

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

<b>Certification of New Interstate Natural Gas Facilities</b>	)	<b>Docket No. PL18-1-000</b>
	)	
	)	
<b>Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews</b>	)	<b>Docket No. PL21-3-000</b>
	)	

**COMMENTS OF LEGAL SCHOLARS SUPPORTING FERC’S AUTHORITY  
TO CONSIDER CLIMATE IMPACTS IN CERTIFICATION PROCEEDINGS  
UNDER SECTION 7 OF THE NATURAL GAS ACT**

The 30 undersigned legal scholars<sup>1</sup> respectfully submit the following comments on the Federal Energy Regulatory Commission’s (FERC or Commission) draft policy statements on the Certification of New Interstate Natural Gas Facilities<sup>2</sup> and the Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Review.<sup>3</sup> This comment letter reiterates what the courts have already recognized: that the Commission has both the authority and obligation to consider climate change impacts resulting from the infrastructure project—including direct, downstream, and upstream emissions—as part of its consideration of public convenience and necessity. In doing so, it rebuts arguments from dissenting commissioners and some intervenors that the issue presents a major question of law that Congress has not delegated to the Commission.

The undersigned legal scholars include a range of experts in administrative and environmental law, who have studied both the consideration of environmental impacts in regulatory decisionmaking generally and the Commission’s powers and history specifically. We

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<sup>1</sup> Titles and affiliations are provided only for identification purposes, and these comments do not purport to represent the views, if any, of the academic institutions with which the signatories are affiliated.

<sup>2</sup> Certification of New Interstate Natural Gas Facilities, 178 FERC ¶ 61,107 (2022) [hereinafter Updated Certificate Policy Statement].

<sup>3</sup> Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 178 FERC ¶ 61,108 (2022) [hereinafter GHG Policy Statement].

have argued in academic research, written comments, and panel statements, that many factors—including the history of the Natural Gas Act and decades of Commission precedent of considering direct and indirect environmental impacts—support, and in fact compel, the Commission’s authority to consider greenhouse gas and other environmental impacts (including downstream and upstream impacts) as part of its public convenience and necessity determination. Indeed, three recent decisions from the U.S. Court of Appeals for the D.C. Circuit confirm that the Commission has an obligation to consider such effects.<sup>4</sup>

Despite this established precedent, critics of the Commission’s draft policy statements now argue that the consideration of greenhouse gas emissions presents a major question of law that Congress has not delegated to the Commission. The major questions doctrine has been applied by the Supreme Court in a small number of cases, and the cases in which it has been applied have generally involved an agency claiming an “unheralded power to regulate a significant portion of the American economy” in “a long-extant statute.”<sup>5</sup> In such cases, the Supreme Court has found that the agency in question violated the apparent legislative intent and design, acted inconsistently with past practice, and stepped far beyond its traditional role.

Each of those factors counsels against applying the doctrine here.

First, the legislative history and judicial interpretation of the Natural Gas Act demonstrates that Congress intended for the Commission to consider environmental impacts—including impacts from the downstream combustion and upstream production of natural gas—as part of the public convenience and necessity determination. Both the historical meaning of “public convenience and necessity” and contemporaneous legislative reports from the statute’s

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<sup>4</sup> *Sierra Club v. Fed. Energy Regul. Comm’n (Sabal Trail)*, 867 F.3d 1357 (D.C. Cir. 2017); *Birekhead v. Fed. Energy Regul. Comm’n*, 925 F.3d 510 (D.C. Cir. 2019); *Food & Water Watch v. Fed. Energy Regul. Comm’n*, 28 F.4th 277 (D.C. Cir. 2022).

<sup>5</sup> *Util. Air Regul. Grp. v. Env’t Prot. Agency*, 573 U.S. 302, 322 (2014) (internal quotation marks omitted).

enactment confirm that Congress intended for the Commission to consider a broad range of factors, including environmental effects, under Section 7.<sup>6</sup> Owing to those clear precedents, the Supreme Court has held that the Commission may consider downstream impacts as part of its public convenience and necessity determination, including downstream air pollution impacts.<sup>7</sup>

Second, the Commission (and its predecessor agency, the Federal Power Commission or FPC) has acted consistently with that interpretation by frequently considering environmental impacts as part of its Section 7 assessment, including downstream environmental impacts. In many past determinations and policy statements, going back more than half a century, the Commission and the FPC have considered downstream air pollution effects. In the 1950s and 1960s, the FPC routinely considered downstream air pollution impacts as part of the public convenience and necessity determination,<sup>8</sup> and indeed recognized downstream air pollution impacts as “one of the important factors” to be considered in certification proceedings.<sup>9</sup> In the 1970s, the FPC continued to recognize that environmental effects including downstream air pollution impacts are “a valid public interest consideration” that “must be considered . . . in determining whether to grant a license.”<sup>10</sup> In the 1990s, in enacting the policy statements that remain in effect, the Commission once again acknowledged that “adverse impacts on . . . the environment” could cause “the balance [to] tip against certification,”<sup>11</sup> and further recognized the

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<sup>6</sup> Romany M. Webb, *Climate Change, FERC, and Natural Gas Pipelines: The Legal Basis for Considering Greenhouse Gas Emissions Under Section 7 of the Natural Gas Act*, 28 N.Y.U. ENV'T L. J. 179, 190–94 (2020).

<sup>7</sup> Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 365 U.S. 1, 10–19 (1961); *see also Sabal Trail*, 867 F.3d at 1373.

<sup>8</sup> Webb, *supra* note 6, at 223–24 (“FPC decisions issued in the 1950s and 1960s routinely discussed how natural gas transported via a proposed pipeline project would be used and assessed the air quality impacts of that use.”).

<sup>9</sup> Transwestern Pipeline Co., 36 F.P.C. 176, 213 (1966) (“[W]e cannot conclude on the present record that additional amounts of natural gas should be certificated because of the effects of such certification upon the air pollution situation.”).

<sup>10</sup> Order No. 407, Statement of General Policy and Amendments to Section 157.14(a), 44 F.P.C. 47, 49 (1970).

<sup>11</sup> Order Clarifying Statement of Policy, Certification of New Interstate Natural Gas Pipelines, 65 Fed. Reg. 7862, 7867 (Feb. 16, 2000) [hereinafter Order Clarifying 1999 Policy Statement].

relevance of considering the impacts of downstream natural gas consumption (and not just transmission) in assessing those environmental effects.<sup>12</sup> And in the 2000s, the Commission considered and required mitigation on downstream pollution as part of its Section 7 assessment—and a federal appeals court upheld that approach.<sup>13</sup>

Third, the Commission’s draft policy statements do not expand the reach of Commission’s jurisdiction as has been the case in previous applications of the major questions doctrine. Instead, the Commission merely outlines the factors that it will assess when exercising its longstanding authority to review pipeline certification applications—and those factors are consistent with those the Commission has previously considered. By outlining its assessment of greenhouse gas emissions in its draft policy statements, the Commission is also ensuring proper consideration of all regulatory impacts before taking action, as regulators routinely do.<sup>14</sup>

These various considerations not only indicate that FERC’s consideration of greenhouse gas emissions under the Natural Gas does not trigger the major questions doctrine, but also demonstrate that the Supreme Court’s decision in *Department of Transportation v. Public Citizen*<sup>15</sup> does not preclude such consideration under the National Environmental Policy Act. Because that Supreme Court case provides a narrow exception to the demands of environmental review that applies only to impacts that categorically cannot be considered by the agency, the case is not applicable here.

In short, the Commission has legal authority—and, in fact, an obligation—to consider direct, downstream, and upstream greenhouse gas emissions under Section 7. Arguments to the

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<sup>12</sup> *Id.* (confirming that the Commission “will continue to take into account as a factor for its consideration the overall [effects] to the environment of natural gas consumption”).

<sup>13</sup> *S. Coast Air Quality Mgmt. Dist. v. Fed. Energy Regul. Comm’n*, 621 F.3d 1085, 1093–94 (9th Cir. 2010).

<sup>14</sup> *See Michigan v. Env’t Prot. Agency*, 576 U.S. 743, 752–53 (2015) (recognizing that “[a]gencies have long treated cost[s]” such as “harms that regulation might do to human health or the environment” as “a centrally relevant factor” when exercising authority).

<sup>15</sup> 541 U.S. 752 (2004).

contrary ignore relevant history and have already been rejected by courts. The Commission should therefore continue to recognize the importance of considering those emissions when it finalizes its policy statements.

**I. The Major Questions Doctrine Requires Consideration of Congressional Design, Regulatory History, and Agency Reach—All of Which Support the Commission’s Authority to Consider Climate Impacts**

While dissenting commissioners and certain intervenors allege that FERC’s draft policy statements run afoul of the major questions doctrine, their arguments stretch this nascent doctrine well beyond its narrow application. If taken at face value, this argument could turn a doctrine meant to apply only “[i]n extraordinary cases”<sup>16</sup> into one that would hamstring the Commission’s broad authority under Section 7. A proper understanding of the major questions doctrine, which this section offers, is critical to interpreting the Commission’s authority.

Though dissenting commissioners and opposing intervenors offer somewhat different formulations of the major questions doctrine, their arguments are all based largely on the premise that Congress must “speak clearly if it wishes to assign to an executive agency decisions of vast economic and political significance.”<sup>17</sup> Because the Natural Gas Act is silent as to the Commission’s authority to consider the climate impacts of certification applications,<sup>18</sup> the argument reasons, the Commission cannot consider greenhouse gas emissions as part of its public convenience and necessity analysis.<sup>19</sup> Some go so far as to suggest that no environmental impact—not even direct greenhouse gas emissions from the pipeline itself or harms to

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<sup>16</sup> Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

<sup>17</sup> GHG Policy Statement, *supra* note 3, at P 22 (Christie, Comm’r, dissenting) (quoting Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring)).

<sup>18</sup> *E.g.*, *id.* at P 19 (Christie, Comm’r, dissenting) (claiming that “any purported authority for the Commission to regulate [greenhouse gas emissions] is conspicuously absent” from Section 7 of the Natural Gas Act).

<sup>19</sup> *E.g.*, *id.* at P 20 (Christie, Comm’r, dissenting) (“Surely if Congress had any intention that GHG analyses should (or could) be the basis for rejecting certification of natural-gas facilities, it would have given the Commission clear statutory guidance as to when to reject on that basis.”).

landowners or environmental justice communities—can serve as the basis to reject a certificate of public convenience and necessity, because the Natural Gas Act does not explicitly address environmental factors.<sup>20</sup>

But the major questions doctrine is not as sweeping or simple as this premise suggests. While it is true that climate impacts are not explicitly referenced in the Natural Gas Act, neither are the multitude of other factors that the Commission is expected to balance when assessing whether a proposed pipeline meets the public convenience and necessity.<sup>21</sup> If the Commission were unable to consider other key, unenumerated factors—such as the economic impacts of pipeline development, along with critical “conservation, environmental, and antitrust questions” that the Supreme Court has recognized as falling within the Commission’s purview<sup>22</sup>—then the Commission’s traditional review process would be unlawful, and the agency would have little basis upon which to decide whether a proposed pipeline meets the public convenience and necessity and thus merits approval under Section 7. The suggestion that Congress must “speak clearly if it wishes to assign to an executive agency decisions of vast economic and political significance”<sup>23</sup> is thus an incomplete formulation of the major questions doctrine; in practice, the Supreme Court has looked to other factors.

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<sup>20</sup> *E.g., id.* at P 11 (Christie, Comm’r, dissenting) (“Can the Commission’s statutory responsibility to determine the public convenience and necessity be used to *reject* a project otherwise needed by the public based *solely* on adverse impacts to environmental interests . . . as the Commission today asserts? Or can the Commission reject a project *solely* due to the interests of landowners and environmental justice communities as the majority also asserts? The short answer is no.” (internal quotation marks and citations omitted)).

<sup>21</sup> *See* 15 U.S.C. § 717 (stating that the “business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest,” without offering particular justifications for why that it is the case); *id.* § 717f(c)(1)(A) (providing for a “certificate of public convenience and necessity” without specifying factors for the Commission to consider in that assessment).

<sup>22</sup> *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 670 n.6 (1976).

<sup>23</sup> *See supra* note 17 and accompanying text.

In particular, while the contours of the major question doctrine are far from precise,<sup>24</sup> the limited number of cases in which the Supreme Court has applied the doctrine have tended to share several key features.<sup>25</sup> First, the defendant agency’s interpretation violates the apparent legislative intent and design, producing “a fundamental revision of the statute.”<sup>26</sup> Second, the agency is acting in a manner that represents a marked and substantial difference from prior practice; it is “claim[ing] to discover in a long-extant statute an unheralded power to regulate.”<sup>27</sup> And third, as a Supreme Court justice recognized at a recent oral argument, the agency’s unprecedented statutory interpretation “step[s] far outside of what we think of as [the] appropriate lane” for the agency<sup>28</sup>; the agency is asserting jurisdiction over “a significant portion of the American economy.”<sup>29</sup>

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<sup>24</sup> E.g., Alison Gocke, *Chevron’s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 966–67 (2021) (“Scholars have struggled to discern any coherent principle behind the doctrine. Those who have attempted to define the doctrine have come to different conclusions about what the major questions doctrine is, and even which cases fall within its domain in the first place.”).

<sup>25</sup> Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 317, 324 (2022) (“These cases [in which the Supreme Court applied the major questions doctrine] were far from run of the mill. In each, there was a significant expansion of the agency’s asserted authority and an important departure from prior agency practices.”).

<sup>26</sup> *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231–32 (1994); see also, e.g., *Brown & Williamson*, 529 U.S. at 144 (explaining that defendant agency made “consistent and repeated statements that it lacked authority . . . to regulate tobacco,” and, in light of these representations, Congress passed “tobacco-specific statutes [that] effectively ratified the FDA’s long-held position”); *UARG*, 573 U.S. at 322 (“A brief review of the relevant statutory provisions leaves no doubt that the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens.”); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021) (“Reading both sentences together, rather than the first in isolation, it is a stretch to maintain that § 361(a) gives the CDC the authority to impose this eviction moratorium.”).

<sup>27</sup> *UARG*, 573 U.S. at 324. In *Brown & Williamson*, as well, the agency had offered a new interpretation of its authority that contradicted the agency’s “consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco.” 529 U.S. at 144. And in the eviction-moratorium case, the Supreme Court noted that since the relevant provision’s enactment in 1944, “no regulation premised on it has even begun to approach the size or scope of the eviction moratorium.” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489.

<sup>28</sup> Transcript of Oral Argument at 58, *West Virginia v. Env’t Prot. Agency*, No. 20-1530 (S. Ct. Feb. 28, 2022) (statement of Kagan, J.). This feature is a defining characteristic of many of the Supreme Court’s major questions precedents. In *Brown & Williamson*, for instance, the Food and Drug Administration asserted authority over the tobacco industry. In *Ala. Ass’n of Realtors*, the Centers for Disease Control and Prevention “imposed a nationwide moratorium on evictions in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination.” 141 S. Ct. at 2486. And in *UARG*, EPA’s interpretation would have expanded “[t]he number of sources required to have permits . . . from fewer than 15,000 to about 6.1 million.” 573 U.S. at 322.

<sup>29</sup> *UARG*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 159).

As demonstrated below, a closer inspection of these three key considerations demonstrates that the Commission properly exercises its authority in the draft policy statements.

**II. As Legislative History and Judicial Precedent Confirms, Congress Designed the Natural Gas Act To Give FERC Broad Discretion To Consider the Environmental Impacts of Pipeline Development, Including Impacts from Fuel Combustion and Production**

While dissenting commissioners and opposing intervenors argue that FERC’s draft policy statements upend the Natural Gas Act’s intent and design, consideration of air pollution impacts is actually fully consistent with the statute’s text, legislative history, and judicial construction.

The Natural Gas Act declares that “the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest,”<sup>30</sup> and prohibits the construction or operation of interstate natural-gas infrastructure unless the Commission provides a certificate of public convenience and necessity.<sup>31</sup> Notably, the Natural Gas Act lacks any textual presumption that interstate natural gas pipelines serve the public interest.<sup>32</sup> While the statute exempted existing natural-gas infrastructure, it stated that future applications for natural-gas infrastructure may not be approved without “proof that public convenience and necessity will be served by [their] operation.”<sup>33</sup>

The Natural Gas Act does not define the term “public convenience and necessity” or provide factors for the Commission to consider when assessing whether to issue such a certificate. By adopting a “public convenience and necessity” standard, however, “Congress

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<sup>30</sup> 15 U.S.C. § 717(a).

<sup>31</sup> *Id.* § 717f(c)(1)(A).

<sup>32</sup> Notably, the language of Section 7 differs from the language of Section 3, with the latter providing a rebuttable presumption that exports and export facilities are in the public interest. *Compare id.* (stating that interstate natural-gas infrastructure cannot be developed unless the Commission affirmatively finds that such infrastructure meets the public convenience and necessity), *with id.* § 717b(a) (providing that the Department of Energy must issue a certificate for proposed natural-gas importation or exportation “unless . . . it finds that the proposed exportation or importation will not be consistent with the public interest”).

<sup>33</sup> *Id.* § 717f(c)(1)(A).

drew on a long history of its use in state public utility regulation.”<sup>34</sup> In particular, state regulators operating under public convenience and necessity standards had traditionally balanced beneficial and adverse impacts in making certificate determinations, incorporating both economic and environmental factors.<sup>35</sup> In short, the “essence of the certificate of public convenience and necessity [wa]s the exclusion of otherwise qualified applicants from a market because, in the judgment of the regulatory commission, the addition of new or expanded services would have no beneficial consequences or, in a more extreme case, would actually have harmful consequences.”<sup>36</sup> From its inception, therefore, the Natural Gas Act contemplated that regulators would balance a broad array of interests and did not presume that natural gas usage was in the public interest.<sup>37</sup> To the contrary, applicants were expected to have to make an “affirmative showing that the convenience and necessity require[d] the service which it [wa]s offering.”<sup>38</sup>

The legislative history of the Natural Gas Act amendments makes it abundantly clear that Congress intended for the Commission to consider not only direct economic and environmental impacts from the pipeline itself, but also economic and environmental impacts resulting from the combustion and production of the transported fuels.<sup>39</sup> The year after the Natural Gas Act was first enacted, in 1939, the Federal Power Commission “concluded that it lacked authority to

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<sup>34</sup> Avi Zevin, *Regulating the Energy Transition: FERC and Cost-Benefit Analysis*, 45 COLUM. J. ENV'T L. 419, 498 (2020); see also *Kans. Pipe Line & Gas Co. & N.D. Consumers Gas Co.*, 2 F.P.C. 29 (1939) (citing twelve state regulatory or court decisions on meaning of “certificate of public convenience and necessity”); *In the Matter of Michigan-Wisconsin Pipeline Co.*, 6 F.P.C. 1 (1947) (citing six state court decisions on the meaning of “certificate of public convenience and necessity”).

<sup>35</sup> Zevin, *supra* note 34, at 498 (citing William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426 (1979)); see also Webb, *supra* note 6, at 194–95 (detailing origins of “public convenience and necessity” standard in state law, and explaining how the standard entailed balancing of various factors including environmental damage and other social costs).

<sup>36</sup> Jones, *supra* note 35, at 427.

<sup>37</sup> *Contra* GHG Policy Statement, *supra* note 3, at P 16 (Christie, Comm’r, dissenting) (claiming that the Natural Gas Act presumes “that the production and transportation of natural gas for ultimate consumption by end users is socially valuable”).

<sup>38</sup> Ford P. Hall, *Certificates of Convenience and Necessity*, 28 MICH. L. REV. 276, 279 (1930).

<sup>39</sup> Webb, *supra* note 6, at 190–94.

consider certain downstream impacts of pipeline development.”<sup>40</sup> Specifically, in the *Kansas Pipe Line Decision*, the FPC concluded that the downstream economic interests of competing fuel providers—which counseled against issuing a certificate—could not be considered because, the FPC believed, “Congress did not intend [it] generally to weigh the broad social and economic effects of the use of various fuels.”<sup>41</sup> In a report to Congress the following year, the FPC expressed concern that it could not sufficiently protect the public interest without considering downstream impacts.<sup>42</sup>

In response to those concerns, Congress amended Section 7 of the Natural Gas Act in 1942 to expand the Commission’s jurisdiction.<sup>43</sup> While the text of the 1942 amendments did not provide further guidance on applying the public convenience and necessity standard, the House and Senate reports from those legislative amendments clearly demonstrate that Congress intended for the FPC to assess downstream usage as part of that standard, as the FPC had requested.<sup>44</sup> For instance, the Senate report explained that the legislative amendments would “authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed service.”<sup>45</sup> The House Report stated that the amendments also permitted the FPC to consider “the effect of construction and extensions upon the interests of producers of competing fuels and competitive transportation interests.”<sup>46</sup> And the 1942 amendments were pushed by the coal and railroad industries—industries with broad interest in natural-gas policy but little direct stake in pipeline construction—and following the amendments, those industries became among

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (quoting *Re Kan. Pipe Line & Gas Co.*, 2 F.P.C. 29, 57, 1939 WL 1374 (1939)).

<sup>42</sup> *Id.* (citing FED. POWER COMM’N, TWENTIETH ANNUAL REPORT OF THE FEDERAL POWER COMMISSION 10 (1940)).

<sup>43</sup> Act of Feb. 7, 1942, ch. 49, Pub. L. No. 444, 56 Stat. 83.

<sup>44</sup> Webb, *supra* note 6, at 193–94.

<sup>45</sup> *Id.* (quoting S. Rep. No. 985-2 (1942)).

<sup>46</sup> H. Rep. No. 1290, at 3, 77th Cong., 1st Sess. (1941).

the primary intervenors in FPC certificate proceedings.<sup>47</sup> As this history demonstrates, Congress intended for the FPC to consider the induced impacts of pipeline development, and did not presume that the transportation of natural gas was necessarily in the public interest. To the contrary, the 1942 amendments were enacted largely to correct the statutory limitation that the FPC identified in *Kansas Pipe Line*—to allow the agency to reject a natural-gas certificate application on the basis of indirect impacts.<sup>48</sup>

Supreme Court case law from the ensuing decades reflects that history, and specifically recognizes the importance of downstream impacts—including downstream pollution impacts—in assessing public convenience and necessity. In a 1944 opinion, Justice Jackson wrote (while dissenting on unrelated grounds) that “[t]he [Federal Power] Commission is required to take account of the ultimate use of the gas” under Section 7.<sup>49</sup> In that same opinion, the majority similarly recognized that “considerations of conservation are material to the issuance of certificates of public convenience and necessity.”<sup>50</sup> And perhaps most significantly, in its 1961 decision in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, a majority of the Supreme Court—relying largely on the legislative history discussed above—held that the Commission could consider downstream impacts in Section 7 certificate proceedings.<sup>51</sup> In fact, the Court specifically concluded that the FPC acted appropriately in considering “evidence concerning [downstream] air pollution” after the agency attempted to evaluate the “relation between injury to health and the stack emissions” that would occur downstream as a result of

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<sup>47</sup> ELIZABETH M. SANDERS, *THE REGULATION OF NATURAL GAS: POLICY AND POLITICS, 1938–1978*, at 50–53 (1981).

<sup>48</sup> *Transcontinental*, 365 U.S. at 10–14.

<sup>49</sup> *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 639 (1944) (Jackson, J., dissenting).

<sup>50</sup> *Id.* at 612 (majority opinion).

<sup>51</sup> 365 U.S. at 10–19.

pipeline approval.<sup>52</sup> The Court’s decision in *Transcontinental*—by recognizing that downstream impacts, including air pollution effects, are a relevant consideration under Section 7—is controlling here and belies the argument that such consideration is beyond the Commission’s authority.

Although some now allege that subsequent legislation “effectively deprived the Commission of authority” that the Supreme Court recognized in *Transcontinental*,<sup>53</sup> those arguments are unpersuasive for multiple reasons. For one, dissenting commissioners and various intervenors point to such statutes as the Natural Gas Policy Act of 1978 and Natural Gas Wellhead Decontrol Act of 1989<sup>54</sup> that are almost entirely silent on the certification of pipelines under Section 7.<sup>55</sup> In fact, the Senate Report for the Natural Gas Wellhead Decontrol Act specifically recognized that “[w]hile this bill decontrols the first sale of natural gas, it does not deregulate interstate natural gas pipelines.”<sup>56</sup> And the Commission itself has acknowledged that the Natural Gas Wellhead Decontrol Act “does not deregulate interstate natural gas pipelines.”<sup>57</sup>

Moreover, while these two statutes did amend the Commission’s jurisdiction under Section 7 in limited ways, those amendments did not involve the Commission’s longstanding consideration of environmental and downstream impacts. Perhaps most notably, the Natural Gas Policy Act provided that “[t]he Commission may not deny, or condition the grant of, any

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<sup>52</sup> *Id.* at 30.

<sup>53</sup> *E.g.*, Updated Certificate Policy Statement, *supra* note 2, at P 18 (Danly, Comm’r, dissenting).

<sup>54</sup> *E.g.*, *id.* at P 17 (Danly, Comm’r, dissenting).

<sup>55</sup> The Natural Gas Policy Act, for instance, concerned the rates charged by natural-gas companies to pipeline operators. *See* Pub. Serv. Comm’n of State of N.Y. v. Mid-Louisiana Gas Co., 463 U.S. 319, 327–38 (1983) (providing detailed regulatory background and legislative history for the statute).

<sup>56</sup> S. Rep. No. 101-38, at 8, 101st Cong., 1st Sess. (1989). Similarly, the House Report for this bill recognized that “[t]his legislation does not deregulate natural gas pipelines, and the Committee will continue its oversight of the FERC to ensure that captive residential consumers are not disadvantaged.” H. Rep. No. 101-29, at 4, 101st Cong., 1st Sess. (1989).

<sup>57</sup> Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267, 13,272 (Apr. 16, 1992).

certificate under section 7 of the Natural Gas Act based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable.”<sup>58</sup> The fact that Congress directly limited the Commission’s authority to consider certain factors under Section 7 without referencing the Commission’s longstanding authority to consider (and practice of considering<sup>59</sup>) environmental and other end-use impacts strongly indicates that Congress meant not to disturb the latter authorities.<sup>60</sup>

Additionally, the Supreme Court has broadly rejected attempts to discern statutory meaning from post-enactment legislative developments,<sup>61</sup> with Justice Scalia stating that “[a]rguments based on subsequent legislative history . . . should not be taken seriously.”<sup>62</sup> Accordingly, arguments invoking subsequent legislation to discern the meaning of the Natural Gas Act should be viewed with considerable skepticism, particularly since, as discussed above, the legislative amendments cited by dissenting commissioners and opposing intervenors are entirely silent on the Commission’s authority to consider environmental and other downstream or upstream impacts in certificate proceedings.

Finally, while dissenting commissioners and some opposing intervenors argue that the Supreme Court’s decision in *NAACP v. Federal Power Commission* rejects the Commission’s authority to consider climate impacts,<sup>63</sup> that argument is misguided. In *NAACP*, the Supreme

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<sup>58</sup> Pub. L. 95-621, Title VI, § 601, 92 Stat. 3409 (Nov. 9, 1978) (enacting 15 U.S.C. § 3431(c)(1)).

<sup>59</sup> See *supra* Section III for discussion of the FPC’s and the Commission’s considerations of downstream air pollution impacts under Section 7. Many of these examples are temporally proximate to the Natural Gas Policy Act of 1978, further suggesting that Congress did not intend to divest the Commission of that authority when it enacted that statute.

<sup>60</sup> See *generally* Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1058 (2019) (“Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.”) (internal quotation marks and citation omitted).

<sup>61</sup> *E.g.*, *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1747 (2020) (explaining that subsequent legislation offers “no authoritative evidence” as to the meaning of a previously enacted law).

<sup>62</sup> *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring).

<sup>63</sup> *E.g.*, GHG Policy Statement, *supra* note 3, at P 4 & nn.15–16 (Danly, Comm’r, dissenting) (citing *NAACP*, 425 U.S. at 669–70).

Court recognized that “the Commission has authority to consider conservation, environmental, and antitrust questions” under the Natural Gas Act.<sup>64</sup> While the Court also held that the Commission could not regulate public utilities’ employment policies, it based that decision on the Commission’s judgment that there was no “nexus” between its regulation under the Natural Gas Act and Federal Power Act and utilities’ employment practices.<sup>65</sup> By contrast, as discussed further below, the Commission has long recognized a nexus between air pollution and Section 7 certifications.<sup>66</sup> As the FPC explained over fifty years ago, for instance, effects on air pollution “merit the most serious attention . . . under the broad public convenience and necessity requirement of the Natural Gas Act.”<sup>67</sup>

In short, the Natural Gas Act’s legislative history and judicial interpretation support the Commission’s authority to consider the environmental impacts of natural-gas transport—including effects from induced production and combustion—and reject the claim that the statute presumes natural gas transport to be in the public interest. Accordingly, the Commission’s draft policy statements do not stand in tension with the Natural Gas Act or fundamentally revise the statute.

### **III. FERC’s Draft Policy Statements Are Consistent With Its Longstanding Consideration of the Environmental Impacts of Pipeline Development, Including Air Pollution Impacts Resulting from Induced Combustion and Production**

In accordance with Congressional intent, the Commission’s assessment of public convenience and necessity under Section 7 has, for decades, considered the environmental impacts of pipeline development—including downstream air pollution impacts. The Commission has also historically considered other downstream and upstream effects as part of its certification

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<sup>64</sup> *NAACP*, 425 at 670 n.6.

<sup>65</sup> *Id.* at 664 (internal quotation marks omitted).

<sup>66</sup> *See infra* Section III.

<sup>67</sup> *Transwestern Pipeline Co.*, 36 F.P.C. at 190.

analysis. Accordingly, the Commission is not now claiming “an unheralded power” in a “long-extant statute,” as some now argue,<sup>68</sup> but instead acting consistent with its well-established approach to pipeline certification.

To begin, the claim that environmental factors have no role in the public convenience and necessity assessment<sup>69</sup> contradicts numerous statements from the Commission going back decades. For instance, the FPC’s 1970 policy statement recognized that the “factors bearing on the public interest” in certificate proceedings include “public interest factors not specifically mentioned in the Natural Gas Act” such as “national defense, conservation of natural gas, *air pollution*, antitrust considerations, and effect of pipeline location on areas traversed.”<sup>70</sup> The FPC further recognized that environmental interests are “a valid public interest consideration” that “must be considered by the [FPC] in determining whether to grant a license.”

The Commission has continued to recognize the importance of environmental considerations in subsequent decades. In its 1999 policy statement that is currently in effect, for instance, the Commission explained that “[i]n reaching a final determination on whether a project will be in the public convenience and necessity, the Commission performs a flexible balancing process” that considers “the proposal’s market support, economic, operational, and competitive benefits, and *environmental impact*.”<sup>71</sup> In a 2000 order clarifying the policy statement, the Commission further recognized that “the adverse effects the Commission will consider” when determining whether to approve a project “include[e] environmental impacts,” and explained that “there may be cases in which . . . adverse impacts on . . . the environment are

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<sup>68</sup> GHG Policy Statement, *supra* note 3, at P 23 n.40 (Christie, Comm’r, dissenting) (quoting *UARG*, 573 U.S. at 324).

<sup>69</sup> See *supra* note 20 and accompanying text.

<sup>70</sup> Order No. 407, 44 F.P.C. at 48–49 (internal quotation marks and citations omitted) (emphasis added).

<sup>71</sup> Statement of Policy, *Certification of New Interstate Pipeline Facilities*, 88 FERC ¶ 61,227, at 14 (1999) [hereinafter 1999 Policy Statement] (emphasis added).

significant enough that the balance would tip against certification.”<sup>72</sup> As such statements demonstrate, there is nothing unprecedented about the Commission weighing environmental factors in certificate proceedings under Section 7.

Moreover, the Commission’s consideration of environmental factors has not been limited to direct effects from pipeline construction or operation, but has also considered the downstream air pollution impacts from proposed projects. Previous decisions have in fact denied certificate applications on the basis that the proposed pipeline would degrade downstream air quality.<sup>73</sup> In a 1966 decision, for instance, the FPC rejected a certification application for a pipeline intended to deliver natural gas to electric generators in Los Angeles, in part due to concerns about downstream air pollution.<sup>74</sup> The FPC explained in that decision that the downstream air pollution resulting from natural gas use is “one of the important factors” to be considered in certification proceedings under Section 7,<sup>75</sup> and expressly rejected claims that environmental legislation deprives the agency of its authority to consider the air pollution impacts of proposed projects under Section 7.<sup>76</sup> The FPC likewise rejected claims that “combat[ing] air pollution is solely for local authorities” and thus beyond the agency’s purview.<sup>77</sup> In so finding, the FPC was acting

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<sup>72</sup> Order Clarifying 1999 Policy Statement, 65 Fed. Reg. at 7867.

<sup>73</sup> Webb, *supra* note 6, at 223–24 (“FPC decisions issued in the 1950s and 1960s routinely discussed how natural gas transported via a proposed pipeline project would be used and assessed the air quality impacts of that use.”). *See, e.g.*, Panhandle E. Pipe Line Co., 13 F.P.C. 301, 313 (1954) (declining to issue certificate of public convenience and necessity in part because proposed service would not meaningfully exacerbate fly ash in downstream community); El Paso Nat. Gas Co., 22 F.P.C. 900, 902 (1959) (recognizing the “acute smog problem in the Los Angeles area” and assessing whether the “use of gas in place of fuel oil would be more beneficial than the conversion to gas by numerous other, less efficient users of fuel oil in the area or that the gas is not needed more vitally for household and commercial uses.”); Fla. Gas Transmission Co., 68 P.U.R.3d 113 (1967) (rejecting Section 7 application in part due to insufficient evidence that proposed gas supply would abate downstream air pollution); Transcon. Gas Pipe Line Corp., 38 F.P.C. 906, 910 (1967) (approving certificate application in part because “the emission of” sulfur dioxide, which was prevalent in the downstream region, “is almost completely eliminated by the substitution of natural gas for fuels containing sulfur or sulfur compounds.”).

<sup>74</sup> *Transwestern Pipeline Co.*, 36 F.P.C. at 190 (“[W]e cannot conclude on the present record that additional amounts of natural gas should be certificated because of the effects of such certification upon the air pollution situation.”).

<sup>75</sup> *Id.* at 213.

<sup>76</sup> *Id.* at 185.

<sup>77</sup> *Id.*

consistent with D.C. Circuit case law finding that it must weigh important impacts of pipeline certification that also fall under the purview of other regulatory agencies.<sup>78</sup> The FPC's determination was upheld by the U.S. Court of Appeals for the Third Circuit.<sup>79</sup>

The Commission's assessment of downstream air pollution impacts has continued, albeit not always consistently, to the present day. For instance, under the Commission's 1999 policy statement for natural-gas facilities—which remains in effect—the Commission professed to “balance demonstrated market demand against potential adverse environmental impacts” and other effects,<sup>80</sup> and recognized that “providing competitive alternatives” that “advanc[e] clean air objectives” could be an important benefit of pipeline development for the Commission to weigh in its public convenience and necessity determination.<sup>81</sup> In its 2000 clarification of that policy statement, the Commission confirmed that it “will continue to take into account as a factor for its consideration the overall [effects] to the environment of *natural gas consumption*,”<sup>82</sup> continuing its decades-long practice of considering downstream air pollution impacts in certificate proceedings.

Pursuant to that policy statement, the Commission in recent years has at times considered downstream air pollution impacts resulting from pipeline development.<sup>83</sup> In a 2007 determination approving a pipeline certificate, for instance, the Commission “explicitly considered the

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<sup>78</sup> *N. Nat. Gas Co. v. Fed. Power Comm'n*, 399 F.2d 953, 958 (D.C. Cir. 1968) (“Although the Commission is not bound by the dictates of the antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the Commission is obliged to weigh antitrust policy.”); *accord* *Md. People's Couns. v. Fed. Energy Regul. Comm'n*, 761 F.2d 780, 786 (D.C. Cir. 1985) (same).

<sup>79</sup> *S. Cal. Edison Co. v. Fed. Power Comm'n*, 387 F.2d 619, 621 (3d Cir. 1967) (finding “a rational basis for the [FPC's] action”).

<sup>80</sup> 1999 Policy Statement, *supra* note 71, at 2–3.

<sup>81</sup> *Id.* at 25; *accord id.* at 16 (“The public benefits [of a pipeline application] may include such factors as the environmental advantages of gas over other fuels[.]”).

<sup>82</sup> Order Clarifying 1999 Policy Statement, 65 Fed. Reg. at 7867.

<sup>83</sup> *See, e.g., Mountain Valley Pipeline*, 163 FERC ¶ 61,197, at P 271 (2018) (quantifying downstream greenhouse gas emissions).

environmental impact of downstream emissions and imposed what it reasonably believed to be effective measures to mitigate the impact.”<sup>84</sup> In part because the Commission concluded that approving the project in light of such mitigation measures would “not result in a material increase in air pollutant emissions and, therefore, should not result in material changes in air quality” in the downstream region, the Commission approved the project.<sup>85</sup> And because the U.S. Court of Appeals for the Ninth Circuit found FERC’s analysis and mitigation of downstream air pollution impacts to be sufficient, it upheld the Commission’s approval.<sup>86</sup>

The Commission’s longstanding consideration of air pollution impacts as part of its Section 7 analysis provides very strong precedent for its consideration of greenhouse gas emissions as part of this same assessment. Greenhouse gases, like the other pollutants that the Commission has traditionally considered, “endanger[s] public health or welfare” by degrading air quality.<sup>87</sup> And while “the Congress that drafted [the Natural Gas Act] might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand” the importance of providing the Commission “regulatory flexibility” to consider “changing circumstances and scientific developments” in assessing public convenience and necessity.<sup>88</sup> The Commission’s consideration of climate impacts is thus consistent with both regulatory precedent and the intent of the Natural Gas Act.

Beyond air pollution considerations, the Commission has also long considered other downstream and upstream factors as part of its Section 7 analysis. For instance, the FPC’s 1970 policy statement highlights the significance of national defense considerations,<sup>89</sup> which the

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<sup>84</sup> *S. Coast Air Quality Mgmt. Dist.*, 621 F.3d at 1093–94.

<sup>85</sup> *Id.* at 1090 (internal quotation marks omitted).

<sup>86</sup> *Id.* at 1095.

<sup>87</sup> *Massachusetts v. Env’t Prot. Agency*, 549 U.S. 497, 528 (2007) (quoting 42 U.S.C. § 7521(a)(1)).

<sup>88</sup> *Id.* at 532.

<sup>89</sup> Order No. 407, 44 F.P.C. at 48.

agency found pertinent in a prior proceeding under Section 7 due to the likelihood that the proposed pipeline infrastructure would affect the availability of petroleum at downstream barges.<sup>90</sup> The D.C. Circuit denied a challenge to the FPC’s determination in that proceeding, rejecting petitioners’ argument that the impact of the natural-gas infrastructure determination “upon the petroleum products transportation industry is not a factor which the Natural Gas Act authorizes the [FPC] to consider.”<sup>91</sup>

The FPC’s 1970 policy statement also highlights the importance of considering the “conservation of natural gas” in Section 7 certificate proceedings<sup>92</sup>—another downstream factor. And as the Supreme Court held in *Transcontinental*, “conservation considerations [may] be weighed” in Section 7 proceedings.<sup>93</sup> As this example further illustrates, downstream considerations have been considered a relevant consideration in Section 7 proceedings for more than fifty years.

Considerations of downstream and upstream impacts under Section 7 have continued to in subsequent decades. In its 1999 policy statement, for instance, FERC explained that it considers access to new supply sources to be a benefit of the project.<sup>94</sup> And in a 2018 determination, the Commission also stated that it considers increased electric system reliability to be a benefit of additional pipeline capacity.<sup>95</sup> Like induced greenhouse gas emissions, these

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<sup>90</sup> *City of Pittsburgh v. Fed. Power Comm’n*, 237 F.2d 741, 754 & n.38 (D.C. Cir. 1956).

<sup>91</sup> *Id.* at 746; *see also id.* at 754–55 (“Whether the conversion of Little Inch, which is made possible by the [FPC], would have the destructive effects foreseen by the petitioners and whether, if so, the project is contrary to the public convenience and necessity are questions not raised on this petition. The narrow issue before us is merely whether those questions are within the ambit of the [FPC’s] power to determine. . . . To us it is clear that they are.”).

<sup>92</sup> Order No. 407, 44 F.P.C. at 48.

<sup>93</sup> *Transcontinental*, 365 U.S. at 10.

<sup>94</sup> 1999 Policy Statement, *supra* note 71, at 15 (“The Commission also has certificated projects that would serve no new market, but would provide some demonstrated system-benefit. Examples include projects intended to provide improved system reliability, access to new supplies, or more economic operations.”); *see also, e.g.*, Texas Eastern Transmission, LP, 164 FERC ¶ 61,037, at P 13 (2018) (identifying connection of “diverse supply basins with emerging Gulf Coast markets” as a “benefit[] that will result from the project”).

<sup>95</sup> Columbia Gas Transmission LLC, 164 FERC ¶ 61,036, at P 62 (2018) (acknowledging that the project’s purpose is to increase natural gas supply options and increase electric system reliability); *see also* 1999 Policy Statement,

are upstream and downstream effects: new supply is a benefit only because of upstream extraction of new natural gas, while increased reliability is achieved only by facilitating additional downstream combustion. The Commission’s regular consideration of downstream and upstream impacts—on the environment, grid reliability, conservation, defense, and other issues—demonstrates that there is nothing “unheralded” about the Commission considering downstream and upstream greenhouse gas impacts. In fact, if the Commission omitted those impacts, its analysis would be lopsided and deficient.<sup>96</sup>

In short, the Commission has historically considered environmental impacts—along with other downstream and upstream effects—under the public convenience and necessity standard, and the Commission’s draft policy statements are consistent with that longstanding approach. The Commission, in short, is not “claim[ing] to discover in a long-extant statute an unheralded power to regulate.”<sup>97</sup>

#### **IV. The Commission Is Not Overstepping Its Authority by Considering and Weighing the Climate Impacts of Pipeline Development Under Section 7**

While one intervenor argues that the Commission is assuming the role of a “climate change regulator” and thereby overstepping its jurisdictional reach,<sup>98</sup> this argument also falls flat. In reality, the Commission is merely laying out its approach to considering environmental effects of its pipeline certification decisions as part of its assessment of public convenience and necessity. Such a limited policy clarification should not trigger the major questions doctrine. In

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*supra* note 71, at 25 (identifying potential benefits when evaluating need, including “increasing electric reliability, or advancing clean air objectives”).

<sup>96</sup> *Sabal Trail*, 867 F.3d at 1374.

<sup>97</sup> *UARG*, 573 U.S. at 324.

<sup>98</sup> Request for Rehearing of Boardwalk Pipelines, LP, Dockets No. PL18-1 & PL21-3 (Mar. 18, 2022); *accord*, e.g., GHG Policy Statement *supra* note 3, at P 24 (Christie, Comm’r, dissenting) (“The U.S. Environmental Protection Agency . . . is charged with regulating greenhouse gas emissions under the Clean Air Act. By contrast, Congress established in the NGA a regulatory regime to address entirely different problems, namely, the need to develop the nation’s natural gas resources and to protect ratepayers from unjust and unreasonable rates for gas shipped in the flow of interstate commerce.”).

fact, FERC’s draft policy statements—by enabling a holistic balancing of regulatory benefits and costs—ensures consistency with how agencies normally regulate.

In previous cases in which the Supreme Court has rejected agency assertions of authority under the major questions doctrine, those agencies have often either asserted jurisdiction over an entirely new area or vastly expanded their regulatory reach. In *Brown & Williamson*, for instance, the Food and Drug Administration asserted authority over the tobacco industry for the first time.<sup>99</sup> In *Alabama Association of Realtors*, the Centers for Disease Control and Prevention asserted the authority to impose a moratorium on evictions across the nation.<sup>100</sup> And in *UARG*, EPA’s interpretation would have expanded the number of potentially regulated sources by about 400-fold.<sup>101</sup>

Those cases are a far cry from the situation here, in which the Commission merely endorses consideration of an effect as part of an existing analysis of the type of infrastructure that it has been regulating for more than half a century. In stark contrast to available precedents, the Commission here does not newly assert jurisdiction over “a significant portion of the American economy.”<sup>102</sup> In fact, the Commission does not extend the scope of its regulation at all—it continues to regulate only interstate natural gas pipelines under Section 7. Instead, the Commission outlines the factors that it will consider when exercising that longstanding authority, and as detailed above, those factors are consistent with the factors that the Commission has considered for decades.<sup>103</sup> Such a limited assertion of authority does not remotely resemble the

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<sup>99</sup> 529 U.S. at 144.

<sup>100</sup> 141 S. Ct. at 2487.

<sup>101</sup> 573 U.S. at 322.

<sup>102</sup> *Id.* at 324 (quoting *Brown & Williamson*, 529 U.S. at 159).

<sup>103</sup> *E.g.*, Order Clarifying 1999 Policy Statement, 65 Fed. Reg. at 7867 (stating, in 2000, that the Commission “will continue to take into account as a factor for its consideration the overall [effects] to the environment of *natural gas consumption*” (emphasis added)); *see generally supra* Section III.

types of regulatory expansions that have characterized previous applications of the major questions doctrine.

In fact, by recognizing its duty to consider climate impacts, the Commission is aligning its assessment of public convenience and necessity with how agencies normally exercise regulatory authority under well-settled, bipartisan principles of administrative law. Agencies routinely “assess all costs and benefits” of proposed policies.<sup>104</sup> As part of that assessment, agencies normally “consider any important ancillary benefits and countervailing risks” of their action, including resulting “adverse economic, health, safety, or environmental consequence[s].”<sup>105</sup> Agencies do not only consider, but also frequently act on the basis of effects that they lack authority to directly regulate. As an example, the U.S. Court of Appeals for the Fifth Circuit has held that the Environmental Protection Agency must consider the indirect consumer safety impacts of toxic substances regulations.<sup>106</sup> EPA has also weakened environmental regulations governing vehicle emissions on the basis that more stringent standards would allegedly harm passenger safety—an area over which the agency has no direct regulatory

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<sup>104</sup> Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993). Although most provisions of this executive order do not apply to FERC as an independent regulatory agency, *see id.* § 3(b), the document evinces that regulatory agencies routinely weigh the beneficial and adverse impacts of federal programs, and there is no reason that independent regulatory agencies should not engage in similar balancing. Indeed, courts require independent agencies to rationally balance beneficial and adverse regulatory impacts. *E.g.* *Bus. Roundtable v. Sec. & Exch. Comm’n*, 647 F.3d 1144, 1149 (D.C. Cir. 2011) (rejecting rule promulgated by the Securities and Exchange Commission, another independent regulatory agency, due to lopsided cost-benefit analysis). And in the past, the Commission has looked to other executive orders for guidance on the best practices to assess regulatory impacts. *E.g.*, *PennEast Pipeline Project Final Environmental Impact Statement 1-14*, Docket No. CP15-558 (2017) (citing the Commission’s Memorandum of Understanding with the U.S. Fish and Wildlife Service pursuant to Executive Order 13,186, 66 Fed. Reg. 3853 (Jan. 10, 2001), which only applies to executive agencies, *id.* § 1.)

<sup>105</sup> OFF. OF MGMT. & BUDGET, CIRCULAR A-4: REGULATORY ANALYSIS 26 (2003). This Circular also does not apply directly to the Commission as an independent agency, but exemplifies common regulatory practice. As discussed in the prior footnote, independent regulatory agencies are required to rationally balance beneficial and adverse impacts.

<sup>106</sup> *Corrosion Proof Fittings v. Env’t Prot. Agency*, 947 F.2d 1201, 1225 (5th Cir. 1991) (vacating rule because agency failed to sufficiently consider the ramifications with regard to vehicle safety of its decision to regulate asbestos from various consumer products under the Toxic Substances Control Act).

authority.<sup>107</sup> The Commission’s consideration of downstream and upstream greenhouse gas emissions is consistent with this standard approach and accordingly should not trigger the major questions doctrine.<sup>108</sup>

To the contrary, in fact, recent Supreme Court precedent indicates that agencies like FERC must consider important environmental and economic consequences when exercising statutory authority, even when those consequences fall beyond the agency’s direct regulatory authority. As the Court recognized in *Michigan v. EPA*, “reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.”<sup>109</sup> For this reason, “[a]gencies have long treated cost[s]” such as “harms that regulation might do to human health or the environment” as “a centrally relevant factor” when exerting regulatory authority.<sup>110</sup> The Court further recognized that agencies should broadly consider adverse impacts unless the governing statute “directs [the agency] . . . on its face” to disregard particular effects.

The Natural Gas Act, of course, does not “on its face” (or otherwise) prohibit the consideration of direct, downstream, or upstream greenhouse gas emissions. Accordingly, consistent with longstanding principles of administrative law, the Commission should consider those impacts when assessing whether a proposed pipeline satisfies the Act’s public convenience and necessity standard.<sup>111</sup> Assessing those impacts pursuant to the Commission’s longstanding

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<sup>107</sup> The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 24,176 (Apr. 30, 2020) (“The costs to both industry and automotive consumers would have been too high under the standards set forth in 2012, and by lowering the auto industry’s costs to comply with the program, with a commensurate reduction in per-vehicle costs to consumers, the standards enhance the ability of the fleet to turn over to newer, cleaner and safer vehicles.”).

<sup>108</sup> *Cf.* note 78 and accompanying text (providing D.C. Circuit case law holding that “the Commission is obliged to weigh antitrust policy” under the Natural Gas Act despite lacking any direct authority over antitrust law).

<sup>109</sup> 576 U.S. at 753.

<sup>110</sup> *Id.* at 752–53.

<sup>111</sup> In *Michigan*, the Supreme Court addressed the question of whether the Environmental Protection Agency—an environmental regulator—must consider adverse economic impacts when assessing whether regulation of hazardous air pollutants is “appropriate and necessary” under the Clean Air Act. The Court ruled that EPA must consider cost under that statutory provision, since “[n]o regulation is ‘appropriate’ if it does significantly more harm than good,” thereby necessitating the agency to undertake a broad assessment of both positive and adverse regulatory impacts to

and well-recognized authority does not raise major questions concerns, as the Commission is not veering from its lane as a regulator of natural-gas infrastructure.

**V. *Public Citizen* Does Not Compel FERC To Disregard the Downstream and Upstream Climate Impacts of Natural Gas Pipeline Certification**

While some argue that FERC’s policy statements stand “in tension with prevailing Supreme Court precedent in *Public Citizen*,”<sup>112</sup> those arguments severely misread the Supreme Court’s precedent and are unpersuasive. A proper understanding of *Public Citizen* clearly establishes that this case does not abrogate the Commission’s authority to consider (and longstanding practice of considering) downstream and upstream air pollution impacts.

Under NEPA, agencies are required to “consider and disclose the actual environmental effects in a manner that . . . brings those effects to bear on [the agency’s] decisions.”<sup>113</sup> As the D.C. Circuit has explained, NEPA “makes environmental protection a part of the mandate of every federal agency and department.”<sup>114</sup> Accordingly, agencies are “not only permitted, but compelled, to take environmental values into account” in their decisionmaking process “just as they consider other matters within their mandates.”<sup>115</sup> Such requirements apply to FERC and further compel the Commission to consider environmental impacts as part of the public convenience and necessity determination under Section 7.

In *Public Citizen*, the Supreme Court confronted the narrow circumstance in which the defendant agency—there, the Federal Motor Carrier Safety Administration (FMCSA)—had no discretion to consider the activity that caused the effects in question: the environmental impacts

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fulfill its statutory mandate. *Id.* at 747. The fact that an environmental regulator (EPA) is expected to weigh economic impacts when exercising broad statutory authority strongly suggests that an economic regulator (FERC) should likewise consider environmental impacts when exercising its authority.

<sup>112</sup> GHG Policy Statement, *supra* note 3, at P 29 (Danly, Comm’r, dissenting).

<sup>113</sup> *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 96 (1983).

<sup>114</sup> *Calvert Cliffs’ Coordinating Comm., Inc. v. U. S. Atomic Energy Comm’n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

<sup>115</sup> *Id.*

of international motor travel. The Court’s decision, which upheld FMCSA’s decision not to consider those environmental impacts when setting regulations governing the registration of foreign motor carriers, was heavily dependent on FMCSA’s explicitly narrow statutory authority and thus does not impose a broad limit on agency consideration of indirect impacts. As detailed above, in fact, such a holding would conflict with longstanding, bipartisan principles of administrative law—including the Supreme Court’s recent decision in *Michigan v. Environmental Protection Agency*—supporting the broad consideration of indirect effects.<sup>116</sup>

As the Supreme Court explained in *Public Citizen*, FMCSA has very “limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are ‘willing and able to comply with’ the applicable safety, fitness, and financial-responsibility requirements . . . [and] has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety.”<sup>117</sup> Relying on this expressly limited grant of authority, the Court explained that FMCSA had “no ability . . . categorically to exclude Mexican motor carriers from operating within the United States.”<sup>118</sup> Thus, given the lack of “usefulness of any new potential information” on the impacts of international motor travel “to the [agency’s] decisionmaking process,” the Court held that FMCSA was not required to evaluate those impacts.<sup>119</sup>

Unlike FMCSA, the Commission here is not restricted by any similar statutory limitation. As the D.C. Circuit explained in *Sabal Trail* when distinguishing *Public Citizen*, Congress

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<sup>116</sup> See *supra* Section IV.

<sup>117</sup> *Public Citizen*, 541 U.S. at 759 (quoting 49 U.S.C. § 13902(a)(1)); see also *id.* at 766 (“Under FMCSA’s entirely reasonable reading of this provision, it must certify *any* motor carrier that can show that it is willing and able to comply with the various substantive requirements for safety and financial responsibility contained in DOT regulations. . . . [I]f FMCSA refused to authorize a Mexican motor carrier for cross-border services, where the Mexican motor carrier was willing and able to comply with the various substantive safety and financial responsibilities rules, it would violate § 13902(a)(1).”).

<sup>118</sup> *Id.* at 766.

<sup>119</sup> See *id.* at 767.

granted the Commission “broad[.]” authority “to consider ‘the public convenience and necessity’ when evaluating applications to construct and operate interstate pipelines.”<sup>120</sup> That assessment should include “all factors bearing on the public interest,”<sup>121</sup> including environmental effects (such as climate impacts) from downstream combustion and upstream production.<sup>122</sup> And for more than fifty years, the Commission has considered downstream air pollution impacts as part of its public convenience and necessity analysis.<sup>123</sup> Accordingly, *Public Citizen* does not prevent the Commission from considering induced air pollution impacts, including greenhouse gas emissions, under Section 7.

That conclusion is consistent not only with the D.C. Circuit’s holdings in *Sabal Trail* and its progeny, but also other federal courts that have concluded that *Public Citizen* does not preclude agencies from considering greenhouse gas emissions resulting from the agency’s actions. In *Center for Biological Diversity v. National Highway Traffic Safety Administration (NHTSA)*, the U.S. Court of Appeals for the Ninth Circuit rejected the defendant agency’s claim that *Public Citizen* precluded its consideration of greenhouse gas emissions from automobile tailpipes when setting fuel-economy standards under the Energy Policy and Conservation Act (EPCA).<sup>124</sup> Although the Clean Air Act authorizes EPA to regulate these same emissions,<sup>125</sup> the Ninth Circuit explained that because “EPCA does not limit NHTSA’s duty under NEPA to

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<sup>120</sup> *Sabal Trail*, 867 F.3d at 1373 (quoting 15 U.S.C. § 717f(e)). The D.C. Circuit again rejected *Public Citizen*-premiered arguments that FERC lacked authority to consider indirect greenhouse gas emissions in *Birckhead*, 925 F.3d at 519 (“But this line of reasoning gets the Commission nowhere. Although it is true that ‘[a]n agency has no obligation to gather or consider environmental information if it has no statutory authority to act on that information,’ in the pipeline certification context the Commission *does* have statutory authority to act.”). And the D.C. Circuit recently relied on its holding in *Sabal Trail* to once again hold that the Commission failed to sufficiently consider downstream greenhouse gas emissions from pipeline certification. *Food & Water Watch*, 28 F.4th at 288–89.

<sup>121</sup> *Alt. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959).

<sup>122</sup> *Transcontinental.*, 365 U.S. at 6 (concluding that “the Commission has the power to consider the ‘end use’ and ‘price’ factors,” and rejecting claims that such considerations are “outside the scope of a [Section] 7 proceeding”).

<sup>123</sup> *See supra* Section II.

<sup>124</sup> 538 F.3d 1172, 1212–15 (9th Cir. 2008).

<sup>125</sup> *Massachusetts*, 549 U.S. 497.

assess the environmental impacts, including the impact on climate change,” the agency had a legal duty to consider those emissions when setting fuel-economy standards.<sup>126</sup> Other courts have similarly concluded that federal agencies must consider the midstream and downstream greenhouse gas emissions associated with approving upstream extraction, rejecting arguments that *Public Citizen* precludes such consideration.<sup>127</sup>

In light of this voluminous precedent, the U.S. Court of Appeals for the Eleventh Circuit’s non-binding dicta in *Center for Biological Diversity v. U.S. Army Corps of Engineers*—a case that involved neither the Natural Gas Act nor FERC—calling the D.C. Circuit’s analysis in *Sabal Trail* “questionable”<sup>128</sup> should be seen as an outlier. Specifically, the Eleventh Circuit’s reading of *Public Citizen* that “agencies are not required to consider effects that they lack the statutory authority categorically to prevent”<sup>129</sup> improperly relies on one line of the opinion while overlooking the Supreme Court’s overarching focus on the explicit limits of FMCSA’s statutory authority.<sup>130</sup> And in any event, as the Eleventh Circuit recognized, the Commission’s statutory authority under the Natural Gas Act is “broader”—and the “causal relationship” between a pipeline approval and greenhouse gas emissions “much closer”—than the statutory authority and causal proximity at issue in that case.<sup>131</sup>

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<sup>126</sup> *Ctr. for Biological Diversity*, 538 F.3d at 1214.

<sup>127</sup> *See, e.g., WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 73–74 (D.D.C. 2019); *WildEarth Guardians v. Zinke*, No. CV 17-80-BLG-SPW-TJC, 2019 WL 2404860, at \*6 (D. Mont. Feb. 11, 2019) (“*Public Citizen* does not constrain [the Office of Surface Mining] from considering the indirect effects of approving the mining plan modification, including coal transportation.”); *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, No. 3:20-CV-00290-SLG, 2021 WL 3667986, at \*13 (D. Alaska Aug. 18, 2021) (“[T]he critical feature of [*Public Citizen*] was the fact that the [FMCSA] had no ability to countermand the President’s lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States. There is no similar critical feature here.” (internal quotation marks omitted)).

<sup>128</sup> *Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs*, 941 F.3d 1288, 1299 (11th Cir. 2019).

<sup>129</sup> *Id.*

<sup>130</sup> *See supra* notes 117–119 and accompanying text.

<sup>131</sup> *Ctr. for Biological Diversity*, 941 F.3d at 1299.

Accordingly, as the D.C. Circuit has already concluded, *Public Citizen* does not preclude the Commission from considering indirect greenhouse gas emissions in the certification process.

## CONCLUSION

For the foregoing reasons, the Commission has authority—and, in fact, an obligation—to consider direct, downstream, and upstream greenhouse gas emissions under Section 7. The Commission should therefore continue to recognize the importance of considering those emissions when it finalizes its policy statements.

Respectfully Submitted,

Todd Aagaard, Professor of Law, Villanova University School of Law

Genevieve Byrne, Staff Attorney and Professor of Law, Institute for Energy and the Environment, Vermont Law School

Jenny Carter, Staff Attorney and Assistant Professor of Law, Institute for Energy and the Environment, Vermont Law School

Caroline Cecot, Assistant Professor of Law, Antonin Scalia Law School, George Mason University

Jennifer Danis, Senior Attorney, Sabin Center for Climate Change Law, Columbia Law School

Victor B. Flatt, Dwight Olds Chair in Law, University of Houston Law Center

Alison Gocke, Harry A. Bigelow Teaching Fellow, Lecturer in Law, University of Chicago School of Law

Shi-Ling Hsu, D’Alemberte Professor of Law, Florida State University College of Law

Mark James, Senior Energy Fellow and Visiting Assistant Professor, Institute for Energy and the Environment, Vermont Law School

Kevin B. Jones, Director and Professor of Energy Law and Policy, Institute for Energy and the Environment, Vermont Law School

Sam Kalen, Associate Dean, William T. Schwartz Distinguished Professor of Law, University of Wyoming College of Law

Sarah Ladin, Senior Attorney, Institute for Policy Integrity, New York University School of Law

Michael Livermore, Edward F. Howrey Professor of Law; Director, Program in Law, Communities and the Environment, University of Virginia School of Law

Joshua C. Macey, Assistant Professor of Law, University of Chicago School of Law

Ari Peskoe, Lecturer on Law; Director, Electricity Law Initiative, Harvard Law School

Melissa Powers, Jeffrey Bain Faculty Scholar and Professor of Law; Director, Green Energy Institute, Lewis & Clark Law School

Richard L. Revesz, AnBryce Professor of Law; Director, Institute for Policy Integrity, New York University School of Law  
Jim Rossi, Judge D. L. Lansden Chair in Law, Vanderbilt Law School  
John Ruple, Research Professor and Wallace Stegner Center Fellow, S.J. Quinney College of Law, University of Utah  
Max Sarinsky, Senior Attorney and Adjunct Professor, Institute for Policy Integrity, New York University School of Law  
Amy L. Stein, Professor of Law and Associate Dean for Curriculum, Levin College of Law, University of Florida  
Mark Squillace, Raphael J. Moses Professor of Law, University of Colorado Law School  
Joseph P. Tomain, Dean Emeritus and Wilbert and Helen Ziegler Professor of Law, University of Cincinnati College of Law  
James Van Nostrand, Professor of Law and Director, Center for Energy and Sustainable Development, West Virginia University College of Law  
Daniel E. Walters, Assistant Professor of Law, Penn State University School of Law  
Michael Wara, Director, Climate and Energy Policy Program; Senior Research Scholar, Woods Institute for the Environment, Stanford Law School  
Romany M. Webb, Associate Research Scholar, Sabin Center for Climate Change Law, Columbia Law School  
Shelley Welton, Associate Professor of Law, University of South Carolina School of Law  
Jessica A. Wentz, Non-Resident Senior Fellow, Sabin Center for Climate Change Law, Columbia Law School  
Hannah Wiseman, Professor of Law, Professor and Wilson Faculty Fellow in the College of Earth and Mineral Sciences, Penn State University

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