Sanders, Today in Energy, U.S. ENERGY INFO. ADMIN. (Mar. 23, 2023), https://www.eia.gov/todayinenergy/detail.php?id=55940. Thus, as in *Alabama Assn. of Realtors*,

FERC will capture a significant proportion of the country under its authority. 594 U.S. at ——, 141 S.Ct. at 2489.

FERC contends that because the MQD generally addresses larger scale measures taken by agencies through regulation, and the GHG conditions here are "specific and individual measures focused on one proposed project," the conditions, therefore, cannot be seen as addressing a major question. Order at 17. Yet, FERC's combined actions amount to a larger scale measure that will address issues of political and economic importance. The AFP alone will cost approximately $599 million, and across other projects, this amounts to further regulating a multi-billion-dollar industry. *Id.* at 5. As in *King v. Burwell*, the MQD should apply here because FERC's actions will involve billions of dollars and affect millions of people. 576 U.S. at 485. 50,000 Dth per day will go to NUG for presumably domestic use—influencing our citizens' access to natural gas—and significantly more LNG will be exported to Brazil. *Id.* at 6. Natural gas pipelines are not only important for reducing our reliance on foreign sources of energy but also influence foreign relations and support the nation's export economy. PAUL W. PARFOMAK, CONG. RSCH. SERV., R45239, INTERSTATE NATURAL GAS PIPELINE SITING: FERC POLICY AND ISSUES FOR CONGRESS 27–28 (2022) (noting that "[a]s a result of military conflict in Europe, demand for U.S. [LNG] exports is growing as well.").

Also of economic and political significance is the fact that imposing GHG conditions makes it more difficult, time-consuming, and expensive for project sponsors to build infrastructure critical to maintaining reliable service. Because natural gas provides an uninterrupted, flexible supply of energy to balance intermittent output from wind and solar power, it is essential for transitioning toward sustainable energy systems. Yu Wen Huang et al., ASEAN grid flexibility: Preparedness for grid integration of renewable energy, 128 ENERGY

POL'Y 711, 717 (May 2019). As the nation incorporates more wind and solar energy into our power sector, the need for natural gas will be higher; thus, imposing conditions that make pipeline construction more challenging will also make expanding the green energy sector more difficult. Imposing GHG conditions on LNG pipelines is one piece of the greater debate around climate change, national security, and foreign relations. This Court should hesitate to allow this assertion of power, as discussed in *West Virginia*. 142 S. Ct. at 2614.

While the statutes FERC invokes are not ancillary provisions of the NGA, the statutes are being used in a novel way to solve a different and new problem. TGP concedes that FERC has the authority to impose GHG Condition (1), which mitigates "traditional" environmental harms such as the felling of trees. However, Conditions (2) through (4) should be seen as "a warning sign that the agency is acting beyond its authority" since this construction is expansive and novel. 142 S. Ct. at 2623 (Gorsuch, J., concurring). Although FERC claims this is a continuation of existing practice and an extension of its traditional authority, FERC only started assessing the significance of GHG emissions in 2021, let alone imposing conditions. Order at 18; FED. ENERGY REGUL. COMM'N, FERC REACHES COMPROMISE ON GREENHOUSE GAS SIGNIFICANCE (2021).

FERC's proposed action imposing GHG conditions on LNG pipeline construction has been debated nationally and considered by Congress, so the Court should be wary of letting an agency decide an issue properly left to the legislature. Past Congresses have declined to enact bills seeking to expand the scope of FERC's environmental review to GHGs. S. 641, 117th Cong. (2021); H.R. 4657, 116th Cong. (2019); H.R. 3241, 115th Cong. (2017). In fact, Congress has most recently considered a bill that would prevent FERC from considering the costs or benefits "associated with incremental increases or decreases in [GHG] emissions." S. 1456,

118th Cong. (May 2023). As noted above, the debate over GHG emissions and natural gas pipelines implicates issues with the makeup of our energy sector, climate change, and foreign policy—decisions of policy the legislature is ultimately best suited to determine. Therefore, the "history and breadth of the authority" claimed and the "economic and political significance" of FERC's assertion of power should trigger the MQD.

B. FERC lacks clear congressional authorization to impose GHG Conditions.

Normally, when interpreting a statute, courts must apply fundamental canons of statutory construction. But because the statute at issue here, Section 7 of the NGA, is one that "confers authority upon an administrative agency," interpretation of the statute must be shaped by whether "Congress in fact meant to confer the power the agency has asserted." *W. Virginia*, 142 S. Ct. at 2607–08 (citations omitted). Because this is a MQD case, the agency must point to "clear congressional authorization for the power it claims." *Id.* at 2609 (citations omitted). In addition, courts must also utilize "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Congress will rarely grant extraordinary powers to an agency through "modest words, vague terms, or subtle devices." *W. Virginia*, 142 S. Ct. at 2609 (citations omitted). Furthermore, Congress would not assign certain policy judgments to an agency with "no comparative expertise" in that area. *Id.* at 2612–13 (citations omitted).

FERC claims that section 717f(e) unambiguously empowers it to set specific terms and conditions when granting authorization, extending to conditions mitigating the GHG emissions of pipeline construction. Order at 17. Section 717f(e) provides FERC the power to attach "reasonable terms and conditions as the public convenience and necessity may require" to projects it approves. 15 U.S.C. § 717f(e). The term "public convenience and necessity" is left

undefined by the NGA. The Supreme Court addressed this ambiguous term when the NAACP petitioned FERC's precursor to issue a rule requiring its regulatees to adopt affirmative action programs combating employment discrimination, among other measures. *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 664 (1976). FERC's precursor refused to enact such a rule, which led the Court to determine the Commission's ability to do so under the NGA and Federal Power Act. *Id.* at 663–64. NAACP argued section 717f(e) and other sections charged the Commission with advancing the public interest in general. *Id.* at 666. The Supreme Court explained that this term is not "a broad license to promote the general public welfare" and rather it "is necessary to look to the purpose for which the [NGA was] adopted." *Id* at 669. It further noted that the "principal purpose" of the NGA was to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *Id.* at 670. The Court, therefore, held that the Commission was authorized to consider "the consequences of discriminatory employment practices" but that its charge was to promote the production of natural gas rather than eradicate discrimination. *Id.* at 671. The NGA's primary purpose to develop and promote natural gas pipelines, while also protecting consumers against exploitation by natural gas companies, holds true decades later. *Minisink Residents for Env't Pres. and Safety*, 762 F.3d at 101. Issues concerning the environment are a subsidiary purpose but not the main objective of the NGA. *Id.*

In *Sierra Club v. FERC*, the Court of Appeals for the District of Columbia found that FERC's EIS was inadequate as did not provide sufficient information concerning downstream GHG emissions of a three-pipeline project in Alabama, Georgia, and Florida. 867 F.3d at 1363, 1374. The D.C. Circuit found that, unlike the LNG-terminal trilogy cases[3] where FERC did not

[3] *See Sierra Club v. FERC* (Freeport), 827 F.3d 36 (D.C. Cir. 2016); *Sierra Club v. FERC* (Sabine Pass), 827 F.3d 59 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016).

have the legal authority to consider such impacts, FERC could do so because Congress had instructed FERC under section 717f(e) to consider "the public convenience and necessity." *Id.* at 1372–73. The D.C. Circuit then goes on to suggest that FERC "has the legal authority to mitigate [GHG emissions]." *Id.* at 1374. This statement about mitigation is out of place because the issue concerned the *consideration* of GHG emissions in an EIS under NEPA rather than the *mitigation* of GHG emissions. In addition, the D.C. Circuit provides no further support for its statement and ignores the Supreme Court's charge in *NAACP* that FERC's ability to act in the name of "the public convenience and necessity" is limited by the primary purpose of the Act rather than by subsidiary concerns such as GHG emissions. 425 U.S. at 669.

FERC claims the power to impose GHG conditions on the construction of natural gas pipelines. This is a far-reaching and impactful action based merely on "modest words" and "vague terms." *W. Virginia*, 142 S. Ct. at 2609 (citations omitted). The term "public convenience and necessity" is ambiguous and must be construed in light of the NGA's primary purpose. *NAACP*, 425 U.S. at 669. Here, it does not follow that Congress intended for FERC to be able to impose GHG conditions as this would restrict, rather than promote, the development of natural gas pipelines. This is further strengthened by the fact that environmental concerns are only a subsidiary, and not primary, purpose of the NGA. As pointed out by one of FERC's commissioners, Congress has always promoted the development of natural gas instead of throwing up barriers when enacting natural gas legislation. Mark C. Christie, Items C-1 and C-2: Commissioner Christie's dissent from the Certificate Policy and Interim Greenhouse Gas Policy Statements, FED. ENERGY REGUL. COMM'N (Feb. 17, 2022).

FERC claims that courts have supported its discretion in determining the types of mitigation to require, in part, "due to the recognition that FERC has specialized expertise in the

natural gas sector and is best positioned to assess what measures are necessary to protect the public interest." Order at 17. It is undeniable that FERC has substantial knowledge of LNG pipelines and their construction. It is best positioned to assess what measures would protect consumers and encourage the construction of pipelines. However, FERC only started considering GHG emissions in 2021. FED. ENERGY REGUL. COMM'N, FERC REACHES COMPROMISE ON GREENHOUSE GAS SIGNIFICANCE (2021). It has had little time to become experienced in mitigating and controlling GHG emissions. Instead, regulating GHGs is normally in EPA's providence and expertise under the CAA. The NGA was passed to address entirely different problems. Common sense and the lack of expertise indicate that Congress would not have authorized FERC the power to impose GHG Conditions. What is most important is that the term "public interest" is not "a broad license to promote the general public welfare," therefore it is hard to say that Congress intended the regulation of GHGs to be within FERC's authority. *NAACP*, 425 U.S. at 669. There is no clear congressional authorization as required under the MQD.

V. FERC's decision not to impose any GHG conditions addressing downstream or upstream GHG impacts was not arbitrary.

FERC is not required to regulate the upstream and downstream GHG emissions of the AFP Project, regardless of whether it is correct that measures regulating these emissions do not address major questions. Order at 18–19. HOME has challenged FERC's decision not to impose upstream or downstream conditions as arbitrary. *Id.* at 19. As this is a challenge to FERC's findings under NEPA, the judiciary's role is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Sierra Club*, 867 F.3d at 1367. In this situation, the EIS must demonstrate "reasoned decision-making" and contain "sufficient discussion of the relevant issues

and opposing viewpoints." *Id.* at 1368. NEPA directs agencies to "look hard at the environmental effects of their decisions." *Id.* at 1367. It does not mandate the agency take a certain action based on its findings. *Id.*

As mentioned above, the Sierra Club challenged FERC's approval of a three-pipeline project, arguing that the EIS failed to "adequately consider the project's contribution to [GHG] emissions," specifically the downstream effects of the pipeline and the natural gas it carries. *Id.* at 1365, 1372. The D.C. Circuit concluded that FERC did not adequately consider these indirect impacts and needed to estimate the downstream emissions the pipelines would allow because these effects were "reasonably foreseeable." *Id.* at 1372. One key component supporting this conclusion was the D.C. Circuit's finding that FERC has the legal authority under the NGA to consider such impacts. *Id.* at 1373. The D.C. Circuit then suggested, without support or elaboration, that FERC could also mitigate GHG emissions. *Id.* at 1374. Even so, the ultimate result of the case was to require FERC to discuss the significance of the impacts of indirect GHG emissions in its EIS. *Id.* The D.C. Circuit additionally noted that quantifying [GHG] emissions is not "required every time those emissions are an indirect effect of an agency action," such as where quantification is not feasible. *Id.*

HOME does not challenge that the EIS was inadequate, like in *Sierra Club v. FERC*. Instead, HOME contends that by concluding that construction impacts are significant and require mitigation, FERC must also mitigate upstream and downstream GHG impacts. Order at 19. At most, *Sierra Club v. FERC* only requires FERC to consider the significance of GHG emissions if they are reasonably foreseeable. 867 F.3d at 1372. Because FERC has found that there are "no reasonably foreseeable significant upstream consequences of [its] approval of the TGP project," it has done what is required regarding upstream emissions under *Sierra Club v. FERC*. Order at

15. Supporting this finding was the fact that the project will not be adding to upstream GHG emissions. *Id.* The natural gas has already been extracted at HFF, and changing its destination will not increase production. *Id.* So, too, has FERC quantified and considered downstream GHG impacts, explaining that emissions would be lower than estimated due to TGP's over-stated estimations and displacement of currently transported LNG. *Id.* FERC has explained its reasoning with both types of emissions, provided an adequate EIS, and done the "hard look" that NEPA requires. *Sierra Club*, 867 F.3d at 1367.

HOME also contends that FERC has no rational reason to exclude upstream and downstream GHG impacts from being mitigated. Order at 19. However, FERC has provided a rational and allowable reason for not imposing additional conditions. FERC has explained that it is developing guidance for addressing upstream and downstream GHG impacts. *Id.* at 18; *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197 (2022). Without having final guidance on how to make significance determinations and because FERC has made a finding of no significance, it is rational and within its discretion for FERC not to impose upstream and downstream GHG conditions. Order at 19.

If this Court instead finds that FERC should impose mitigation measures for upstream and downstream GHG impacts, the MQD will certainly be implicated again. The imposition of additional conditions concerning upstream and downstream impacts would not be appropriate. Expanding the already broad potential authority of FERC to impose conditions on the GHG emissions resulting from pipeline construction would be made only broader if FERC could also regulate every entity involved in the production of natural gas and downstream users. Regulating upstream and downstream GHG impacts would require a clear grant of congressional

authorization, which FERC cannot show, especially given the purpose of the NGA to promote natural gas resources.

Ultimately, FERC's decision not to impose mitigation measures for upstream and downstream impacts was correct and not arbitrary because FERC has considered the significance of indirect GHG impacts and provided rational reasoning for not imposing conditions to mitigate these impacts. No specific action, such as mitigation is mandated, and it is within FERC's discretion to not act until guidance is finalized. Even if this Court decided that FERC should place conditions on upstream and downstream GHG emissions, it would be beyond FERC's authority under the NGA and implicate the MQD.

CONCLUSION

For the foregoing reasons, this Court should affirm FERC's CPCN Order on the basis of public necessity. FERC's decision to route the AFP through HOME's property is not a RFRA violation. This Court should reverse FERC's order mandating GHG Conditions because this goes beyond FERC's authority under the NGA and is a violation of the MQD. This Court shall not allow FERC to impose additional upstream and downstream GHG conditions.