Non-Measuring Brief
Team 27

23-01109

CONSOLIDATED WITH

23-01110

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

HOLY ORDER OF MOTHER EARTH,

Plaintiff-Appellant,

-and-

TRANSNATIONAL GAS PIPELINES, LLC,

Plaintiff-Appellant,

v.

UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION,

Defendant-Appellee

On Petition for Review from the United States Federal Energy Regulatory Commission in Docket No. TG21-616-000, Commissioners Jane D. Clark, Scott P. Williams, Timothy S. Child, and Wendy L. Bankman

Brief of Appellant, HOLY ORDER OF MOTHER EARTH

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JURISDICTIONAL STATEMENT

The United States Federal Energy Regulatory Commission ("FERC") issued an order in Docket No. TG21-616-000 denying the Holy Order of Mother Earth's ("HOME") and Transnational Gas Pipelines, LLC's ("TGP") petitions for rehearing of aspects of its order granting a Certificate of Public Convenience and Necessity ("CPCN") for the American Freedom Pipeline ("AFP") on May 19, 2023. FERC had subject matter jurisdiction pursuant to 15 U.S.C. §717n. TGP's principal place of business is New Union. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 15 U.S.C. § 717r(a)-(b). *See also New York State Dep't of Env't Conservation v. FERC,* 991 F.3d 439, 445-46 (2d Cir. 2021).

STATEMENT OF ISSUES PRESENTED

I. Was FERC's finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as FERC found a project need where 90% of the gas transported by that pipeline was for export?

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

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

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

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

STATEMENT OF THE CASE

I. Statutory Background

A. Natural Gas Act

The Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717z, delegates authority over interstate and international transportation and sale of natural gas to the Federal Energy Regulatory Commission. *Id.* §§ 717(a), 717o. The NGA's legislative history indicates that the "overriding congressional purpose [of the Act] was to plug the 'gap' in regulation of natural-gas companies" particularly as it pertains to "wholesale rates of gas." *Phillips Petroleum Co. v. State of Wis.*, 347 U.S. 672, 682-83 (1954).

Section 3 of the NGA requires authorization from FERC to engage in the importation and exportation of natural gas. *Id.* § 717b(a). Section 7 requires a certificate of public convenience and necessity for "natural gas companies" that wish transport or sell natural gas, or construct a natural gas facility. *Id.* § 717f(c)(1)(A). The NGA defines "natural gas company" as "a person engaged in the transportation [or sale] of natural gas in interstate commerce" and define interstate commerce "commerce between any point in a State and any point outside thereof . . . but only insofar as such commerce takes place within the United States." *Id.* § 717a. Furthermore, FERC grants a CPCN only if the proposed facility "is or will be required by the present or future public convenience and necessity." § 717f(e). Issuance of a Section 7 CPCN grants the certificate holder the right to exercise eminent domain to acquire right-of-way for pipeline construction when it cannot be acquired by other means. *Id.* § 717f(h). There is no such right under Section 3.

B. Religious Freedom Restoration Act

In 1993, Congress enacted the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq., to restore the broad protections for religion rejected by the Supreme Court's

decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Id*. at 879 (quotation marks omitted). Congress recognized that *Smith* "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).

Recognizing that "the compelling interest test . . . is a workable test for striking sensible balances between religious liberty and competing prior government interests," 42 U.S.C. § 2000bb(a)(5), RFRA has two stated purposes: (1) "to restore the compelling interest test" articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and "to guarantee its application in all cases where free exercise of religion is substantially burdened;" and (2) "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b).

RFRA applies to all Federal law, 42 U.S.C. § 2000bb-3(a), and prohibits government from imposing a substantial burden on a person's exercise of religion unless it can satisfy strict scrutiny, demonstrating that "the application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(b).

C. National Environmental Policy Act

The National Environmental Policy Act ("NEPA") "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action," and "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (internal citations omitted). The statue requires an agency to take "a

'hard look' at the environmental consequences before taking a major action." *Id.* (internal citation omitted). NEPA requires the action agency to "obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(C) NEPA "does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

"Courts review an agency's compliance with NEPA under the Administrative Procedure Act." *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 72 F.4th 1166, 1177 (10th Cir. 2023). A reviewing court should "ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Elec. Co.*, 462 U.S. at 98. Under the APA an agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [if the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 1177 (internal citation omitted).

II. Factual Background

A. Transnational Gas Pipelines, LLC's American Freedom Pipeline

On June 13, 2023, Transnational Gas Pipelines, LLC ("TGP"), a natural gas company under section 2(6) of the Natural Gas Act ("NGA"), filed an application with the Federal Energy Regulatory Commission ("FERC") for authorization to construct and operate the American Freedom Pipeline ("AFP"). R. at 4 ¶ 1, 5 ¶ 8. The proposed AFP is a 99-mile-long, 30-inch-diameter pipeline, R. at 5 ¶ 10, with a maximum capacity of 500,000 dekatherms ("Dth") per day of liquified natural gas ("LNG"), R. at 6 ¶ 11. The project would include two receipt meter stations, a receipt tap, mainline valve assemblies, pig launcher/receiver facilities, pig trap valves, and

cathodic protection. R. at 5-6 ¶ 10. The pipeline will carry LNG from the Hayes Fracking Field ("HFF") in Old Union to the Broadway Road M&R Station in New Union on a route parallel the western side of the Misty Top Mountains, cutting through roughly two miles of the Holy Order of Mother Earth's ("HOME") property along the way. R. at 10 ¶ 38; Ex. A. TGP also proposed an alternate route that would avoid HOME's property by routing through the Misty Top Mountains. Ex. A.

While TGP has binding precedent agreements with two natural gas companies for the full capacity of the AFP (450,000 Dth per day from International Oil & Gas and 50,000 Dth per day from New Union Gas and Electric Services Company), R. at 6 ¶ 11, the production of gas from the HFF is not expected to increase to fill that capacity, R. at 6 ¶ 12. Instead, the precedent agreements merely reroute approximately 35 percent of the LNG already transported by the Southway Pipeline (which currently transports all the LNG from the HFF) to the AFP. R. at 6 ¶ 12. Demand for LNG in the region served by the Southway Pipeline is diminishing. *Id.* Furthermore, all of International's gas will be diverted at the Broadway Road M&R Station to the Northway Pipeline, which will transport International's LNG to the Port of New Union, where the LNG will be loaded onto tankers and exported to Brazil. R. at 6 ¶14.

TGP estimates that constructing the AFP will take about four years, R. at 15 ¶ 73, and cost approximately $599 million, R. at 6 ¶ 10. Building the pipeline will impact landowners along the route, R. at 10 ¶ 41, and cause serious harm to the environment, including removal of trees and vegetation, R. at 10 ¶ 38, and increased emission of greenhouse gasses ("GHGs"), R. at 15 ¶ 72. The GHG emissions from the construction and operation of the pipeline will be enormous: the Environmental Impact Statement ("EIS") for the AFP showed that if the pipeline operates at maximum capacity and all the LNG transported is burned, "downstream end-use could result in

about 9.7 million metric tons of CO2e per year." R. at 15 ¶ 72. Additionally, without mitigation, the GHG emissions from construction of the pipeline alone would be over 400,000 metric tons of CO2e. R. at 15 ¶ 73.

If TGP were to build the pipeline on the alternate route that avoids HOME's property, it would increase the cost of the project by less than ten percent, adding roughly $51 million to the total bill, and there would be objectively more environmental impacts as the alternate route is longer and passes through more sensitive ecosystems. R. at 11 ¶ 44.

B. FERC Issues a CPCN Order

Even though 90 percent of the gas to be transported by the AFP is destined for export to Brazil and the environmental impacts of the pipeline, on April 1, 2023, FERC issued an order granting a Certificate of Public Convenience and Necessity ("CPCN") for the AFP. R. at 2. In granting the CPCN, FERC found that the benefits of the project outweighed its adverse effects on the environment and landowners along the proposed route. R. at 4 ¶ 3.

Consistent with its "long-standing history of imposing conditions to mitigate environmental harms in its authorizations," R. at 17 ¶ 90, FERC attached conditions to its approval of the AFP designed to reduce the impacts of its construction, R. at 17-18 ¶ 90. More specifically, FERC required that TGP take steps to mitigate its GHG emissions during construction by planting trees to replace those that had to be removed, using electric-powered equipment (including vehicles) where available, purchasing only "green" steel pipeline segments, and using electricity generated by renewable sources. R. at 14 ¶ 67.

C. Impact of the AFP on the Holy Order of Mother Earth

HOME is a not-for-profit religious organization based in New Union. HOME's founders created the order in 1903 in response to increasing environmental harms resulting from rapidly

expanding industrialization and capitalism, organizing the religion around the belief that the natural world is sacred and that nature itself is a deity. R. at 11 ¶ 46. At the heart of HOME's religious beliefs is the conviction that "humans should do everything in their power to promote natural preservation over all other interests." R. at 11 ¶ 47.

HOME owns 15,000 acres of land in Burden County, New Union, all of which is "fully devoted to Mother Earth." R. at 12 ¶ 58. This land houses HOME's headquarters as well as several sacred sites, including a sacred hill in the foothills of the Misty Top Mountains that lie on the eastern border of HOME's property. R. at 5 ¶ 9, 11 ¶ 44, 11 ¶ 48.

For nearly 90 years, each summer and winter solstice, HOME's members engage in a pilgrimage across their property known as the Solstice Sojourn ("the Sojourn"). R. at 11 ¶ 48. During the Sojourn, the members travel from their temple near the property's western boundary to the sacred hill on the property's eastern boundary. *Id.* When they arrive at the hill, the members conduct a religious ceremony for all children in the Order who reached the age of 15 in the time since the last Sojourn. *Id.* After the ceremony, HOME's members return to the western part of their property along a different path. *Id.*

The AFP threatens to prevent HOME from practicing the Sojourn. R. at 12 ¶ 57. The AFP will impact landowners along its entire route, but HOME will be uniquely burdened. The proposed pipeline route will leave a two-mile long treeless scar on HOME's land, R. at 10 ¶ 38, that crosses the path of the Solstice Sojourn in both directions, R at 11 ¶ 48. To build the pipeline, TGP will have to remove approximately 2,200 trees along with other vegetation from HOME's land, most of which cannot be replanted due to safety concerns. *Id.*

Though TGP agreed to change over 30 percent of the pipeline route to address the concerns of other landowners, they have made minimal accommodations for HOME. R. at 10 ¶ 41. Rather

than changing the route to, at the very least, avoid interfering with the path of the Solstice Sojourn, TGP merely agreed to bury the portion of the AFP on HOME's property and to expedite construction "to the extent feasible" in the time between Sojourns in a meager attempt to minimize disruption to HOME. *Id*.

These concessions do not do enough to address HOME's concerns. For HOME's members, the presence of the pipeline under the path of the Sojourn completely destroys the meaning of the journey. R at 12 ¶ 57. At a more fundamental level, HOME's religious beliefs prohibit them from allowing their land to be used to support the environmentally harmful fossil fuel industry. R at 11 ¶ 49. By allowing HOME's land to be used for transport of LNG, FERC essentially coerced HOME to violate its religious beliefs. R. at 11 ¶ 50.

III. Proceedings Below

On April 20, 2023, HOME sought rehearing from FERC on three aspects of the CPCN: First, HOME argued that FERC provided insufficient support to justify its finding of public need for TGP's project. Second, HOME contended that even if there was public need for the AFP, the adverse effects of the AFP outweigh any benefits the pipeline may provide and that FERC's approval of the AFP route over its land violated RFRA. Third, HOME claimed that FERC's decision not to impose conditions related to the upstream and downstream GHG emissions of the AFP was arbitrary. R. at 4-5 ¶ 5. On April 22, 2023, TGP sought rehearing from FERC on the GHG Conditions in the CPCN Order, arguing that the conditions were beyond the scope of FERC's authority under the NGA and addressed "major questions." R. at 5 ¶ 6.

About one month later, on May 19, 2023, FERC issued an Order denying both HOME's and TGP's petitions for rehearing, affirming the CPCN as written. R. at 2. HOME and TGP filed

timely petitions for review of the CPCN Order and the Rehearing Order, and this Court consolidated their petitions.

SUMMARY OF THE ARGUMENT

FERC's decision to grant the CPCN to TGP was arbitrary and capricious. Section 7 of the NGA provides that FERC can grant a CPCN "only if the proposed facility 'is or will be required by the present or future public convenience and necessity.'" *City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 722 (D.C. Cir. 2022) (quoting 15 U.S.C. § 717f(e)). In deciding whether there is a public need, FERC is required to undergo reasoned decision-making, considering "all relevant factors reflecting on the need for the project," 88 FERC at 61,747 (1999), and "fully articulat[ing] the basis for its decision," *Env't Defense Fund v. FERC*, 2 F.4th 953, 972 (D.C. Cir. 2021).

In *City of Oberlin, Ohio v. FERC*, 39 F.4th 719 (D.C. Cir. 2022) *("Oberlin II*"), the D.C. Circuit recognized that FERC may consider export precedent agreements in granting a CPCN when (1) natural gas is to be exported to a country with which the United States has a free trade agreement, *id.* at 726; (2) export of gas has domestic benefits such as supporting the "production and sale of domestic gas," *id.*; and (3) FERC can demonstrate that the exports may ultimately lead to increased imports of gas in the future, *id.* at 727. FERC failed to adequately justify, according to *Oberlin II*, its finding that precedent agreements for the TGP demonstrated project need given that 90 percent of the precedent agreements are for gas to be exported to Brazil, a non-free trade agreement country; the precedent agreements do not correspond to an increase in overall natural gas production; and there is no evidence indicating that exportin gas to Brazil will result in increased imports back to the U.S. Thus, the Court should remand the CPCN Order and the Rehearing Order to FERC to undertake truly reasoned decision-making.

Next, FERC's finding that the benefits of the AFP outweigh its adverse effects was arbitrary and capricious. While the balancing of benefits and adverse effects is "essentially an economic test," 88 FERC at 61,745, in recognition of the fact that money may not always adequately compensate a landowner for their losses due to eminent domain, FERC may also consider other adverse effects to landowners, 90 FERC at 61,398.

One such adverse effect present here is the burden on HOME's exercise of its religion. RFRA provides that the federal government may not substantially burden a person's exercise of religion unless it can show that the "application of the burden to the person" furthers a compelling government interest and is the least restrictive means of furthering that interest. 42 U.S.C. 2000bb-1(b). Here, the approval of the AFP's route through HOME's property substantially burdened HOME's free exercise under RFRA because it coerced HOME to allow its property to be used in a manner completely contrary to their sincerely held religious beliefs. *See, e.g., Burwell v. Hobby Lobby*, 573 U.S. 682, 726 (2014).

As such, FERC's granting of the CPCN is subject to RFRA's compelling interest test. *See, e.g., Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957, 963 (E.D. Mich. 2014). But here, FERC failed to show that the AFP route was the least restrictive means of furthering its compelling interest because its asserted interests were not strong enough interest to justify the burden on HOME, and there were viable alternatives to the approved route that would avoid interfering with HOME's property. Thus, FERC's approval of the proposed AFP route in the CPCN Order violated HOME's free exercise rights under RFRA.

Moreover, FERC failed to demonstrate it undertook a "proper consideration" of the "logical alternatives," underlying its decision. In contrast to the thorough evaluation conducted in *Minisink*, where various alternatives were examined, and the decision heavily relied on the results

of the Environmental Assessment (EA), *Minisink Residents for Env't Pres. and Safety v. FERC*, 762 F.3d 97, 104 (D.C. Cir. 2014), here FERC's approach in this case is deficient. FERC relies on TGP's estimate of a $51 million cost increase for rerouting through the Misty Top Mountains and TGP's claim of increased environmental harm, R. at 11 ¶ 44. The lack of an independent analysis comparing proposed and alternate routes, coupled with FERC's concession to TGP's estimates, indicates a failure to meet the required diligence in comparison.

Additionally, FERC was within its authority under the NGA to impose conditions on TGP for the mitigation of GHG emissions, as the conditions do not address so called "major questions." The major questions doctrine applies when a federal agency acts in a way that will cause sweeping change in a sector of the economy and the statutory basis for that action is ambiguous. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022). FERC's actions do not implicate the major questions doctrine because FERC's interpretation of its regulatory authority under the NGA is consistent with the express grant of authority from Congress in the NGA; FERC is not acting in a field from which it has been historically excluded; and FERC's action is not causing a sweeping change to a sector of the economy.

Finally, FERC acted in an arbitrary and capricious manner in deciding not to impose conditions addressing upstream and downstream GHG emissions. While an agency conducting an environmental review is not required to engage in a "crystal ball" inquiry, it is responsible for identifying reasonably foreseeable adverse environmental impacts. *See Selkirk Conservation All. v. Forsgen*, 336 F.3d 944, 962 (9th Cir. 2003). Here, FERC entirely neglected to consider potential upstream GHG impacts, instead concluding, without sufficient justification, that "there is no reasonably foreseeable significant upstream consequence." R. at 15 ¶ 74. Additionally, FERC failed to consider whether export of LNG to Brazil would result in a net change in GHG emissions.

Therefore, FERC's decision not to mitigate upstream or downstream GHG impacts was arbitrary and capricious.

STANDARD OF REVIEW

A grant of a Certificate of Public Convenience and Necessity is reviewed under the Administrative Procedures Act's arbitrary and capricious standard. *See Env't Def. Fund v. FERC*, 2 F.4th 953, 967 (D.C. Cir. 2021), 5 U.S.C. § 706(2)(A). FERC's factual findings will only survive judicial review if they are supported by substantial evidence. *Id.* at 968. Furthermore, "where an agency's 'explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency's decision and policy.'" *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 605 (D.C. Cir. 2019) (citing *BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016)).

ARGUMENT

I. FERC'S GRANT OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY WAS ARBITRARY AND CAPRICIOUS.

Under Section 7 of the NGA, FERC grants a CPCN "only if the proposed facility 'is or will be required by the present or future public convenience and necessity.'" *City of Oberlin, Ohio v. FERC* ("*Oberlin II*"), 39 F.4th 719, 722 (D.C. Cir. 2022) (quoting § 717f(e)). Furthermore, FERC's Policy Statement outlines the "analytical steps it will use to evaluate proposals for certificating new construction." *See Certification of New Interstate Nat. Gas Pipeline Facilities* ("Policy Statement"), 88 FERC ¶ 61,227 (Sept. 15, 1999), further clarified, 92 FERC ¶ 61,094 (July 28, 2000). The first threshold step is whether the project can proceed without subsidies from its existing customers. 92 FERC at 61,373. Then, FERC is to determine "whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on [its own] existing customers [], existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline." *See* 88 FERC at 61,745. "Where

residual adverse effects on the three interests remain after the pipeline makes an effort to minimize them, the Commission will evaluate the project by balancing the evidence of the project's public benefits against its residual adverse effects." 92 FERC at 61,373.

A. FERC's reasoning in granting the CPCN to TGP is not sufficient to satisfy its obligation to carry out "reasoned" decision-making because it did not clearly apply the *Oberlin II* factors or adequately articulate the basis for its decision.

"Rather than relying only on one test for need, the Commission [] considers all relevant factors reflecting on the need for the project," with an intent "to evaluate specific proposals based on the facts and circumstances relevant to the application and to apply the criteria on a case-by-case basis." 88 FERC at 61,747 (1999) ("Bright line tests are unlikely to be flexible enough to resolve specific cases and to allow the Commission to take into account the different interests that must be considered"). Relevant factors reflecting the need for the project "might include . . . precedent agreements . . . ." 88 FERC at 61,747; *see Minisink Residents for Env't Pres. and Safety v. FERC ("Minisink")*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014); *Oberlin II*, 39 F.4th at 722; *but see Env't Def. Fund v. FERC*, 2 F.4th 953, 972 (D.C. Cir. 2021) ("[T]here is a difference between saying that precedent agreements are always important versus saying that they are always sufficient to show that construction… 'is or will be required by the present or future public convenience and necessity.'"). To satisfy its obligation to make "reasoned" and "principled" decisions, FERC must "fully articulate the basis for its decision," making more than just "a passing reference to relevant factors. *Env't Def. Fund*, 2 F.3d at 968 (quoting *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010)); *See City of Oberlin, Ohio v. FERC ("Oberlin I")*, 937 F.3d 599 (D.C. Cir. 2019).

In *Oberlin I*, FERC granted a CPCN to the Nexus pipeline project based on eight precedent agreements accounting for 59% of the pipeline's total capacity, two of which (accounting for 17 percent of the pipeline's capacity) were export agreements to serve Canadian customers. *Oberlin*

II, 39 F.4th at 723. While the D.C. Circuit could have affirmed FERC's decision based solely on the 41.6 percent capacity accounted for by domestic precedent agreements, it remanded on the basis that FERC did not adequately justify its reliance on export precedent agreements as evidence of project need. *Oberlin I*, 837 F.3d at 606. On remand, FERC provided more thorough reasoning for its consideration of the export agreements, and in *Oberlin II*, the D.C. Circuit upheld FERC's grant of the CPCN, concluding that FERC had "reasonably explained why it considered Nexus' export precedent agreements in granting a [CPCN] under section 7." 39 F.4th at 728.

In Oberlin II, the D.C. Circuit accepted three explanations from FERC for its consideration of export precedent agreements in granting the CPCN. First, FERC turned to the Congressional determination, reflected in Section 3 of the NGA, that "natural gas exports to countries with which the United States has a free trade agreement" are considered to be "beneficial to the public." 39 F.4th at 726. Under that reasoning, the Court agreed that "[e]xports to Canada are [] 'in the public interest' under Section 3(c)" because Canada is a country with which the United States has a Free Trade Agreement with. *Id.*

Second, FERC explained that increased transportation of gas, regardless of its destination, has domestic benefits, including supporting the "production and sale of domestic gas." *Id.* Particular to the Nexus pipeline, FERC demonstrated that export shippers contribute to the gas market, in the context of the Nexus pipeline, by providing additional takeaway capacity for abundant supplies in the Appalachian Basin, which had experienced capacity constraints. *See* Brief for Respondent at 31-32, *City of Oberlin, Ohio v. FERC*, 39 F.4th 719 (D.C. Cir. 2022) (No. 20-1492.), 2021 WL 4234641 (C.A.D.C.). The D.C. Circuit concluded that the precedent agreements were "evidence of need for the capacity" given the fact that the Nexus pipeline added "additional

capacity" to an area with capacity constraint, and that there was a rational connection between the facts provided and the consideration of export precedent agreements.

FERC's final explanation was that, taken broadly, an increase in the availability of gas that might be transported out of the United States and imported back into the United States demonstrates future domestic benefits of expanding pipeline capacity. *Oberlin II*, 39 F.34th at 727. FERC used the Dawn Hub, a liquid trading point located in Ontario, Canada "where supplies move freely" between the U.S. and Canada, to show how export agreements may ultimately end up serving domestic needs, noting that "U.S. gas transported to the Dawn Hub increased the availability of gas that might be transported through Canada and imported back into New York and New England." For the D.C. Circuit, this "demonstrate[ed] future domestic benefits of expanding pipeline capacity." *Oberlin II*, 39 F.4th at 727–28.

Here, the court should remand the Certificate Order and Rehearing Order to FERC to undertake appropriate "reasoned" and "principled" decision-making. FERC cites *Oberlin II* for the proposition that "precedent agreements for gas that is to be exported are a valid consideration in determining the need for a project." R. at 9 ¶ 30. FERC, however, failed to show that it applied any of the *Oberlin II* factors. Moreover, FERC completely neglected to fully articulate why the key distinctions from the *Oberlin II* factors are not meaningful to its application. R. at 9 ¶ 32-33. While the D.C. Circuit in *Oberlin II* held that "FERC reasonably explained why it considered Nexus' export precedent agreements in granting a [CPCN] under Section 7" where gas was bound for Canada, 39 F.4th at 728, the Court's decision only extends as far as its consideration of the relevant factors bearing on the public interest to the extent of its comparison to the facts of the Nexus pipeline. Without a clear application of the *Oberlin II* factors or an adequate articulation for the basis of its decision, FERC's grant of a CPCN to TGP is not sufficient to satisfy FERC's

obligation to carry out "reasoned" and "principled" decision-making and is therefore arbitrary and capricious.

Unlike the Nexus pipeline, where export agreements accounting for 17% of the total pipeline capacity were to be exported to Canada—a country with which the United States has a free trade agreement, here, agreements for export to Brazil, a country with which the United States *does not* have a free trade agreement, account for 90 percent of the AFP's total capacity. R. At 9 ¶ 33. And yet while FERC concedes that "Section 3 of the NGA expressly states as much where the gas is to be exported to a county with which the United States has a free trade agreement," it explicitly denounces the importance of this distinction, finding it not to be "meaningful," and going so far as to state that they "do not put any significant weight on the end use of the LNG." *Id*. However, by contrast, the *Oberlin II* Court found meaning between the distinction of a free trade nation and non-free trade nation, specifically from an explicit congressional determination under Section 3 of the NGA, providing categorically that exports to countries with free trade agreement "shall be deemed in the public interest." 39 F.4th at 726. Therefore, the line of reasoning finding support in congressional determination and Section 3 of NGA is only relevant to the extent that the United States has a free trade agreement with the nation to which gas will be exported, and does not address a situation as here, where the export agreement is with a non-free trade agreement nation.

FERC's attempt to justify the credit given to export precedent agreements as evidence of domestic benefit lacks a clear and logical connection between the facts presented and the decision made. Certainly, FERC attempts to list "domestic benefits" derived from the TGP pipeline: "provides transportation for domestically produced gas, provides gas to some domestic customers, and fills additional capacity at the International New Union City M&R Station." R. at 9 ¶ 34.

However, FERC falls short of, if not contradicts, a “rational connection” in light of the facts that the production of gas from the HFF is not expected to increase to fill that capacity, as it merely reroutes approximately 35 percent of the LNG already transported by the Southway Pipeline. R. at 6 ¶ 12. By contrast, FERC provided a compelling rationale in *Oberlin II* by elucidating how the Nexus shippers played a key role in increasing capacity within an area facing constraints, thereby underscoring the genuine need and providing a sound basis for crediting export agreements. 39 F.4th at 727. Moreover, a pipeline that merely shifts gas from an area without demand to one already served, without increasing domestic gas production, lacks the rational factual connections associated with the "production and sale of domestic gas" and its purported "contribution to economic growth and job support." *Id*. Therefore, FERC’s failed to demonstrate a rational connection between diminishing demand and gas that “may or may not otherwise be purchased in the future” and a public need or benefit. R. at 9 ¶ 34.

Finally, there is no specific evidence indicating an increase in the availability of gas for transport out of and import back into the United States as a result of the AFP, particularly to states in need. This absence fails to demonstrate potential future domestic benefits associated with expanding pipeline capacity. Unlike in *Oberlin II*, where FERC showed that gas exported to the Dawn Hub increased the gas availability for potential transport through Canada and importation back into New York and New England, here, FERC fails to assert similar facts to establish that the 90% of exported gas would return to fulfill domestic needs. 39 F.4th at 727-728. Notably, when HOME pointed out this clear distinction, FERC merely acknowledged the differences, stating they "recognize the[] distinctions" and are aware that the gas produced in the HFF is already fully transmitted by the existing Southway Pipeline. However, FERC did not provide a sufficient explanation for not attributing weight to this acknowledged distinction. R. at 9 ¶ 32.

Therefore, FERC's application of *Oberlin II* to justify crediting export precedent agreements within its Section 7 analysis lacks a thorough examination of each *Oberlin II* factor and fails to provide a rationale for its failure to assign particular weight to those factors or for endorsing export agreements. This deficiency in analysis violates the Commission's duty to engage in "reasoned" and "principled" decision-making, as evidenced by the precedent that "a passing reference to relevant factors . . . is not sufficient to satisfy the Commission's obligation." *Env't Def. Fund*, 2 F.4th at 968. FERC's decision to forego a comprehensive analysis under the Oberlin factors, or any factors altogether, was arbitrary and capricious.

B. Even if the AFP is found to be in the public interest, the devastating adverse effects on the interests of landowners, the surrounding community, and the environment overwhelmingly outweigh the benefits.

Under FERC's 1999 Policy Statement, if there are residual adverse effects on, among other interests, the economic interests of landowners and communities "after efforts have been made to minimize them," FERC "will proceed to evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects." 88 FERC at 61,745. At this stage FERC may "identify conditions that it could impose on the certificate that would further minimize or eliminate adverse impacts and take those into account in balancing the benefits against the adverse effects." *Id.* at 61,745–46. Only when the benefits outweigh the adverse effects on the interests of landowners and the community will FERC then proceed to complete the environmental analysis where other interests are considered. *See* 88 FERC at 61,747.

The balancing of benefits and adverse effects is "essentially an economic test." *Id.* at 61,745. However, according to FERC's 2000 Policy Statement on Certification of New Interstate Natural Gas Pipeline Facilities, FERC may also consider any other adverse effect to landowners in recognition that "the dollar amount received as a result of eminent domain may not provide a satisfactory result to the landowner." *Certification of New Interstate Nat. Gas Pipeline Facilities*,

90 FERC at 61,398. FERC is required to evaluate all factors bearing on the public interest, including the impact of a proposed pipeline on landowners' free exercise right under RFRA. *See Atl. Ref. Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 391 (1959). Here, the burden on HOME's religious exercise is so substantial that any money they may receive under eminent domain cannot possibly compensate them for the losses they will incur because of the construction of the AFP.

1. The AFP as approved by the CPCN has significant adverse effects on landowners and the surrounding community.

Where a proposed project is "able to acquire all, or substantially all, of the necessary right-of-way by negotiation prior to filing the application, and the proposal is to serve a new, previously unserved market, it would not adversely affect any of the three interests." 88 FERC at 61,749. However, "[t]he more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact." 88 FERC at 61,749. And while the NGA "vests the Commission with 'broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines,'" FERC "must provide a cogent explanation for how it reached its conclusions. *Env't Def. Fund,* 2 F.3d at 975 (holding that FERC failed to balance the benefits and costs in both the Certificate Order and Rehearing Order by not pointing to any concrete evidence supporting its decision to outweigh adverse effects with benefits).

Here, TGP failed to negotiate right-of-way easements with all affected landowners along the proposed route of the AFP prior to filing its application with FERC. TGP was not able to come to an agreement with over 40% of affected landowners, including HOME. R. at 10 ¶ 42. Therefore, FERC cannot presume that the pipeline will have no adverse effects on landowners' interests, and they must engage in a balancing test supported by substantial evidence to assess whether the

benefits of the project outweigh its adverse effects. *See* 88 FERC at 61,749; *Env't Def. Fund*, 2 F.3d at 975.

i. FERC did not adequately consider whether its actions impose a substantial burden on any person's right to free exercise of religion under RFRA.

A balancing test is only adequate where it is supported by substantial evidence, considering all relevant factors, including potential burdens on affected landowners' free exercise rights under RFRA. *See e.g., Atl. Ref. Co.*, 360 U.S. at 391; 88 FERC at 61,747 (1999) ("Bright line tests are unlikely to be flexible enough to resolve specific cases and to allow the Commission to take into account the different interests that must be considered"). RFRA provides that federal government "shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). Under RFRA, the term "government" includes federal agencies like FERC. *Id,* at § 2000bb-2(a). Therefore, FERC is prohibited from substantially burdening a person's exercise of religion, unless they can show that the "application of the burden to the person" furthers a compelling government interest and is the least restrictive means of furthering that interest.

Here, FERC improperly determined that routing the AFP through HOME's land will not substantially burden HOME's exercise of religion. In a RFRA claim, the claimant bears the initial burden of "showing that the law in question would (1) substantially burden (2) a sincere (3) religious exercise." *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957, 963 (E.D. Mich. 2014). 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); 42 U.S.C. § 2000cc-5(7)(A). Generally, courts "tread gently" when determining the sincerity of a claimant's religious beliefs, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d 77, 91 (D.D.C. 2017), understanding that their "'narrow function . . . in this context, is to determine' whether the line

drawn reflects 'an honest conviction.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (citing *Thomas v. Review Bd. Of Indiana Emp. Sec. Div.*, 450 U.S. 707, 716 (1981)). Here, neither FERC nor TGP dispute the sincerity of HOME's religious beliefs or practices, R. at 12 ¶ 51, so the only remaining threshold question is whether the CPCN Order approving the pipeline's route through HOME's land imposes a substantial burden on HOME's exercise of religion.

A government action imposes a substantial burden when it "coerce[s] . . . individuals in the practice of their religion," *Hobby Lobby*, 573 U.S. at 726, or when it "puts substantial pressure on an adherent to modify his behavior and violate his beliefs," *Standing Rock*, 239 F. Supp. 3d at 91. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 209, 219 (1972) (finding Wisconsin's compulsory school attendance law substantially burdened Amish plaintiffs' religious beliefs because it forced them to violate their sincerely held belief that attending high school was contrary to their religion and way of life); *Hobby Lobby*, 573 U.S. at 703 (concluding that the Affordable Care Act's requirement that employers provide insurance coverage for certain contraceptives coerced owners to "facilitate access to contraceptive[s] . . . that operate after [the] point of conception" which substantially burdened religious belief that life begins at conception).

On the other hand, government actions that "make it more difficult to practice certain religions," but do not "'coerce individuals into acting contrary to their religious beliefs' do not constitute substantial burdens on the exercise of religion." *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988)) (finding that relocation of grave sites did not substantially burden plaintiffs' religious beliefs because plaintiffs would be able to "continue their religious beliefs and practices even if the condemnation proceeds as planned."). *See also Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (holding that use of treated wastewater for ski resort's artificial snowmaking

on a sacred mountain did not substantially burden tribal members' exercise of religion because it merely resulted in a "diminishment of spiritual fulfillment," not a complete derivation of their ability to exercise religion).

Here, like in *Yoder* and *Hobby Lobby*, HOME's religious beliefs are substantially burdened by government action. The CPCN Order approving the AFP's route through HOME's property would impair HOME's ability to engage in the Solstice Sojourn, *see* R. at 12 ¶ 57, but that fact alone is not enough to show a substantial burden, *see, e.g., Thiry*, 78 F.3d at 1495. Rather, there is a more fundamental issue here: the approved route compels HOME to "support—in a real physical way—the production, transportation, and burning of fossil fuels." R. at 11 ¶ 50. Constructing the AFP on HOME's land violates HOME's religious practices and beliefs that prohibit its members from allowing their land to be used for environmentally harmful purposes. R. at 11 ¶ 49. FERC's approval of the pipeline route gives HOME no choice but to act contrary to its beliefs: either HOME can negotiate an easement with TGP for construction of the pipeline through their land, voluntarily subjecting it to a use that is antithetical their beliefs, or TGP can take the land by force through use of eminent domain, *see* 15 U.S.C. § 717f(h). Because the CPCN Order coerces HOME to violate its sincerely held beliefs, FERC has imposed a substantial burden on HOME's right of free exercise under RFRA.

ii. FERC's issuance of the CPCN approving TGP's route through HOME's property violated RFRA.

Because FERC's action substantially burdens HOME's rights under RFRA, its approval of the AFP's route through HOME's property is subject to RFRA's compelling interest test. *See, e.g., Ave Maria Found.*, 991 F. Supp. 2d at 963. Under the compelling interest test, the government bears the burden of proving that its action was the least restrictive means of furthering a compelling interest. *See, e.g., Id*. An interest is compelling only if it is "of the highest order." *Yoder*, 406 U.S.

at 215. The existence of exceptions to a generally applicable government policy or program is evidence that the interest it serves is not sufficiently compelling to override the right of free exercise. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432-33 (2006); *Hobby Lobby*, 573 U.S. at 730-31. Furthermore, "a general interest in uniformity" is typically insufficient to justify a substantial burden on religious exercise. *O Centro*, 546 U.S. at 435.

The least restrictive means test is an "exceptionally demanding test" that requires the government to show that there are no viable alternatives that are less burdensome on the claimant's exercise of religion. *Hobby Lobby*, 573 U.S. at 728-29. An alternative inviable when adopting the alternative would make the government incapable of furthering the interest underlying its initial action. *See, e.g., U.S. v. Lee,* 455 U.S. 252 (1982) (holding that imposition of social security taxes on people with religious objections to paying taxes to fund or receiving public insurance benefits was constitutionally permissible because allowing religious objectors to opt out of the tax system would fatally undermine the system's viability). The least restrictive means inquiry is a balancing test, asking whether "the cost to the government of altering its activity to continue unimpeded" outweighs the "cost to the religious interest imposed by the government activity." *Ave Maria Found.*, 991 F. Supp. 2d at 967 (citation omitted). But cost is just one factor to consider: "RFRA . . . may in some circumstances require . . . expend[ing] of additional funds to accommodate citizens' religious beliefs," especially when the cost of accommodation is relatively minor compared to the overall cost of the program. *Hobby Lobby*, 573 U.S. at 729, 730.

Here, FERC failed to meet its burden of showing that the approved AFP route is the least restrictive means of furthering its interests. First, FERC did not assert a sufficiently compelling interest to justify burdening HOME's religious exercise. FERC's approval of the AFP was

predicated on a finding of that project "is or will be required by the present or future public convenience and necessity" and that the project is consistent with the public interest. 15 U.S.C. §§ 717b(a), 717f(e). In approving the pipeline FERC found that the AFP was in the public interest because, among other things, it would provide natural gas service to an underserved region, optimize the existing natural gas system, and help promote use of cleaner burning fuels in an effort to improve air quality. R. at 8 ¶ 27. While these are laudable goals, the fact that TGP and FERC made accommodations for the concerns of other landowners by altering the route of over 30 percent of the AFP, R. at 10 ¶ 41, shows that they are not so compelling as to allow for no exception. *See O Centro*, 546 U.S. at 432-33.

Second, FERC did not sufficiently support its assertion that the proposed alternative route is infeasible or that it would not adequately provide for the public interest motivating the project. FERC cannot argue that the proposed alternative route is infeasible because adopting that route would still further the interests FERC claimed justified the project in the first place: The alternate route would still allow natural gas to be transported from the HFF to the Broadway M&R Station, Ex. A, would still bring natural gas to an otherwise underserviced region, would still open the possibility that natural gas replaces other, more polluting fuel sources. The only significant difference between the approved route and the alternative route for purposes of this analysis is that the alternate route avoids HOME's property. Additionally, per *Hobby Lobby*, 573 U.S. at 729, 730, a slight increase in expense is an insufficient basis upon which to reject an otherwise feasible alternative, and here, the proposed alternative route for the AFP results in a less-than-ten-percent increase in overall project costs, R. at 6 ¶ 10, 11 ¶ 44. Because the AFP route approved in the CPCN order is not the least restrictive means of furthering FERC's interests, the CPCN order violated HOME's free exercise rights under RFRA.

2. Even if the benefits outweigh the adverse effects, approval of the TGP project was arbitrary and capricious given that the existence of a nearby alternative route was not adequately considered.

FERC is obligated to consider, as part of its certification process under the NGA, reasonable alternatives to proposed projects. *Minisink Residents for Envi't Pres. And Saftey*, 762 F.3d at 107. However, the "duty imposed" on FERC "by Section 7 of the Natural Gas Act is not merely to determine which of the submitted applications is most in the public interest, but also to give proper consideration to logical alternatives which might serve the public interest better than any of the projects outlined in the applications." *See N. Natural Gas Co. v. Fed. Power Comm'n*, 399 F.2d 953, 973 (D.C. Cir.1968).

FERC's obligation to consider alternatives to a proposed project will only be reasonable where it "undertakes an extensive analysis," providing a clear basis for its choice. *See Minisink Residents for Env't Pres. And Safety*, 762 F.3d at 107. For example, In *Minisink*, FERC "undertook an extensive analysis," evaluating "several system and aboveground site alternatives," "thoroughly" comparing the alternative to the proposed project. 762 F.3d at 104. Moreover, FERC's decision in *Minisink* leaned "heavily on the results of the EA." *Id.* The D.C. Circuit found FERC's analysis to be convincing, stating that FERC "amply considered alternatives to the Minisink Project, devoting especially *thorough attention* to the Wagoner Alternative favored by Petitioners." *Id.* at 107 (emphasis added). Therefore, FERC is required to base their decision on a fully articulated analysis in order to fulfill its NEPA requirements under the NGA.

Furthermore, "the fact that an alternate route will be more expensive should not deter" a proper consideration into a rational comparison between the proposed and alternate route. *See e.g., Texas E. Transmission Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261, 276, 225 (1966); *Baltimore Gas & Elec. Co.*, 462 at 97–98. ("The role of the courts is [] 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.").

In fulfilling its NEPA obligations regarding alternative considerations, FERC failed to demonstrate it undertook a "proper consideration" of the "logical alternatives," underlying its decision. Unlike in *Minisink*, where FERC evaluated "several system and aboveground site alternatives," "thoroughly" comparing the alternative to the proposed project, and ultimately coming to a decision that "heavily" reliant on the results of the EA, 762 F.3d at 104, here FERC relied on TGP's estimate that re-routing the AFP through the Misty Top Mountains would incur over $51 million in additional construction costs and TGP's contention that this alternate route would cause more environmental harm by traveling an extra three miles through sensitive ecosystems, R. at 11 ¶ 44. Not only does FERC lack an independent analysis by which it thoroughly compares the proposed and alternate route, but it concedes TGP's estimates and contentions without basing their decision on their own NEPA analysis. This approach falls short of the required diligent comparison, rendering FERC's decision arbitrary and reliant on TGP's assertions.

Moreover, even with the acknowledgment of TGP's estimates, revealing a potential increase of over $51 million in construction costs for rerouting the pipeline, a thorough and rational comparison between the proposed and alternate routes should not have been neglected. *See e.g., Texas E. Transmission Corp.* at 225; *Baltimore Gas & Elec. Co.*, 462 at 97–98. The provided estimate indicates that opting for the alternate route, avoiding HOME's property, would incur a cost increase of less than ten percent, roughly $51 million on the total project cost of $599 million. R. at 11 ¶ 44. FERC's failure to conduct a comprehensive cost analysis or provide a detailed

rationale for dismissing the alternate route underscores the arbitrary and capricious nature of its approval for the TGP project.

II. THE GHG CONDITIONS IMPOSED BY FERC WERE WITHIN FERC'S AUTHORITY UNDER THE NGA AND DO NOT IMPLICATE THE MAJOR QUESTIONS DOCTRINE.

Courts examine cases under the major questions doctrine when an executive agency takes action that will cause a sweeping change in a sector of the economy and the statutory basis for that action is ambiguous, especially if the agency's action causes illogical conclusions. Here, the major questions doctrine is not implicated. First, within the context of the statutory scheme, the results of the agency interpretation fit logically with the express intent of Congress. Second, FERC has acted within an express grant of authority from Congress. Third, FERC is not regulating a field that Congress has historically excluded it from. Finally, FERC's action is not causing sweeping change to a sector of the economy, instead, Congress has acted to change the energy economy.

The major questions doctrine applies to "extraordinary cases" where the "'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 at 159-160 (2000)).

An administrative agency may not exercise authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *Brown & Williamson*, 529 U.S. at 125 (internal quotation marks omitted). When interpreting the statutory ambit of agency authority, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 133 (citations omitted).

A. The Major Questions Doctrine is Amorphous.

The Court has not articulated a "bright-line" rule that explains when a question becomes major; rather, there is "a bit of a 'know it when you see it' quality" to the deployment of the major questions doctrine. *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (order denying reh'g). Because the "doctrine's boundaries remain hazy," an examination of seminal cases is helpful. *N. Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 296 (4th Cir. 2023). Only a brief investigation is necessary to recognize that FERC's action is distinguishable from major questions cases.

The origin of today's major questions doctrine is *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). There, the FDA interpreted tobacco products to be a drug within the meaning of the Food, Drug, and Cosmetic Act ("FDCA") and promulgated regulations to "reduce tobacco consumption among children and adolescents." *Brown & Williamson*, at 125. The objective was to reduce adult tobacco use, as most adults began smoking while young. *Id.* at 128. The FDA was asserting jurisdiction to regulate a product that constituted "a significant portion of the American economy." *Id.* at 159.

First, the Court explained a core objective of the FDCA was "to ensure that any product regulated by the FDA is 'safe' and 'effective' for its intended use." *Brown & Williamson*, at 133. That is, the FDAs regulatory authority is intended to assure the public that a medicine's "probable therapeutic benefits . . . outweigh its risk of harm." *Id.* at 140. Because the FDA had concluded tobacco products were dangerous to use for limited pharmacological benefits, the implication of classifying tobacco products as drugs was "the [FDCA] would require the FDA to remove them from the market entirely." *Id.* at 143.

Second, Congress had passed "six separate pieces of legislation" related to tobacco use over the 35 years preceding the FDA's attempt to regulate tobacco. *Id.* The thrust of that legislation was to allow tobacco sales while requiring warnings, limiting advertising, and incentivizing states to prevent sales to minors. *Id.* at 143-44. Most importantly, "Congress considered and rejected bills" that would have given the FDA the authority to regulate tobacco. *Id.* Consequently, the Court determined that "Congress [had] created a distinct regulatory scheme to address the problem of tobacco and health, and that scheme . . . precludes any role for the FDA." *Id.*

A recent articulation of the doctrine appears in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). There, the EPA had promulgated a rule for existing coal-fired power plants that required "generation shifting." *West Virginia*, 142 S. Ct. at 2603. Under the prior regulatory scheme, the EPA would determine "the best system of emission reduction . . . that has been adequately demonstrated for [existing covered] facilities." *Id.* at 2602 (internal quotation marks omitted). The agency would establish emissions limits after which "States [] submit plans containing the emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA." *Id.* The generation shifting rule required existing coal-fired power plants to reduce pollution in one of three ways. Operators could either "simply reduce" their production of electricity, reduce production and invest in a new wind, solar, or natural gas plant, or purchase emissions "allowances" in a cap-and-trade scheme. *Id.* at 2603.

The Court was troubled the agency interpretation of "system" had changed from a device that reduced pollution to shifting production "from dirtier to cleaner sources." *Id.* at 2610 (internal quotation marks omitted). The majority also reasoned that Congress had rejected action "long after the dangers posed by greenhouse gas emissions had become well known." *Id.* at 2614 (citation

omitted). The concurrence saw generation shifting as "intruding on powers reserved to the States." *Id.* at 2621 (Gorsuch, J., concurring).

B. FERC's Action is not a Major Question.

Here, FERC's power to regulate greenhouse gas production under the NGA is distinguishable from the lack of authority held by the FDA and EPA under FDCA and the Clean Air Act. First, requiring a pipeline project to mitigate greenhouse gas emissions ("GHG Conditions") does not lead to illogical results or intrude on State powers. The GHG Conditions TGP challenges fall into three broad categories: 1) preventing net deforestation, 2) reducing GHG emissions onsite, 3) reducing GHG emissions from offsite suppliers. R. at 14 ¶ 67. These conditions are qualified and do not prevent TGP from constructing or operating the pipeline. This is distinguishable from *Brown & Williamson*, where the FDA's categorization of tobacco as a "drug" led to the logical implication that the FDA would be required to ban tobacco. FERC is not banning interstate pipeline projects; it is approving them. It is also difficult to analogize FERC's action with *West Virginia*. FERC did not condition the CPCN on the pipeline carrying something other than natural gas, and it is not attempting to regulate intrastate pipelines.

Second, FERC is acting within its express powers. Congress created FERC as an independent agency within the Department of Energy ("Department"), and specifically required the President and the Department to consider environmental goals and take steps to restore and protect the environment. Congress determined that a national energy program was needed "to meet the present and future energy needs of the Nation consistent with overall national economic, *environmental* and social goals." Pub. L. No. 95-91, 91 Stat. 567 §101(3) (to be codified at 42 U.S.C. § 7111(3) (emphasis added)). In making the national energy plan, Congress directed the President to consider "conservation objectives" and to pay "particular attention to the needs for . .

. environmental protection." Pub. L. No. 95-91, 91 Stat. 610 §801(b)(1) (to be codified at 42 U.S.C. § 7321(b)(1)). DEOA created FERC as an independent agency within the Department of Energy and required the Chairman and members of the Commission be those "specially qualified to assess fairly the needs and concerns of all interests affected by Federal energy policy." Pub. L. No. 95-91, 91 Stat. 571-72 §204 (to be codified at 42 U.S.C. § 7134).

Congress has expressly stated that national energy policy implicates environmental concerns. The President has defined executive policy "to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach that reduces climate pollution in every sector of the economy." Exec. Order No. 14008, 86 Fed. Reg. 7619 § 201 (Jan. 27, 2021). For more than two decades, FERC's current and draft policy statements have incorporated environmental goals including "avoidance of unnecessary disruption of the environment." Policy Statement, 88 FERC ¶ 61,227, 61,737 (1999); *see generally* Policy Statement, 178 FERC ¶ 61,108, 61,719 (2022). Congress established a statutory requirement for the Department to consider environmental concerns. FERC is merely incorporating current environmental concerns within its express authority granted by Congress.

Third, rather than rejecting bills that would give FERC the authority to regulate interstate natural gas transportation, Congress created a distinct scheme to regulate interstate natural gas pipelines and vested that authority in FERC. Unlike the FDA's attempt to regulate tobacco in the context of a regulatory scheme that avoided giving it authority, or the EPA's attempt to enter a jurisdiction Congress left to the States, Congress included regulatory authority over interstate gas transportation as part of its express grant of authority to FERC. *See generally* 42 U.S.C. § 7172(a)(1)(D); 15 U.S.C. § 717f(e). Viewed in context, FERC is exercising the regulatory authority Congress granted.

Finally, the GHG Conditions do not cause sweeping changes to the energy market. The GHG Conditions are not a rule promulgated through informal rulemaking, they affect a single pipeline project. Congress, on the other hand, has enacted sweeping changes to the energy market. The Inflation Reduction Act ("IRA") shows an unambiguous commitment to reduce greenhouse gas emission by incentivizing the development of carbon free energy sources. *See generally* IRA § 13101. The U.S. Energy Information Administration forecasts that CO2 emissions in the energy sector will drop 33% below 2005 levels, primarily due to carbon-free energy production eclipsing coal and natural gas production by 2050. Stephanie Tsao, *Issues in Focus: Inflation Reduction Act Cases in the AEO2023*, U.S. ENERGY INFORMATION ADMINISTRATION, (March 16, 2023), https://www.eia.gov/outlooks/aeo/IIF_IRA/.

Thus, Congress acted to vest power in the Department of Energy to create a national energy policy that incorporates statutory requirements to protect and restore the environment. Congress also acted to vest power in FERC to grant CPCNs and attach conditions to those CPCNs. Rather than seeking to ban natural gas, FERC is simply exercising its express authority to approve pipelines subject to conditions that serve public convenience and necessity. Consequently, FERC acted within its authority under the NGA, and the GHG Conditions do not implicate the major questions doctrine.

III. FERC'S DECISION NOT TO IMPOSE GHG CONDITIONS ADDRESSING DOWNSTREAM AND UPSTREAM GHG IMPACTS WAS ARBITRARY AND CAPRICIOUS.

While considering mitigation conditions for AFP's construction, FERC created the factual background necessary to consider GHG Conditions for upstream and downstream effects. FERC failed to consider important parts of the problem, failed to make rational decisions, and failed to inform the public that it adequately considered environmental concerns. Thus, FERCs decision not

to add GHG Conditions to mitigate upstream and downstream emissions is arbitrary and capricious.

FERC must comply with "principles of reasoned decisionmaking, NEPA's policy of public scrutiny, and [the Council on Environmental Quality's] regulations." *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014). Because forecasting environmental effects of agency action incorporates speculation, courts should not let agencies "shirk their responsibilities under NEPA by labeling . . . discussion of future environmental effects as 'crystal ball inquiry.'" *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003) (citation omitted). Effects are reasonably foreseeable if they are "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017). "[G]reenhouse-gas emissions are an indirect effect of authorizing [a pipeline], which FERC could reasonably foresee, and which the agency has legal authority to mitigate." *Id.* at 1374. When an agency makes an assumption that is "contrary to basic supply and demand principles" the "assumption itself is irrational," thus it is arbitrary and capricious. *WildEarth Guardians v. United States Bureau of Land Mgmt.*, 870 F.3d 1222, 1236 (10th Cir. 2017).

FERC's decision to not impose GHG Conditions addressing upstream and downstream GHG impacts is arbitrary and capricious for two reasons. First, FERC's order found that upstream emissions were not relevant. R. at 15 ¶ 74. The commission reasoned that approving the AFP would not result in new production at HFF, it would merely change the destination of gas already in production. As a result, the Commission concluded "there is no reasonably foreseeable significant upstream consequence of our approval of the TGP Project." R. at 15 ¶ 74.

However, FERC based its finding that the project benefits outweighed potential adverse impacts on TGP's evidence that LNG demands were diminishing in Old Union, so approving the AFP "would not result in gas shortages." R. at 6 ¶ 13. As a result, FERC concluded "the AFP will transmit gas that may or may not otherwise be purchased in the future." R. at 9 ¶ 34. Basic

principles of supply and demand dictate that if the AFP were not built, and demand decreased – as TGP expects it will – LNG production would decrease.

Consequently, if the AFP were not approved, the lack of demand could lead to an upstream reduction of up to 8.7 million metric tons of CO2e per year. R. at 15 ¶ 72. Because FERC completely failed to consider the environmental impacts of a foreseeable upstream reduction of GHG if the AFP was not approved, it has failed to consider an important aspect of the problem. Additionally, the Commissions' conclusion that "there is no reasonably foreseeable significant upstream consequence of our approval of the TGP Project" runs counter to the evidence before the agency. R. at 15 ¶ 74. Thus, FERC's decision not to mitigate upstream GHG emissions is arbitrary and capricious.

Next, FERCs consideration of downstream effects fails to consider whether export to Brazil will lead to a net increase or decrease in GHG emissions. FERC establishes the upper bound of emissions by assuming if 500,000 Dth per day went to combustion end use, "downstream end-use could result in about 9.7 million metric tons of CO2e per year." R. at 15 ¶ 72. Undisputed evidence indicates "approximately 90% of the LNG carried by the AFP" will be diverted for export, and "nearly all (if not all) of the LNG International natural gas will be exported to Brazil." R. at 8 ¶ 24.

Export of LNG to Brazil presents two foreseeable scenarios that affect Americans in different ways. Brazil may reduce its emissions of GHG because it uses the LNG to transition away from fossil fuels that emit more GHG per unit of energy. Conversely, Brazil may increase its GHG emissions if it uses the LNG in addition to other fossil fuels. The record contains no discussion of these scenarios other than FERC's statement that "whether the TGP Project will cause any significant increase in emissions upstream or downstream is not clear to us." R. at 19 ¶ 100. FERC seems to not contemplate that export to Brazil may result in a net reduction of GHG emissions.

These scenarios reasonably foreseeable and do not require a "crystal ball" to foretell. In fact, these "flaws might be so obvious that there is no need for a commentator to point them out

specifically in order to preserve its ability to challenge a proposed action." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004). While this analysis may be beyond FERC's resources, there are any number of agencies that FERC could coordinate with on the issue. Indeed, that type of interagency coordination is mandatory under 42 U.S.C. § 4332(C). Although foreign use of LNG is not under FERC's jurisdiction, FERC must consider the GHG emissions caused by foreseeable downstream use because the effects of that use will be felt on domestic shorelines. Because NEPA prevents uninformed agency action and FERC has failed to consider this important aspect of the problem, the decision not to mitigate downstream effects is arbitrary and capricious.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court vacate and remand for rehearing on FERC's findings of public convenience and necessity for the AFP, that the benefits of the AFP outweighed the adverse effects, and FERC's decision of AFP route. In the alternative, this Court should affirm FERC's order denying rehearing regarding the scope of FERC's authority to require GHG Conditions and vacate and remand FERC's decision not to impose GHG conditions on upstream and downstream effects.
