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

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

HOLY ORDER OF MOTHER EARTH
Appellant

-and-

TRANSNATIONAL GAS PIPELINES, LLC
Cross-Appellant

v.

FEDERAL ENERGY REGULATORY COMMISSION
Defendant-Appellee

On Appeal from the Federal Energy Regulatory Commission

Non-Measuring Brief of Appellant, HOLY ORDER OF MOTHER EARTH

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INTRODUCTION

This is a case about the Federal Energy Regulatory Commission (FERC) putting the natural gas industry before its congressional and constitutional duties. The Natural Gas Act (NGA) is meant to regulate natural gas projects to protect the public interest. 75 P.L. 688, 52 Stat. 821, 75 Cong. Ch. 556. FERC is charged with deciding whether natural gas projects can proceed pursuant to the NGA. In doing so, it must weigh the project's public benefits against its adverse environmental and social harms. In short, FERC must consider the public interest, which requires taking a hard look at the substantial evidence. A "hard look" means recognizing the gravity of the effects—downstream, upstream, current, future—of greenhouse gas emissions." See Water del gap. It means considering property owners' concerns about a potential project seriously. It means prioritizing consideration of the domestic impact of the natural gas project. Perhaps most importantly, considering the public interest means respecting the fundamental right to free religious exercise guaranteed by the United States Constitution. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). The Religious Freedom Restoration Act (RFRA) was enacted to protect precisely that interest. 15 U.S.C. § 717.

FERC betrayed the public interest when it greenlighted TGP's natural gas project by issuing a Certificate of Public Convenience and Necessity (CPCN). The CPCN fails to take a hard look at the evidence before it and curtails religious freedom in violation of the United States Constitution. Allowing the CPCN to remain in its current form erodes congressional direction and constitutional mandate, fostering agency overreach and detracting from the rule of law.

JURISDICTIONAL STATEMENT

Holy Order of Mother Earth ("HOME") appeals from an Order granting a Certificate of Public Convenience and Necessity (the "CPCN") to Transnational Gas Pipelines, LLC ("TGP")

for construction of the American Freedom Pipeline ("AFP") issued by the Federal Energy Regulatory Commission ("FERC") on April 1, 2023, No. TG21-616-000. FERC had subject-matter jurisdiction because TGP will become a natural gas company within the meaning of section 2(6) of the Natural Gas Act ("NGA") once it commences its proposed operations. 15 U.S.C. § 717a(6). HOME and TGP filed timely Applications for Rehearing pursuant to 15 U.S.C. § 717r(a). The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 15 U.S.C. §717r(b), which provides that any party to a proceeding under the Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such 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 or has its principal place of business.

STATEMENT OF ISSUES PRESENTED

I. Was FERC's finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?

II. Was FERC's finding of public convenience and necessity for the AFP arbitrary and capricious insofar as FERC approved a pipeline project where 90% of the gas transported was for export?

III. Were the GHG Conditions imposed by FERC beyond FERC's authority under the NGA?

IV. Was FERC's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

V. Was FERC's decision to route the AFP over HOME property despite HOME's religious objections in violation of RFRA?

STATEMENT OF THE CASE

A. The Natural Gas Act

The Natural Gas Act (NGA) provides a regulatory framework for the natural gas industry. 15 U.S.C. § 717(a). The Federal Energy Regulatory Commission (FERC) implements the NGA. 15 U.S.C. § 717m(a). A natural gas company must obtain a certificate of public convenience and necessity (CPCN) from FERC prior to constructing or extending natural gas facilities. 15 U.S.C. 717f(c). A CPCN is also necessary for the transport or sale of natural gas. *Id*. Whether FERC issues a CPCN turns on whether the natural gas project serves the public interest. *Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959).

FERC granted Transnational Gas Pipelines, LLC (TGP) a CPCN for construction of the American Freedom Pipeline (AFP) on April 1, 2023. *Order Denying Rehearing*, 199 FERC ¶ 72, 201 (2023), *as reprinted in The Holy Order of Mother Earth v. Federal Energy Regulatory Commission*, No. 23-01109 at 2 (12th Cir. June 1, 2023), [hereinafter Order]. The CPCN included construction conditions that mitigated the AFP's greenhouse gas emission impacts. *Id*. On April 20, 2023, Holy Order of Mother Earth (HOME), a religious organization owning land on the AFP's proposed route, sought rehearing on parts of the CPCN. *Id*. On April 22, 2023, TGP too sought rehearing on parts of the CPCN. *Id*. On May 19, 2023, FERC denied the petitions for rehearing and affirmed the CPCN as originally issued on April 1, 2023. *Id*. On June 1, 2023, HOME and TGP brought respective suits appealing the April 1, 2023 CPCN and FERC's May 19, 2023 denial for rehearing. These suits were consolidated into the present action.

B. The Finding of Convenience and Necessity

FERC issued a CPCN authorizing TGP to construct the AFP so long as it complied with the CPCN conditions. *Id*. FERC's analysis was guided by FERC's Certificate Policy Statement.

Certification of New Interstate Nat. Gas Facilities, 178 F.E.R.C. P61,107 (F.E.R.C. February 18, 2022). Based on the Certificate Policy Statement, FERC balanced public benefits against potential adverse consequences when deciding whether to issue a CPCN. *Id*. at 7. Assuming that TGP can financially support its project without relying on subsidization from existing customers, FERC considered whether TGP made efforts to mitigate adverse consequences on existing customers and individuals or communities impacted by the project. *Id*. If FERC found that adverse consequences remain despite mitigation efforts, it evaluates the project by balancing public benefits against the remaining adverse consequences. *Id*.

Here, FERC found that there were remaining adverse consequences and therefore used a balancing test to determine whether to issue a CPCN. *Id*. at 10. With respect to public benefit, FERC found that there was significant evidence that the AFP would address domestic and international market needs, fulfill capacity in the NorthWay Pipeline, and improve regional air quality by using natural gas rather than more harmful fossil fuels. *Id*. at 8. As for remaining adverse consequences, FERC found that the AFP would require removing substantial vegetation, adversely impacting HOME's religious practice and environmental protection interests. *Id*. at 10.

FERC found that the public benefit outweighed any remaining adverse consequences. *Id*. at 4. It found that HOME had not demonstrated significant adverse impacts from the AFP. *Id*. at 12. FERC noted that TGP agreed to bury the AFP through its two-mile stretch on HOME's property. *Id*. at 10. FERC emphasized that the AFP would impact a small percentage of HOME's 15,500 acreage. *Id*. at 11. FERC acknowledged the lack of signed easement agreements for 40% of landowners along the AFP route but found that that failed to cut against the overall public benefit, noting the potential use of eminent domain. *Id*. at 10. FERC dismissed that HOME's alternate route would be preferable to the public benefit because it would add approximately $51

million in construction costs and cause more objective environmental harm. *Id*. at 11. FERC found that the 2,200 trees and vegetation that would need to be permanently destroyed was a mere "bare spot" and was therefore insufficient to tip the balancing test. *Id*. at 13.

In sum, FERC found that the AFP route provided greater public benefit than adverse consequences. *Id*. at 4. FERC thus issued the CPCN now at issue. *Id*.

C. The Religious Freedom Restoration Act

The Religious Freedom Restoration Act (RFRA) provides a cause of action to individuals whose religious exercise is substantially burdened by government regulations. 42 U.S.C. § 2000bb(b). RFRA restores the compelling interest test set out in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Id*. RFRA was enacted in reaction to *Employment Division v. Smith*, 494 U.S. 872 (1990), where the Court "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4).

RFRA mandates that the government may not substantially burden religious exercise unless it can demonstrate that the action passes under strict scrutiny. 42 U.S.C. § 2000bb-1. RFRA defines religious exercise as: "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb–2(4) (referring to the definition in 42 U.S.C. § 2000cc–5). Neither RFRA nor the Supreme Court have defined substantial burden, leading to a circuit split. Zacheree S. Kelin & Kimberly Younce Schooley, *Dramatically Narrowing RFRA's Definition of "Substantial Burden" in the Ninth Circuit - the Vestiges of Lyng v. Northwest Indian Cemetery Protective Association in Navajo Nation et al. v. United States Forest Service et al*., 55 S.D. L. Rev. 426. *See* discussion *infra* Section V.. The Tenth and Eighth Circuits have adopted the most expansive standard, holding that a substantial burden:

> significantly inhibit[s] . . . conduct . . . that manifests some central tenet of a [petitioner's] individual beliefs . . . meaningfully curtail[s] a [petitioner's] ability to express adherence to his or her faith; or must deny a [petitioner] reasonable opportunities to engage in those activities that are fundamental to a [petitioner's] religion.

Werner v. McCotter, 49 F. 3d 1476, 1480 (10th Cir. 1995). The Ninth, Fourth, and D.C. Circuits have adopted the most stringent standard, holding that a substantial burden appears where "individuals are forced to choose between following the tenets of their religion and receiving a government benefit [] or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008). The Seventh, Fifth, Third, and Eleventh Circuits have used a more moderate standard, holding that a substantial burden "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable." *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003).

A government action found to be a substantial burden on a petitioner's religious exercise is prohibited by RFRA unless it passes strict scrutiny: it must further a compelling government interest and be the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1.

D. The Finding of No Substantial Burden

FERC found that the AFP was not substantially burdensome on HOME's religious exercise and therefore not governed by strict scrutiny. FERC used the more stringent substantial burden test from *Navajo*. Order at 12. It found that because the AFP creates "no physical barrier to HOME's religious practices," there was no substantial burden. *Id*. at 13. FERC emphasized that the AFP would be built underground where it intersected with HOME's property and that TGP's mitigation efforts were sufficient to address HOME's concerns. *Id*. at 12. FERC dismissed

HOME's argument that the removal of trees and vegetation along the AFP route constituted a physical barrier, finding instead that the vegetation removal was *de minimis*. *Id*. at 13. FERC additionally concluded that HOME's proposed alternative route was overly burdensome. *Id*.

E. Proceedings Below

HOME and TGP appeal different aspects of the CPCN issued on April 1, 2023. HOME contends that the CPCN is arbitrary and capricious for three reasons. First, HOME argues it is unsupported by substantial evidence and fails to balance public benefits and adverse consequences. Second, HOME asserts that the CPCN's finding that the benefits of the AFP outweighed its harms, particularly considering that 90% of gas transported by the AFP will be exported to international buyers. Third, HOME claims FERC improperly failed to impose GHG conditions addressing downstream and upstream GHG impacts. HOME separately argues that FERC erroneously found no substantial burden on HOME's religious exercise. Therefore, HOME argues that the CPCN violates RFRA. In response to HOME's objections, TGP asserts that the CPCN is not arbitrary and capricious. TGP further argues that FERC correctly found no substantial burden on HOME's religious exercise, and in the alternative, that the AFP route would pass under strict scrutiny. TGP argues that the GHG conditions mandated in the CPCN constitute major questions under the major questions doctrine. Therefore, says TGP, FERC was outside its authority and the GHG conditions should not apply. In response, HOME maintains that FERC acted in its authority under the NGA to impose GHG conditions.

SUMMARY OF THE ARGUMENT

The Federal Energy Regulation Commission erred in its order denying rehearing with respect to its decision to authorize Transnational Gas Pipelines, LLC's American Freedom Pipeline (AFP). FERC's determination that the benefits the TGP project will provide to "the

market" outweighed any potential adverse effects on existing shippers and pipelines, the environmental harms on the region, and the social harms against landowners in the area, was arbitrary and capricious.

FERC's finding that the benefits of the AFP outweighed the environmental and social harms was arbitrary and capricious. FERC, while acknowledging HOME's legitimate religious concerns, claims that ascribing weight to the environmental harms on HOME's property with respect to their religious beliefs would be unjust and show a preference for their religion. This is a flawed analysis. HOME's religion revolves around the protection and worship of nature itself. By destroying the trees along HOME's Solstice Sojourn route, FERC is violating HOME's constitutionally protected rights to the free exercise of religion by forcing them to allow the destruction of their homeland.

The environmental impacts are also arbitrarily dismissed by FERC. The construction of the AFP may result in an average of 88,340 metric tons of CO2e per year over four years; the downstream end-use of the gas could result in 9.7 million metric tons of CO2e per year. Order at 15.The order then hedges by saying that 9.7 million metric tons is an upper bound that is unlikely to occur. *Id*.

FERC's decision to qualify the pipeline as a "public necessity" despite 90% of the gas being exported to a non-free trade country was incorrect. FERC argues that it cannot be disputed that LNG produced in and exported from the United States serves a "public interest," according to Section 3 of the Natural Gas Act. FERC does not provide any explanation for neglecting to take into account that Section 3 is referring to "Free Trade Countries," which Brazil is not. FERC fails to explain why exporting LNG to a non-free trade country is of public necessity and runs afoul of the statute it cites.

FERC was correct in that the imposed Greenhouse Gas conditions fall within the commission's statutory authority under the Natural Gas Act. The conditions, because they are within the breadth of FERC's subject matter-expertise, do not have industry-wide economic or political significance, and do not implicate federalism courts, are not major questions under the Major Questions Doctrine. There are several factors that distinguish this case from those that fall under the Major Questions Doctrine, which concerned conditions that would have dramatically altered their respective industries if applied. This court should affirm FERC's determination that the commission had the authority to impose the GHG conditions.

While FERC does have the authority to impose GHG conditions, its decision not to impose any addressing downstream and upstream GHG impacts was arbitrary and capricious. FERC must either quantify and consider a project's downstream carbon emissions or explain in more detail why it cannot do so. FERC argues that, without clear policy defining what environmental impacts are "significant," it is unable to characterize the downstream GHG impacts as sufficiently significant and therefore cannot mitigate any such impacts. More information is needed to determine what conditions must be studied and added to the environmental impact statement; the decision not to impose any conditions before obtaining more facts was arbitrary and capricious.

Finally, FERC's decision to route the AFP over HOME property despite HOME's religious objections was in violation of the RFRA. RFRA prohibits land use regulations such as pipeline routes that impose a "substantial burden on the religious exercise" of a religious entity unless the land use regulation passes strict scrutiny. 42 U.S. Code § 2000cc(a)(1). It is not disputed that HOME's religious exercises are legitimate. While circuits are split on which test to apply to determine what constitutes a "substantial burden," the AFP route would be considered a

substantial burden under all of them. Approval of the pipeline therefore must be subject to strict scrutiny, under which it would not pass. There is an alternative route available to the current one chosen that would not violate HOME's free exercise rights, but TGP decided against pursuing it due to costs. FERC's failure to choose the alternative path was a clear violation of the RFRA.

This Court should hold that FERC's approval of the AFP and order denying rehearing were arbitrary and capricious and in violation of the RFRA.

STANDARD OF REVIEW

The Twelfth Circuit Court of Appeals can affirm, modify, or set aside, in whole or in part, FERC's April 1, 2023 CPCN. 15 U.S.C. § 717r. The court may only hear issues raised in prior proceedings. *Id*. Unless FERC relies on insubstantial evidence, the court shall conclusively defer to FERC on the facts of the case. *Id*. The court's judgment shall be final and binding subject to review by the Supreme Court of the United States as described in 28 U.S.C. § 1254. *Id*.

The court reviews FERC's April 1, 2023 CPCN under the arbitrary and capricious standard of the Administrative Procedure Act. *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 105-06 (D.C. Cir. 2014); *see also* 5 U.S.C. § 706(2)(A). It must consider whether FERC made a clear error of judgment and whether the CPCN sufficiently considered the relevant factors and opposing viewpoints. *Del. Riverkeeper Network v. FERC*, 458 U.S. App. D.C. 345, 349 (2022). The court should review FERC's findings to ensure they are supported by substantial evidence. *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015). Substantial evidence "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence" *Minisink*, 762 F.3d at 108).

The court reviews HOME's RFRA claims under strict scrutiny so long as it finds that the land use regulation at issue (the AFP) imposes a substantial burden on HOME's religious

exercise. 42 U.S. Code § 2000cc(a)(1). For a government action to pass muster under strict scrutiny, it must advance a compelling governmental interest and further than interest using the least restrictive means possible. 42 U.S.C. § 2000bb–1(b). A compelling state interest is one "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Least restrictive means are those "essential to accomplish an overriding governmental interest." *United States v. Lee*, 455 U.S. 252, 257-58 (1982).

ARGUMENT

I. FERC Misrepresented the Effects of the AFP Domestically, Therefore its Finding That Benefits From the AFP Outweighed the Environmental and Social Harms was Arbitrary and Capricious

FERC's finding that benefits from the AFP outweighed the environmental and social harms was arbitrary and capricious. FERC's orders are reviewed under the Administrative Procedure Act's arbitrary and capricious standard and will be affirmed if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. FERC is given substantial deference in these decisions, but must be set aside when out of accordance with law. El Paso Natural Gas Co., L.L.C. v. FERC, 966 F.3d 842. In this case, FERC has failed to properly examine social and environmental considerations, misrepresented facts related to the case, and relied upon reasoning contrary to the law. The Court of Appeals must rule that its order was arbitrary and capricious.

Mere possibility that a project's emissions will be offset elsewhere does not excuse FERC from estimating and considering total emissions. *Birckhead v. FERC*, 925 F.3d 510 FERC dismisses the harms that come with removing 2,200 trees by claiming that replanting them

elsewhere will offset any impact from the removal. However, replanting trees indiscriminately does not necessarily mitigate the impacts of the initial removal. In fact, financial incentives to plant trees often backfire and reduce biodiversity with little impact on carbon emissions. Matt McGrath, *Climate change: Planting new forests 'can do more harm than good'*, (Jun. 22, 2020) https://www.bbc.com/news/science-environment-53138178. To claim without further evidence that the tree replacement will offset any environmental harms is arbitrary.

The affront to HOME's religion caused by the construction and operation of the pipeline cannot be overstated. As discussed in detail below, the AFP route clearly constitutes a "substantial burden" on HOME's religious exercise. FERC's ruling cites the *Navajo* standard that a substantial burden exists when government action puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs. Order Denying Rehearing, 199 FERC ¶ 72, 201 (2023), as reprinted in *The Holy Order of Mother Earth v. Federal Energy Regulatory Commission*, No. 23-01109 at 12 (12th Cir. June 1, 2023), [hereinafter Order], citing *Navajo Nation v. U.S. Forest Serv*., 535 F.3d 1058, 1069 n.11 (9th Cir. 2008) (citing *Thomas v. Rev. Bd. of Indiana Emp*. Sec. Div., 450 U.S. 707, 708 (1981)). The order then argues that, because the pipeline would be underground and unseen, it would not impact HOME's Solstice Sojourn significantly. *Id* at 13. Allowing such environmental damage would be in conflict with the religious beliefs held by HOME. HOME, a religious order founded over a century ago in response to the industrial revolution, specifically considers environmental harms sacreligious. Order at 11. There is an added harm to running the pipeline on HOME's land relative to that of other landowners who do not hold such beliefs. FERC responds to this by reasoning that they "cannot treat every landowner in this subjective manner, as it would be unjust and may well show a preference to certain religions." *Id* at 12. This statement is misleading.

In this case, environmental harm to the property necessarily causes social harm to HOME, unequivocally adding to the impacts of the pipeline. The ruling characterizes addressing this as special treatment. Unlike in *Navajo*, the construction of the AFP pipeline has physical implications for HOME, defiling their sacred land. TGP does contend that it will expedite construction "to the extent feasible" across the property to minimize disruption (*Navajo Nation v. U.S. Forest Serv*; Order at 10**)**, but there remains risk as in any construction project that significant delays will impact the next Solstice Sojourn. HOME's holy site will therefore turn into either a desecrated sacred ground or a construction zone. FERC failed to consider the effects these options would have on HOME.

While FERC does not need to predict costs with complete accuracy, it may not approve unjust and unreasonable costs to those who reap little to no benefit. *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470. When FERC fails to offer reasoned explanations for its orders, the orders will be considered arbitrary and capricious. *Miso Transmission Owners v. FERC*, 45 F.4th 248; 5 U.S.C.S. § 706(2)(A). LNG export applications to countries with which the United States does not have a free trade agreement must be independently determined to be consistent with public interest. *Sierra Club v. United States DOE*, 867 F.3d 189. FERC does not properly evaluate the social costs incurred by HOME. FERC's order acknowledges that HOME raised the fact that, because 90% of the LNG transported by the AFP will be exported, the benefits of the AFP should be evaluated differently than if it were providing energy locally. Order at 9. FERC merely mentions this distinction; it does not dispute it.

Irrespective of the guaranteed religious burdens to HOME, FERC did not properly consider the environmental harms that the AFP may cause. During the National Environmental Policy Act review process, FERC must consider not only the direct effects, but the indirect

environmental effects of a pipeline project. 40 CFR (s) 1508.8(b). FERC states in its order that the downstream and upstream effects are indirect and therefore not characterized as significant Order at 19. That certain effects would be considered "indirect" does not excuse them from consideration, but FERC dismisses them as irrelevant. *Id*.

Additionally, FERC improperly evaluated the benefits that will come from the AFP. FERC's finding of public convenience and necessity was improper, misrepresenting the potential benefits. According to the FERC's Certificate Policy statement, demonstrations of project need usually include a market study; vague assertions of public benefits will not be sufficient. *EDF v. FERC*, 2 F.4th 953, 972; citing 88 FERC at 61,748. In this case, FERC relies entirely on vague assertions of public benefit, some of which receive little or no explanation whatsoever. For example, one "domestic need" cited by FERC in TGP's application is that the pipeline provides "opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels. Order at 8. TGP also purports that the AFP serves domestic needs by "optimizing the existing systems for the benefit of both current and new customers by creating a more competitive market," despite the fact that 90% of the gas will be exported. *Id*.

In its order denying rehearing, FERC has minimized the social and environmental harms that the AFP guarantees while exaggerating the potential benefits. FERC tries to circumvent the reality that there is little domestic need for the AFP by misrepresenting what is considered a public necessity in the eyes of the law. At the same time, FERC uses inconsistent logic on what environmental harms it ought to consider and dismisses the AFP's effects on HOME without proper consideration. FERC's balancing of harms and benefits was conducted arbitrarily and capriciously.

II. FERC's Finding of Public Convenience and Necessity was Arbitrary And Capricious, Where 90% of the Gas Transported by the Pipeline was for Export to a Non-Free Trade Country.

Among the factors that FERC considers in balancing harms and benefits are a given proposal's market support, economic, operational, and competitive benefits, and environmental impact. *South Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1089. FERC's policy outlining how it determines whether a proposed pipeline will be in the public convenience and necessity states that it will first determine whether a project can proceed without subsidies from the company's existing customers (this is not in dispute). Order at 7. If so, FERC balances this with any adverse effects that cannot be eliminated against the public benefits of the project, essentially an economic test. *Id*; *City of Oberlin v. FERC*, 39 F.4th 719**.** As noted in the order denying rehearing, standards on the public necessity of exported gas are governed by Section 3 of the Natural Gas Act (NGA). Order at 9.

The Natural Gas Act defines "interstate commerce" to specifically exclude foreign commerce, thus placing pipelines that export natural gas outside of FERC's Section 7 authority. *Border Pipe Line Co. v. Federal Power Com.*, 171 F.2d 149. Export facilities are instead subject to Section 3, which states the following:

> "[N]o person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest…**(b)** With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas."

15 USCS § 717b. According to the FERC's Certificate Policy statement, demonstrations of project need usually include a market study; vague assertions of public benefits will not be sufficient. 2 F.4th 953, 972; citing 88 FERC at 61, 758. The TGP in its application to FERC listed several domestic "needs," including: delivering up to 500,000 Dth per day of natural gas, providing natural gas service to areas currently without access to it in New Union, expanding natural gas access in the U.S., optimizing existing systems for the benefit of current and future customers via competition, fulfilling capacity in the NorthWay Pipeline, and providing opportunities to improve air quality by switching to "cleaner-burning" natural gas. Order at 8. No market study was conducted; rather, the Federal Energy Regulatory Commission's order relies on vague, baseless assertions.

FERC erred by ignoring the distinction between "Free Trade" countries and "non-Free Trade" countries. In exports to countries in the latter category, LNG export applications must be independently determined to be consistent with public interest. 867 F.3d 189. The lack of weight given to this issue alone renders the decision arbitrary and capricious. In this case, the LNG will ultimately be exported to Brazil, with which the United States does not have a free trade agreement. With no explanation or further reasoning, FERC states in its order that it does "not find this distinction to be meaningful" and does not put significant weight on the end use of the LNG. Order at 9. As stated above, an action taken by the Commission may be set aside if it failed to consider an important aspect of the problem; FERC neglected to treat Brazil as a non-Free Trade country in determining this issue.

In *City of Oberlin*, FERC has given three reasons in the past why export precedents may imply public convenience and necessity. First, FERC has cited Congress's intent to encourage exports to free trade nations like Canada, pursuant to Section 3 of the NGA. 39 F.4th 719.

Second, increased transportation services may lead to domestic benefits such as economic growth and jobs. *Id*. Finally, an export precedent agreement may demonstrate the need for additional capacity to support gas to a given location. *Id*. FERC may consider precedent agreements when determining market need. *Id*. FERC's order cites *Myersville* and *Minisink* as evidence of the importance of precedent agreements in determining market need. Order at 8, *citing Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015); *also citing Minisink Residents for Env't Pres. and Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014). In this case, FERC's first reason regarding free trade nations obviously does not apply, since TGP will be exporting to Brazil, a non-free trade country. In *Myersville* and *Minisink*, FERC had market studies to determine whether there was sufficient demand for the projects in question. 83 F.3d 1301, 1311; *see also* 762 F.3d 97, 111. There was no market study and therefore it cannot be determined that the second and third explanations given by FERC for public necessity apply here either. 783 F.3d 1301, 1311. It is worth reiterating that the Nexus pipeline in *Oberlin* is distinguishable from that in the current case, as this pipeline does not increase domestic production. Order at 9; *citing* 39 F.4th 719. Additionally, Nexus secured eight precedent agreements, further providing evidence of demand, compared to the single precedent agreement in this case. FERC's determination of public convenience and necessity despite failing to meet their own standards for doing so was arbitrary and capricious.

III. The GHG Conditions Were Within the Scope of FERC's Authority Under the NGA and Do Not Constitute Major Questions Under the Major Questions Doctrine.

The imposed GHG conditions fall within FERC's statutory authority based on the NGA's plain text. The conditions are not major questions under the major questions doctrine because

they are within the breadth of FERC's subject-matter expertise, do not have industry-wide economic or political significance, and do not implicate federalism concerns.

FERC's authority for issuing construction conditions comes from the NGA. 15 U.S.C. § 717f(e). 717f(e) allows FERC to attach reasonable terms and conditions to its certificate as required by public convenience and necessity. *Id*. 717f is titled "construction, extension, or abandonment of facilities." *Id*. Based on the section title's plain text, reasonable terms include construction conditions. *Id*. As for the type of conditions permissible under 717f, Congress' purpose in enacting the NGA is a good place to start. The NGA was enacted in 1938 to protect the public interest through natural gas regulation. 15 U.S.C. § 717(a). The public interest has been construed broadly, including effects on environmental protection or destruction. *Udall v. Federal Power Comm'n*, 387 U.S. 428, 450 (1967). When determining public convenience and necessity, FERC considers environmental interests and the interest of environmental justice communities. *Staff Presentation | Certification of New Interstate Natural Gas Facilities*, FERC, https://www.ferc.gov/news-events/news/staff-presentation-certification-new-interstate-natural-gas-facilities (last visited Nov. 20, 2024). Greenhouse gas emissions undeniably impact environmental justice communities and exacerbate climate change and are thus relevant to the public interest. Carmen G. Gonzales, *The Environmental Justice Implications of Biofuels*, 20 UCLA J. Int'l L. & For. Aff. 229. Put together, the NGA's plain text, Congress' intent in the NGA furthering the public interest, and FERC's factors for determining public convenience and necessity demonstrate that FERC was authorized to impose GHG construction conditions.

Further, the GHG conditions imposed by FERC are not major questions under the major questions doctrine. Under the major questions doctrine, federal agencies are prohibited from regulating major questions without explicit congressional authorization. *West Virginia v. EPA*,

142 S. Ct. 2587, 2595 (2022). While the doctrine is still evolving, precedent provides nonexhaustive guiding principles for what makes a question major. *N.C. Coastal Fisheries Reform Group. v. Capt. Gaston LLC*, 76 F.4th 291, 296 (4th Cir. 2023). A major question appears in "extraordinary cases" where agencies assert authority that goes beyond the "history and the breadth of the authority." *West Virginia*, 142 S. Ct. at 2595. A major question will typically have "economic and political significance." *Id*. A major question might implicate powers traditionally reserved for states or find new powers in old statutes. *N.C. Coastal Fisheries Reform Grp.*, 76 F. 4th at 294. Last, a major question might surface where "the Act's structure indicates that Congress did not mean to regulate the issue in the way claimed [by the agency.]" *Id*.

The *West Virginia* Court held that an EPA regulation was an unlawful major question where it devised carbon emission caps based on generation shifting technology. 142 S. Ct. at 2595. It was a major question because it relied upon an ancillary and gap-filling section of the Clean Air Act to "substantially restructure the American energy market." *Id*. at 2610. It noted that EPA's proposed regulation was outside its traditional area of expertise. *Id*. at 2613. Last, the Court focused on negative legislative history: "Congress had already considered and rejected [the proposed regulation] numerous times." *Id*. at 2614.

In *N.C. Coastal Fisheries Reform Group*, the Fourth Circuit held that a proposed regulation where the EPA was required to regulate bycatch through the Clean Water Act constituted a major question. 76 F. 4th at 294. The court emphasized the economic and political impact of the proposed change, noting that it would give EPA unprecedented power over large parts of the American economy as "[a]lmost every commercial or recreational fisherman in America would be subject to the EPA's new regulatory control." *Id*. at 300. The court also pointed to the existing scheme for regulating bycatch. *Id*. at 297. It explained that because there

was an existing scheme exercised by state governments, the proposed regulation would raise potent federalism issues. *Id*. at 298. The existing scheme also detracted credence from the petitioners' claim that the proposed regulation fell under EPA's traditional expertise. *Id*.

Turning to the facts at hand, the GHG construction conditions do not constitute a major question. The GHG conditions are within FERC's expertise, arise from a central section of the NGA that has functioned similarly in prior case law, and do not implicate significant economic or political consequences. There is no indication that the GHG conditions implicate federalism concerns or contravene congressional intent with respect to the NGA.

Unlike the regulations challenged in *West Virginia* and *N.C. Fisheries*, pipeline construction guidelines are centrally in FERC's purview. As discussed, 717(f) is expressly titled "construction, extension, or abandonment of facilities." 15 U.S.C. § 717f(e). And, unlike *West Virginia* and *N.C. Fisheries*, 717(f) is no backwater, ancillary, gap-filling part of the NGA. Rather, it is a statutory mainstay. FERC has used 717(f) to impose malleable construction conditions tailored to individual natural gas projects. For example, in *Sierra Club v. State Water Control Bd*., FERC's certificate of public convenience and necessity was upheld where it was notably "flexible," giving the project's director "discretion to stop construction or to impose additional conditions for protection of the environment." 898 F.3d 383, 394 (4th Cir. 2018); *see also United Gas Pipe Line Co. v. Federal Power Com*., 385 U.S. 83, 91 (1966); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 246 (3d Cir. 2018). The flexibility allotted to FERC in *Sierra Club* highlights Congress' intent regarding the scope of FERC's authority. Congress, knowing that pipeline regulation is a highly technical and complex field, gave FERC authority to set construction conditions for individual projects based on the agency's expertise. 15 U.S.C. § 717f.

Additionally, the GHG construction conditions do not implicate significant economic or political consequences. FERC is right to say that its conditions "do not seek to broad mandate industry-wise mitigation." Order at 17. Instead, the conditions apply to a sole pipeline construction project: the AFP. By contrast, the regulations in *West Virginia* and *N.C. Fisheries* would have entirely altered their industries. The court in *N.C. Fisheries* noted that under the proposed regulation, the fishing industry would be so changed that "when my daughter fishes on a boat by casting a hooked mud minnow into the sea, she has discharged a pollutant" and would be subject to the proposed regulation. 76 F.4th at 300. FERC's GHG conditions are nothing more than one-time instructions to mitigate environmental harm for an individual pipeline.

Further, the GHG construction conditions apply to a discrete, rather than ongoing, time period. The conditions apply to the AFP construction period; they do not extend to ongoing pipeline maintenance. The regulations in *West Virginia* and *N.C. Fisheries* would have resulted in *ongoing* industry-wide change. Take *West Virginia*: the issue was not that EPA wanted a factory to use generation-shifting technology in one discrete process; rather, it was that the proposed regulation favoring generation-shifting technology would have applied ongoingly and universally. 142 S. Ct. at 2614. So too in *N.C. Fisheries*, the ongoing nature of the proposed regulation—the weight of its impact—was part of what made it a major question. 76 F.4th at 300.

Last, there is no indication that GHG construction conditions for natural gas pipelines are governed by a separate regulatory scheme. Instead, the NGA's plain language gives FERC authority to set construction conditions for natural gas pipeline projects per 717f. 15 U.S.C. § 717f(e). And unlike *N.C. Fisheries*, there are no federalism concerns since states do not traditionally regulate natural gas pipeline construction. Again, the NGA explicitly gives FERC authority to regulate natural gas pipeline construction. *Id*. Even without the NGA, natural gas

pipelines almost invariably cross state lines, implicating the commerce clause and giving rise to federal regulation. *See Tenn. Gas Pipeline Co. v. Urbach*, 96 N.Y.2d 124 (2001).

This court should hold that the GHG conditions imposed by FERC are valid. The GHG conditions are well within FERC's authority under a plain-text reading of the NGA. Further, the conditions are not major questions under the major questions doctrine because they are squarely in FERC's subject-matter expertise, do not have industry-wide economic or political significance, and do not implicate federalism concerns.

IV. FERC's Choice to Distinguish its Obligation to Impose any Greenhouse Gas (GHG) Conditions addressing Downstream and Upstream Impacts of the Pipeline, While Imposing GHG Conditions on its Construction, Was Arbitrary and Capricious.

FERC's decision not to impose any greenhouse gas (GHG) conditions addressing downstream and upstream GHG impacts was arbitrary and capricious.

The Federal Energy Regulatory Commission must either quantify and consider a project's downstream carbon emissions or explain in more detail why it cannot do so. *Appalachian Voices v. FERC*, 2019 U.S. App. LEXIS 4803 (2019). FERC stated that the decision not to impose GHG conditions addressing downstream and upstream GHG impacts was proper mainly due to a lack of clear guidance on addressing such impacts. Order at 18. Further, the order denying rehearing states that it has elected not to impose any conditions whatsoever addressing the upstream and downstream impacts until there is guidance to create a consistent policy. *Id*. Because it does not characterize upstream or downstream impacts as significant or insignificant, FERC reasons that no finding of significance may occur, and mitigation is thusly by definition unwarranted. *Id*. This line of reasoning does not hold up to further scrutiny. The National Environmental Policy Act (NEPA) process mandates the creation of an environmental impact statement (EIS) for actions

that may significantly affect the quality of the human environment, informing decision makers and the public of potential alternatives which may minimize adverse effects. *W. Org. of Res. Councils v. United States BLM*, 2022 U.S. Dist. LEXIS 138980 (2022).

During the National Environmental Policy Act review process, FERC must consider the indirect environmental effects of a pipeline project. 40 CFR (s) 1508.8(b). Where greenhouse-gas emissions are a reasonably foreseeable indirect effect of authorizing a project, it has the authority to mitigate the emissions. *Sierra Club v. FERC*, 867 F.3d 1357. While downstream emissions are not always reasonably foreseeable effects of pipelines, knowledge on where the gas will ultimately be consumed generally makes it so. 925 F.3d 510. Whether downstream GHG emissions qualify as an indirect effect must be decided on a case-by-case basis. *Id*. Because FERC may deny a pipeline on the grounds that the pipeline would be too harmful to the environment, the commission must evaluate indirect effects in its analysis. 15 USC (S) 717f(e).

Turning to this case, HOME has contended that the effects of the construction of the pipeline are significant enough to warrant mitigation therefore the upstream and downstream GHG impacts cannot rationally be excluded from such measures. FERC argued in response that the downstream and upstream effects are indirect and therefore not characterized as significant Order at 19. FERC did analyze the indirect effects in its NEPA analysis, but it did not truly consider them in its decision making. It is true that FERC would not be obligated to consider environmental impacts where it does not have authority to act, but FERC itself acknowledges its right to regulate GHG emissions. Order at 17. That certain effects would be considered "indirect" does not excuse them from mitigation. It is true that NEPA requires FERC to take a "hard look" at potential impacts, but does not mandate a specific outcome or mitigation measures. Order at 16; *citing* 867 F.3d 1357. However, FERC takes this to mean that environmental impacts may be

analyzed and ignored entirely. This cannot be the intended meaning of the statute. The indirect impacts must be *considered*; here; in this case they are dismissed solely because they are indirect, without giving the impacts any weight. Order at 19.

The position that downstream emissions are not reasonably foreseeable and subject to regulation because the emissions may be offset by existing natural gas supplies is inaccurate. 925 F.3d 510. The EIS conducted by TGP suggests that the pipeline may result in up to 9.7 million metric tons of CO2e per year. Order at 15. FERC hedges in its order by claiming that the CO2e could be offset by displacements in other fuels. Possible reductions in other sources of emissions should not affect the estimate. 867 F.3d 1357. By claiming that the net increase in emissions will be somewhere between zero and 9.7 million metric tons of CO2e per year, it has rendered the estimate virtually meaningless.

There remains a distinct possibility that FERC should have mandated at least some additional conditions to be addressed with regards to upstream and downstream conditions. However, the lack of attention given to the EIS proves that the decision was made in an arbitrary and capricious manner and should be reconsidered.

V. FERC's Decision to Route the AFP Over HOME Property Despite HOME's Religious Objections Was in Violation of RFRA.

FERC's order routing the AFP over HOME property violates RFRA. RFRA prohibits land use regulations that impose a "substantial burden on the religious exercise" of a religious entity unless the land use regulation passes strict scrutiny. 42 U.S. Code § 2000cc(a)(1). FERC and TGP concede that HOME's religious practices constitute "religious exercise" under RFRA. Order at 12; 42 U.S. Code § 2000cc–5(7). FERC found that the AFP route did not create a substantial burden on HOME's religious exercise and therefore its land use regulation was not

subject to strict scrutiny. Order at 13. This section will first demonstrate that the AFP route constitutes a "substantial burden" on HOME's religious exercise. It will then show that the route would not pass muster under strict scrutiny.

A. The AFP route creates a substantial burden on HOME's religious exercise.

The AFP route creates a substantial burden on HOME's religious exercise. Substantial burden is not defined by statute. The United States Supreme Court has not spoken on the issue, *Navajo Nation v. United States Forest Serv.*, 556 U.S. 1281 (2009), resulting in a circuit split. Zacheree S. Kelin & Kimberly Younce Schooley, *Dramatically Narrowing RFRA's Definition of "Substantial Burden" in the Ninth Circuit - the Vestiges of Lyng v. Northwest Indian Cemetery Protective Association in Navajo Nation et al. v. United States Forest Service et al*., 55 S.D. L. Rev. 426. The AFP route constitutes a substantial burden on HOME's religious exercise as construed by any of the substantial burden standards discussed below.

Because "RFRA's stated purpose is to restore the [tests] in *Sherbert* . . . and *Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened," all substantial burden definitions come from the compelling interest test set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*. *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008). In *Sherbert*, the Court found that the Seventh-Day Adventist plaintiff's religious exercise was substantially burdened where she was fired because she refused to work on the Sabbath. 374 U.S. 398 (1963). In *Yoder*, the Court found that the Amish defendants' religious exercise was substantially burdened after the defendants were convicted of violating state law that required their children to attend school until age sixteen. 406 U.S. 205 (1972). The *Yoder* Court noted that the defendants truly believed that following the state law would be "contrary to the Amish religion and way of life." *Id*. at 208.

The Tenth and Eighth Circuits have adopted the most expansive test, holding that a government regulation is substantially burdensome where it:

> significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [petitioner's] individual beliefs . . . [it] must meaningfully curtail a [petitioner's] ability to express adherence to his or her faith; or must deny a [petitioner] reasonable opportunities to engage in those activities that are fundamental to a [petitioner's] religion.

Werner v. McCotter, 49 F. 3d 1476, 1480 (10th Cir. 1995); *United States v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1418-19 (8th Cir. 1996).

In *Werner*, the plaintiff-inmate alleged that penal officers violated RFRA by denying him a sweat lodge and medicine bag and thus interfered with his religious exercise. 49 F.3d at 1478. The court held that the penal officers' denial constituted a substantial burden on the plaintiff-inmate's religious exercise, noting the "central and fundamental role played by the Sacred Sweat Lodge" and that, based on precedent, the "use of a sweat lodge may not place an unreasonable burden upon prison officials." *Id*. at 1480.

The Seventh, Fifth, Third, and Eleventh Circuits have adopted a more moderate test. The Seventh Circuit held that a substantial burden "is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable." *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003); *See also Adkins v Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F. 3d 1214, 1227 (11th Cir. 2004); *Washington v. Klem*, 497 F. 3d 272, 280 (3d Cir. 2007). These more moderate tests interpret the term substantial burden in the context of the Religious Land Use and Institutionalized Persons Act (RLUIPA). RLUIPA and RFRA share the same substantial burden standard. *Gonzalez v. O'Centro Espirita Beneficente Uniao Do Vegetal et al.*,

546 U.S. 418, 436 (2006). Congress has explicitly noted that RLUIPA should "be construed in favor of a broad protection of religious exercise." 42 U.S.C. § 2000cc-3(g).

In *Civil Liberties for Urban Believers*, the court held that several churches were not substantially burdened under RLUIPA where the churches experienced difficulties obtaining space to worship because of local zoning ordinances and legislative processes for zoning approvals. 342 F.3d at 755. The court noted that finding for the churches would render the word substantial "meaningless," since "the slightest obstacle to religious exercise incidental to the regulation of land use—however minor the burden it were to impose—could then constitute a burden sufficient to trigger [the law.]" *Id*. at 761. The court emphasized that the churches were ultimately able to practice their faith; they just had to face administrative hiccups along the way. *Id*. The court maintained that a land regulation's use of real property *could* constitute a substantial burden where it made religious exercise "effectively impractical." *Id*.

The Ninth, Fourth, and D.C. Circuits have embraced the most stringent test, holding that a land use regulation is substantially burdensome where "individuals are forced to choose between following the tenets of their religion and receiving a government benefit [] or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008); *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995); *Henderson v. Kennedy*, 346 U.S. App. D.C. 308, 253 F.3d 12 (2001). The court refused to adopt a dictionary definition of substantial burden because "Congress did not define 'substantial burden,'" 535 F. 3d at 1074, but notably did not comment on congressional intent as to RLIUPA's substantial burden standard.

In *Navajo*, the court found that the plaintiffs were not substantially burdened by the use of artificial snow on a public mountain. 535 F.3d at 1062. The court noted that "the sole effect . .

. is on the [p]laintiffs' subjective spiritual experience," zeroing in on the district court's record that "no plants, springs, natural resources, shrines with religious significance, or religious ceremonies" would be "destroyed or stunted." *Id*. at 1063. Because the sole effect of the artificial snow was subjective and intangible, the plaintiffs' religious practice was not meaningfully disrupted. *Id*. Therefore, the plaintiffs' were not forced to choose between their religion and the governmental benefit, which was the use of artificial snow. *Id*. The court further observed that the plaintiffs were not "fined or penalized in any way." *Id*. at 1071. The plaintiffs would continue to have access to the part of the mountain considered sacred. *Id*. at 1064. Thus, said the court, the plaintiffs were not coerced to act contrary to their religion by threat of sanction. *Id* at 1070.

Turning toward the case at hand, the AFP route constitutes a substantial burden on HOME's religious exercise under all three tests: the liberal *Werner*, the moderate *Civil Liberties for Urban Believers*, and the weighty *Navajo* standards. FERC applied the stringent *Navajo* standard without comment on the ongoing circuit split. Order at 12.

First, the AFP route substantially burdens HOME's religious exercise under *Werner*. It curtails HOME members' ability to express adherence to the central tenets of their faith and denies them the opportunity to engage in activities fundamental to their faith, principally the Solstice Sojourn. HOME's core beliefs and tenets involve worshiping nature as a deity, promoting environmental preservation, and stopping economic development to further environmental goals. Order at 11. In the Solstice Sojourn, HOME members journey from a temple at the western border of the property to a sacred hill on the eastern border of the property and then return on a different route. *Id*. At the hill, HOME children who are 15 years or older undergo a coming-of-age ceremony. *Id*. The AFP route would cross the ceremonial path in both directions. *Id*. HOME members participate biannually in the ceremony and have been since at

least 1935. *Id*. The AFP will reap a myriad of harmful environmental impacts, ranging from the effects of fracking to burning fossil fuels. *Id*. As in *Werner*, the AFP route asks HOME members to put aside their central religious beliefs. Further, it asks them to besmirch their sacred coming-of-age tradition. Demanding that HOME members participate in a ceremony meant to celebrate nature as a deity alongside ongoing environmental harm from the AFP meaningfully curtails their religious exercise, if not denies it entirely. Thus, under the *Werner* standard, the AFP route substantially burdens HOME's religious practice.

Second, the AFP route substantially burdens HOME's religious exercise under *Civil Liberties for Urban Believers*. It directly and fundamentally renders HOME's religious exercise (the Solstice Sojourn) impracticable. Unlike the churches in *Civil Liberties for Urban Believers*, the AFP route is anything but a "minor burden." 342 F.3d at 761. As discussed, the AFP route forces HOME members to put aside their central religious tenets and traditions. And unlike the churches in *Civil Liberties for Urban Believers*, who were able to relocate to alternative locations, there is no alternative way for HOME to practice the Solstice Sojourn should the AFP route cross it. The ceremony used real property (the Solstice Sojourn path) for almost a century. Order at 11. If the AFP route were to cross it, HOME could not uproot their practice to a different location. The path itself is part of the tradition, involving a particularized route and coming-of-age ceremony on a specific hill. *Id*. The AFP route, if it were to be constructed as currently planned, would be fundamentally responsible for rendering HOME's religious exercise impractical, therefore constituting a substantial burden under *Civil Liberties for Urban Believers*.

Last, the AFP route substantially burdens HOME's religious exercise under *Navajo*. The route forces HOME to choose between their religion and a government benefit, as in *Sherbert*. The government benefit is the AFP. Unlike in *Navajo*, where the only effect of the land

regulation was members' subjective spiritual experience, the AFP route has potent physical implications for HOME's religious exercise. It creates a physical barrier between HOME and their longstanding religious practices, permanently uprooting trees along the Solstice Sojourn and physically altering the real property upon which the Solstice Sojourn depends. Order at 13. Just as the *Sherbert* plaintiff was forced to choose between working on the Sabbath and a government benefit, HOME members are forced to choose between their religious exercise and a government benefit. If HOME was to accept the proposed AFP route, its religious exercise would be impossible. The route would fundamentally disrupt HOME's key tenets and traditions.

In the alternative, the AFP route would force HOME to act contrary to its religious beliefs by threat of civil or criminal sanction, as in *Yoder*. Recall that HOME's core tenet is that humans should do anything they can to protect nature from economic interests. Order at 11. Therefore, HOME members are obligated to stop the AFP route, regardless of the FERC findings, to comply with their religion. The next steps for HOME members would include at a minimum civil disobedience. Failure to act would violate HOME's core religious beliefs. *Id*. HOME members would be virtually guaranteed to face sanctions as a result of their inevitable protest efforts. Notably, this was not the case in *Navajo*, where the plaintiffs' religion did not require subsequent action that would threaten them with civil or criminal sanctions.

The prospective nature of the threat of sanctions against HOME does not change the calculus. Courts have found that religious organizations have standing in RFRA actions where there is a credible threat of enforcement. *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 607 (8th Cir. 2022). Further, "establishing a likely RFRA violation satisfies the irreparable harm factor [for injunctive relief]." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013). Here, because HOME members are obligated to protest the AFP route per their

religion, there would necessarily be a credible threat of enforcement against them. *See also Franciscan All., Inc. v. Becerra*, 553 F. Supp. 3d 361, 374 (N.D. Tex. 2021) (where government action put plaintiffs' to the "impossible choice" of violating their religious beliefs or defying federal law). There is no question that HOME members face an impossible choice: follow their religion, protest the AFP route, and face civil or criminal sanctions, or act contrary to their religious beliefs. The *Yoder* defendants also faced an impossible choice: follow their religion, violate the state statute, and face the consequences, or act contrary to their religious beliefs. As in *Yoder*, forcing HOME to make that choice puts a substantial burden on their religious exercise. Thus, whether under the most liberal or narrow construction of the substantial burden test, HOME is substantially burdened by the AFP route.

FERC found that the AFP route presented no physical barrier to HOME's religious practices and therefore did not constitute a substantial burden. Order at 13. It posits that the mere existence of the AFP route does not impair HOME's religious exercise. *Id*. FERC's finding misunderstands HOME's religious exercise, the tenets that inform it, and the substantial burden test. FERC bases its finding that the AFP route contains no physical barrier on its assertion that the removal of trees does not "sufficiently impact" HOME's religious practices. *Id*. But as discussed, the permanent removal of trees alters the Solstice Sojourn. Asking HOME to conduct their biannual ceremony after desecrating their most sacred and central belief—that nature is a deity that should be protected at any cost—asks them to desert their religion entirely. The fact that in FERC's eyes, permanently removing trees along the Solstice Sojourn is *de minimis* does not change its substantial burden on HOME's religious practice, nor its physical character.

FERC further found that the AFP route is minimally disruptive because the pipeline will be constructed underground and between solstices where it intersects with HOME's property. *Id*.

Therefore, said FERC, the pipeline does not constitute a substantial burden. *Id*. As to the construction timeline, practical considerations detract from FERC's conclusion. The length of the project, compounded with unknown risks which could include, but are not limited to, weather, staffing, and supply chain shortages, take away from FERC's claim that construction will be minimally disruptive. FERC and TGP also fail to account for where the construction equipment will go when construction ostensibly pauses for HOME's religious ceremonies. Will HOME members be forced to worship nature alongside cranes, hard hats, and half-dug ditches? Will members be able to safely walk atop an ongoing construction site? In any case, FERC's arguments that the AFP is minimally disruptive do not change that the AFP route constitutes a substantial burden under all three circuit tests. *See* discussion *supra* Section V.

While we argue that the AFP route constitutes a substantial burden on HOME's religious practice under either the *Werner*, *Civil Liberties for Urban Believers*, and *Navajo* standards, it is worth reemphasizing that the Supreme Court has not spoken on the substantial burden standard in the RFRA context. Congress has, however, noted that RLUIPA, RFRA's "sister statute," *Holt v. Hobbs*, 574 U.S. 352, 356 (2015), should be construed broadly to protect religious exercise. 42 U.S.C. § 2000cc-3(g). RFRA, like RLUIPA, is meant to "ensure[] that interests in religious freedom are protected." *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 736 (2014). Taken together, the AFP route poses a substantial burden on HOME's religious practice.

B. The AFP would not pass strict scrutiny.

The AFP route would not pass strict scrutiny. Because the AFP route constitutes a substantial burden on HOME's religious exercise, it is prohibited unless the government can demonstrate that it is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb–1(b). A compelling state interest

is one "of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Least restrictive means are those that are "essential to accomplish an overriding governmental interest." *United States v. Lee*, 455 U.S. 252 at 257-58. Least restrictive means analysis typically "compar[es] the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the government activity." S. *Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990).

Sherbert and *Yoder* are benchmarks for how strict scrutiny might be applied here. In *Sherbert*, the Court found that the interest raised by plaintiffs—potential fraudulent claims by those feigning religious objections—was insufficiently compelling. 374 U.S. 398, 407 (1963). The Court noted that it would be incumbent on the government to show "that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id*. Because the Court found no compelling interest, it did not address the test's second prong.

In *Yoder*, the Court found that uniform education was a compelling interest, but that the statute was not the least restrictive means of furthering that compelling interest. 406 U.S. 205, 222 (1972). The Court explained that while education was undoubtedly a compelling state interest, Amish children were already receiving the benefits of that interest through a "long-established program of informal vocational education." *Id*. The Court emphasized that its finding was fact-specific to the Amish community. *Id*. at 228.

The AFP route would not pass strict scrutiny. TGP asserts that the compelling government interest is maintaining a coherent natural gas pipeline permitting system. Order at 13. TGP says the approximately 9% project cost increase and greater overall environmental harm that accompany the alternate AFP route detract from such a system. *Id*. TGP contends that the

least restrictive means for maintaining that system would be ensuring that it does not "bend unreasonably to the desired exceptions of any religion." *Id*.

While there is some precedent for recognizing a compelling interest in maintaining uniform governmental regulation, uniformity is only compelling where it is necessary for the government program to function. *United States v. Lee*, 455 U.S. 252 (1982). A general interest in uniformity does not suffice. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006). TGP has conceded that the alternate AFP route *would* allow the pipeline to function, albeit with a 9% cost increase and greater overall environmental harm. Order at 13.

The cost increase on its own would not constitute a compelling government interest since "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013). Additionally, with respect to RLUIPA, government interests in cost reduction are less compelling than they would be otherwise because the very nature of the statute "may require . . . incur[red] expenses . . . to avoid imposing a substantial burden on religious exercise." *Williams v. Annucci*, 895 F.3d 180, 190 (2d Cir. 2018). Last, "[w]here fundamental claims of religious freedom are at stake . . . we cannot accept such a sweeping claim . . . we must searchingly examine the interests that the State seeks to promote." *Yoder*, 406 U.S. at 221.

TGP's interest in a uniform natural gas pipeline permitting system, and arguably in cost reduction, does not adequately capture the precise interests the state must seek to promote. Regardless, the AFP route would fail strict scrutiny at the test's second prong. The AFP route is not the least restrictive means of maintaining a coherent natural gas permitting system. The least restrictive means would use the alternate route, which would accomplish TGP's stated goal while respecting HOME's fundamental rights. As noted, the pipeline would still operate through the

proposed alternate route. Recall *Yoder*: while education was a compelling government interest, depriving the Amish community of their religious exercise was not a narrowly tailored means of accomplishing that interest. *Id*. at 222. The *Yoder* court emphasized that the Amish community's religious exercise did not deprive children of education, but rather offered them an alternative by means of vocational training. *Id*. The same is true here. There is an alternative to the current AFP route, one that does not "bend to the desired exceptions of any religion," Order at 13, but rather guarantees HOME's fundamental free exercise rights as protected by RFRA.

In any case, TGP has not adequately supported their claim for how the AFP route would pass strict scrutiny, failing to address the standard's weighty demands. It is necessary to remember that TGP hopes to encroach on "this highly sensitive constitutional area," where "only the gravest abuses . . . give occasion for permissible limitation." 374 U.S. at 406. Because TGP has not shown a compelling government interest, or in the alternative, that the alternate route is not the least restrictive means of achieving that interest, the court should hold that the AFP route fails strict scrutiny and should be rerouted along the proposed alternate route.

CONCLUSION

Upon the foregoing, Appellant Holy Order of Mother Earth requests that this Court reverse the Federal Energy Regulation Commission's order denying rehearing with respect to the balancing of benefits and harms, the finding of public convenience and necessity, the decision not to impose any upstream and downstream GHG conditions, and the decision to route the AFP over HOME's property, affirm the decision that regulation of GHG conditions falls within the commission's authority, and remand for further proceedings consistent with these updated guidelines.