No. 06-466

In the Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY, PETITIONER

v.

SAN LUIS OBISPO MOTHERS FOR PEACE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, requires the Nuclear Regulatory Commission to consider, as part of its review of a proposed federal action, the environmental impact of a potential terrorist attack.

2. Whether the Commission must consider such an impact even if the risk is not sufficiently quantifiable to be meaningful or to assist agency decision making under NEPA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is published at 449 F.3d 1016. The order of the Nuclear Regulatory Commission (Pet. App. 32a-41a) is reported at 57 N.R.C. 1.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2006. On August 28, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 29, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agen-

cies to "include in every recommendation or report on * * * major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on * * * the environmental impact of the proposed action." 42 U.S.C. 4332(2)(C)(i). NEPA is a procedural statute that does not mandate substantive results. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989). It is designed "to insure a fully informed and well-considered decision." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

Implementing regulations issued by the Council on Environmental Quality (CEQ) provide that an agency may prepare an environmental assessment (EA), which is a "concise public document" that briefly describes the need for, alternatives to, and environmental impacts of the proposed federal action. 40 C.F.R. 1501.3, 1508.9. If the agency determines, based on the EA, that the proposed federal action will not significantly affect the environment, it can discharge its NEPA duties by making a finding of no significant impact. 40 C.F.R. 1501.4(e), 1508.13. If, however, the agency determines that the proposed action will significantly affect the environment, it must prepare a more thorough environnmental impact statement (EIS) concerning the project. See 40 C.F.R. Pt. 1502.[1]

Under NEPA, an agency must consider an environmental effect of a proposed major federal action if there is a "'reasonably close causal relationship' between the environmental effect and the alleged cause." *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 767

[1] The Nuclear Regulatory Commission has issued similar regulations of its own. See 10 C.F.R. 51.1 *et seq.*

(2004) (quoting *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). This Court has "analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'" *Ibid.* (quoting *Metropolitan Edison*, 460 U.S. at 774).

b. The Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, authorizes the Nuclear Regulatory Commission (NRC or Commission) to license interim spent fuel storage installations. 42 U.S.C. 2073, 2093, 2111; see 42 U.S.C. 10152. For licensing proceedings, Section 189(a) of the AEA requires NRC to grant a hearing "upon the request of any person whose interest may be affected." 42 U.S.C. 2239(a)(1)(A). A petitioner in a licensing proceeding may submit contentions on issues arising under NEPA. 10 C.F.R. 2.309(f)(2). When appropriate, a three-member panel of the Atomic Safety and Licensing Board (Licensing Board) holds a hearing before issuing a decision. 10 C.F.R. 2.321. A party may petition the Commission for review of the Licensing Board's decision. 10 C.F.R. 2.341.

2. Petitioner applied to NRC for a 20-year license to construct and operate an interim spent fuel storage facility, in addition to its existing storage capacity, at the Diablo Canyon Power Plant in San Luis Obispo, California. Pet. App. 5a. The non-federal respondents and others requested a hearing and argued, *inter alia*, that NEPA required NRC to analyze the potential impacts of a terrorist attack on the facility. *Id.* at 6a-7a. The Licensing Board rejected that contention. *Ibid.*; *Pacific Gas & Elec. Co.*, 56 N.R.C. 413 (2002).

The Commission affirmed. Pet. App. 32a-41a. Relying on agency precedent and *Metropolitan Edison*, NRC determined that "the 'possibility of a terrorist attack * * * is speculative and simply too far removed from

the natural or expected consequences of agency action to require study under NEPA,' which is confined to 'manageable' inquiries." *Id.* at 38a-39a (quoting *Private Fuel Storage L.L.C.*, 56 N.R.C. 340, 349 (2002)). As an alternative ground for its decision, NRC also stated that "the risk of a terrorist attack at a nuclear facility cannot be adequately determined," and that "attempts to evaluate that risk even in qualitative terms are likely to be meaningless and consequently of no use in the agency's decisionmaking." *Id.* at 39a. The Commission noted further that "NEPA does not require a 'worst-case' analysis," and "NEPA's public process is not an appropriate forum for considering sensitive security issues." *Ibid.*

The Commission found that "[s]torage of spent fuel at commercial reactor sites offers no unusual technological challenges. Indeed, it has been occurring at Diablo Canyon for many years and will continue whether or not we license the proposed" expansion of the facility's storage capacity. Pet. App. 40a. The Commission further stressed that although it "decline[d] to consider terrorism in the context of NEPA," it was "devoting substantial time and agency resources to combating the potential for terrorism involving nuclear facilities and materials." *Ibid.*

Subsequently, the Commission declined to review the Licensing Board's final decision authorizing the licensing of the Diablo Canyon spent fuel storage facility. *Pacific Gas & Elec. Co.*, 58 N.R.C. 47, petition for review denied, 58 N.R.C. 185 (2003).

3. The Ninth Circuit remanded to the agency for further proceedings. Pet. App. 1a-31a. As relevant here, the court of appeals held that NRC violated NEPA by failing to analyze the potential impacts of a terrorist attack on the Diablo Canyon facility. *Id.* at 17a-31a.

The court rejected NRC's argument that, under *Metropolitan Edison*, there was not a sufficiently close causal connection between licensing the facility and the environmental impacts of a potential terrorist attack to require analysis under NEPA. *Id.* at 19a-24a. The court found "*Metropolitan Edison* and its proximate cause analogy * * * inapplicable here." *Id.* at 20a.

Instead, the Ninth Circuit determined that "[t]he appropriate inquiry is * * * whether [terrorist] attacks are so 'remote and highly speculative' that NEPA's mandate does not include consideration of their potential environmental effects." Pet. App. 21a. Applying that standard, the court of appeals determined that "it was unreasonable for the NRC to categorically dismiss the possibility of a terrorist attack" on the Diablo Canyon facility as remote and highly speculative, without expressly addressing respondents' "factual contentions that licensing the Storage Installation would lead to or increase the risk of a terrorist attack." *Id.* at 21a-22a. The court also asserted that the Commission's position is inconsistent with its efforts to prevent terrorist attacks on nuclear facilities. *Id.* at 22a-24a.

The court of appeals then rejected the Commission's other reasons for not considering terrorism as part of its NEPA analysis. Pet. App. 24a-30a. In relevant part, the court reasoned that the agency must consider risks even if it cannot quantify them, and that, in any event, the agency had failed "to adequately show that the risk of a terrorist act is unquantifiable." *Id.* at 25a. In remanding to the Commission for further proceedings, the court of appeals stated that its decision "should not be construed as constraining the NRC's consideration of the merits on remand," because "[t]here remain open to

the agency a wide variety of actions it may take." *Id.* at 30a, 31a.

ARGUMENT

The court of appeals' unprecedented holding that NEPA requires analysis of the environmental effects of potential terrorist attacks is wrong, and the court's refusal to apply the "reasonably close causal relationship" test conflicts with decisions of this Court. The federal respondents did not file their own petition for a writ of certiorari, however, because there is no square circuit conflict and it is unclear at this time how burdensome the court of appeals' decision will be, given that the Ninth Circuit did not specify how much analysis it expects the agency to undertake on remand. At a minimum, however, the court's erroneous decision may require NRC to undertake time-consuming procedures and will lead to further litigation, which will risk delaying important licensing decisions. Moreover, the issue will recur in other NRC licensing proceedings subject to review by the Ninth Circuit, and will affect at least some other agencies as well. The federal respondents recommend denying review at this time, recognizing that the issue may warrant this Court's review in the future if a circuit split develops or the Ninth Circuit imposes burdensome requirements in other cases.

1. a. The court of appeals erred in holding that NRC must consider the potential impacts of terrorist attacks as part of its NEPA analyses. See Pet. App. 17a-31a. NRC goes to great lengths to protect the Nation from terrorism, including terrorism directed at nuclear facilities. See p. 9, *infra*. But NEPA has a narrower and different focus. As this Court has explained, the NEPA statute and CEQ's implementing regulations require

federal agencies to analyze only the reasonably foreseeable environmental "effects" of proposed federal actions. *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 763-764 (2004) (citing 40 C.F.R. 1508.8(a) and (b)). Significantly, a "'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." *Id.* at 767; accord *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). Rather, an agency must consider an environmental effect of a proposed federal action only if there is "'a reasonably close causal relationship' between the environmental effect and the alleged cause." *Public Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774). In both *Public Citizen* and *Metropolitan Edison*, this Court "analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'" *Public Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774).

As construed in *Public Citizen* and *Metropolitan Edison*, NEPA does not require NRC to analyze the effects of a potential terrorist attack, because the agency's licensing decision could not be construed as the legal cause of such an attack or its environmental impact. Under the traditional understanding of the proximate cause doctrine of tort law, intervening criminal activity generally breaks the chain of causation. See, *e.g.*, Restatement (Second) of Torts §§ 442, 442B cmt. c, 448 (1965). Here, a terrorist's intentional criminal act of mass murder and destruction, not a licensing decision, would proximately cause a terrorist attack's consequences. Moreover, one does not in any sense cause criminal activity simply by providing an object for a criminal act. No one causes his or her watch to be stolen simply by buying a valuable watch.

The court of appeals' suggestion that NRC's extensive efforts to prevent terrorist attacks are somehow "inconsistent" with its view that NEPA is not implicated focuses on the wrong question. Pet. App. 22a. Under the correct legal standard, the question is not merely whether an attack is likely or worth trying to prevent, but whether NRC's licensing decision would be the proximate *cause* of an attack's consequences. An agency's precautionary choice to protect against a highly improbable event hardly increases the causal connection between the agency's action and the event, much less the likelihood of the event occurring. The Ninth Circuit itself has recognized that such precautionary actions do not trigger a duty to perform NEPA analyses. See, *e.g.*, *Ground Zero Ctr. for Non-violent Action* v. *United States Dep't of the Navy*, 383 F.3d 1082, 1090 (2004).

Moreover, the analogy to tort law is not precise. Courts must "look to the underlying policies or legislative intent in order to draw a manageable line." *Public Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774 n.7). Even if a State's tort-law policy of compensating victims would warrant holding a negligent actor liable for harm caused by a terrorist attack, NEPA's policies do not warrant the requirement imposed by the Ninth Circuit here. The policies underlying NEPA focus on environmental effects within a rule of reason, and they would not be furthered by requiring analysis of terrorism, which is unlikely to occur at any particular facility and poses a threat to the Nation as a whole that is entirely independent of NRC's actions at any particular facility. As this Court emphasized in *Metropolitan Edison*, NEPA's demands must "remain manageable" if its goals are to be met. 460 U.S. at 776. Otherwise, "available resources may be spread so thin

that agencies are unable adequately to pursue protection of the physical environment and natural resources." *Ibid.* Thus, "inherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Public Citizen*, 541 U.S. at 767 (quoting *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 373-374 (1989)).

Requiring NRC to analyze the potential impacts of terrorist attacks under NEPA would be inconsistent with the rule of reason because it would divert agency resources without any corresponding benefit. NRC already goes to great lengths to increase the safety of nuclear facilities, not only to protect the environment, but also because of the catastrophic human consequences that could result from a successful terrorist attack. See Pet. App. 40a, 43a-46a. Following the terrorist attacks of September 11, 2001, NRC ordered licensed nuclear facilities to implement additional security measures beyond those required by regulation. See, *e.g.*, 67 Fed. Reg. 9792 (2002); *id.* at 65,150. NRC has also proposed strengthening its regulations that require nuclear facilities to guard against radiological sabotage and theft or diversion of nuclear material. 70 Fed. Reg. 67,380 (2005). Adding NEPA analysis of potential terrorist attacks to NRC's already extensive regulatory efforts to address that threat would divert agency resources and make NEPA less manageable without producing any useful new information—and would therefore fail to advance NEPA's goal of protecting the environment.[2]

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[2] The court of appeals thus erred in placing reliance on a CEQ regulation stating that an EIS should address events with potentially

Moreover, information concerning the potential consequences of terrorist attacks at individual facilities is sensitive security information. Pet. App. 39a, 62a-65a. As NRC explained, "NEPA does not override [our] concern for making sure that sensitive security-related information ends up in as few hands as practicable." *Id.* at 39a (quoting *Private Fuel Storage*, 56 N.R.C. 340, 355 (2002)). Even if protecting sensitive information in NEPA proceedings is manageable, and even assuming that the sensitivity of security information does not alone excuse compliance with NEPA's analysis requirements if the analysis can be withheld from the public, cf. *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146 (1981); see Pet. App. 29a-30a, analysis of terrorist attacks under

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catastrophic consequences, "even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." Pet. App. 27a (quoting 40 C.F.R. 1502.22(b)(4)). In the first place, the CEQ regulation on its face is inapplicable when an agency is determining whether an EIS is required; it addresses only the content of an EIS once the agency has already determined that one must be prepared. Moreover, Section 1502.22(b)(4) merely addresses reasonable foreseeability as a general matter. It sheds no light on the question whether NEPA analysis is required when the federal action is *not* the legal cause of the relevant effect; nor does it speak to the question whether an intervening criminal act such as a terrorist attack would break the causal connection required by *Metropolitan Edison* and *Public Citizen*. In any event, the regulation would not support the court of appeals' conclusion in this case even if it did apply, because it applies to "low" probability events, not events that are entirely speculative and unpredictable; it requires analysis only if supported by "credible scientific evidence" rather than "pure conjecture," a standard that is not satisfied here; and it is subject to a "rule of reason," which, as explained in the text, does not support a requirement that the threat of terrorist attack be addressed in the NEPA context. See 40 C.F.R. 1502.22(b)(4).

NEPA still creates a risk that sensitive information could be disclosed. That risk reinforces the conclusion that NEPA's rule of reason does not require consideration of terrorist attacks as part of the NEPA process.

b. The Ninth Circuit's erroneous decision conflicts with this Court's decisions in *Metropolitan Edison* and *Public Citizen* because it refuses to apply the "reasonably close causal relationship" standard mandated by those decisions. See Pet. App. 20a-21a. While the court of appeals purported to distinguish *Metropolitan Edison* on the ground that it involved the relationship between a change in the physical environment and an effect, whereas this case involves the relationship between a federal action and a change in the environment, see Pet. App. 20a, that is no distinction at all. In every NEPA case, the question is whether a federal action will cause a significant effect on the environment. Moreover, the court of appeals did not even attempt to distinguish *Public Citizen*, which reiterates, unconditionally, that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause." 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774).

It is true that neither *Metropolitan Edison* nor *Public Citizen* involved the environmental effects of a potential terrorist attack, and as a result, neither of them had occasion to apply the "reasonably close causal relationship" test to such effects. See *Metropolitan Edison*, 460 U.S. at 775 n.9 (noting that the Court did not consider "effects that will occur if * * * an accident occurs"). But the Ninth Circuit's failure even to apply this Court's "reasonably close causal relationship" test was clear error. And under that standard, it is clear that NEPA

analysis of the consequences of terrorist attacks is not required, as discussed above.

c. The Ninth Circuit's decision appears to be unprecedented in requiring a NEPA analysis of the impacts of a potential terrorist attack. But while there is tension in the case law, there is not a square circuit split on that question.

Two circuits have held that agencies were not required to consider terrorist attacks as part of their NEPA analyses. In *Mid States Coalition for Progress* v. *Surface Transportation Board*, 345 F.3d 520 (2003), the Eighth Circuit reviewed the Surface Transportation Board's decision to allow construction of new rail lines. In doing so, the court held that the agency did not err in declining to reopen the record to consider the terrorist attacks of September 11, 2001, because the agency had "exercised its permissible discretion when it determined that any increased threat was general in nature" and did not relate to the specific project at issue. *Id.* at 543, 544. While the Eighth Circuit's conclusion suggests that an agency does not err by declining to consider generalized terrorism concerns, the court relied in part on "the safety analysis already performed by" the agency before the petitioner in that case requested a supplemental analysis. *Id.* at 544. Here, in contrast, NRC did not rely on a particularized safety analysis.

In *City of New York* v. *Department of Transportation*, 715 F.2d 732 (1983), appeal dismissed, cert. denied, 465 U.S. 1055 (1984), the Second Circuit deferred to the Department of Transportation's conclusion that the risks of terrorism or other sabotage "were too far afield for consideration" in the NEPA analysis of a regulation governing shipment of radioactive material by highway. *Id.* at 750. Like the Eighth Circuit in *Mid States Coali-*

tion for Progress, however, the Second Circuit found that the Department of Transportation's conclusion was "justified by the record," *ibid.*, while in this case the Ninth Circuit found that NRC erred by making a categorical determination as a matter of law without addressing the non-federal respondents' factual contentions, Pet. App. 21a-22a.[3]

The D.C. Circuit has recognized that "mere foreseeability does not trigger a duty to consider an alleged environmental effect" caused by criminal tampering. *Glass Packaging Inst.* v. *Regan*, 737 F.2d 1083, 1091, cert. denied, 469 U.S. 1035 (1984). In that case, the court of appeals held that the Bureau of Alcohol, Tobacco and Firearms did not have to analyze under NEPA the potential impacts of criminal tampering when considering whether to allow liquor to be sold in plastic bottles. *Id.* at 1091-1092. While the D.C. Cir-

[3] The court of appeals overstated the categorical nature of the Commission's decision. NRC explained that "[s]torage of spent fuel at commercial reactor sites offers no unusual technological challenges. Indeed, it has been occurring at Diablo Canyon for many years and will continue whether or not we license the proposed" interim spent fuel storage installation. Pet. App. 40a. Moreover, NRC specifically assessed the risks of a terrorist attack, and concluded that "the possibility of a terrorist attack * * * is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA," which is confined to "manageable inquiries." *Id.* at 38a-39a. The agency further concluded that, in light of the available evidence, "attempts to evaluate that risk even in qualitative terms are likely to be meaningless and consequently of no use in the agency's decisionmaking." *Id.* at 39a. The court of appeals erred in dismissing those determinations, which reflect the agency's expertise and its careful assessment of the relevant issues. Nonetheless, the express reasoning of the decision below is not directly inconsistent with the decisions of the Second and Eighth Circuits on the question presented here.

cuit's rejection of a "mere foreseeability" standard when it comes to potential criminal conduct is difficult to square with the Ninth Circuit's decision in this case, the cases do not directly conflict because the D.C. Circuit relied on the lack of any "environmental" impact and on the plaintiffs' failure to raise the issue before the agency in a timely manner, and the factual setting of that case (liquor bottles) is obviously not analogous to the facts at issue here. *Id*. at 1091, 1093.

d. The Ninth Circuit's decision has the potential to be highly disruptive for NRC (and perhaps other federal agencies), but the extent of any disruption will depend on how the decision is interpreted by the Ninth Circuit.

i. The question whether NEPA requires an analysis of the potential impacts of terrorist attacks at nuclear facilities has been raised in several licensing proceedings currently pending before NRC.[4] Over the next two years, NRC expects to receive 30 or more license applications for new nuclear power reactors, the first such applications in decades.

An effective licensing process is crucial to bringing new nuclear power capacity on-line at a time when the

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[4] See *System Energy Res., Inc. (Early Site Permit for Grand Gulf EPS Site)*, CLI-06-28, No. 52-0009-ESP (Nov. 9, 2006); *AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station)*, CLI-06-24, No. 50-0219-LR (Sept. 6, 2006), slip op. 2; *Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant)*, 63 N.R.C. 727, 734 n.31 (2006); *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, LBP-06-23, No. 50-293-LR (Oct. 16, 2006), slip op. 32-33; *Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station)*, LBP-06-20, No. 50-271-LR (Sept. 22, 2006), slip op. 17-30; *Pa'ina Hawaii, LLC*, 63 N.R.C. 99, 113-114 (2006). This issue is also among the identified issues in a case pending in the District of Columbia Circuit. *Ohngo Devia Gaudedeh* v. *NRC*, Nos. 05-1419, 05-1420 & 06-1087.

Nation's demand for "clean" energy sources is reaching new heights. In part for that reason, the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, established new programs and financial incentives to encourage the construction of new nuclear power reactors and to protect against unnecessary licensing delays. See *Statement on Signing the Energy Policy Act of 2005*, 41 Weekly Comp. Pres. Doc. 1267 (Aug. 8, 2005). As a former NRC Commissioner, now a Wall Street financier, recently told a Senate Committee, new investment in nuclear power depends on predictability:

> [I]nvestors will need confidence that a new nuclear plant can be built on a predictable schedule and for a predictable cost, that the cost will be competitive with that of other available base load generating alternatives such as coal, and that they will be protected against the risk of licensing and litigation delays at least until the new NRC licensing process has demonstrated a track record of successful performance.

Implementation of the Provisions of the Energy Policy Act of 2005: Hearings Before the Senate Comm. on Energy and Natural Res., 109th Cong., 2d Sess. 67 (2006) (statement of James E. Asselstine) (*Senate Hearings*).

The government shares that concern. To avoid the delays and inefficiencies that plagued nuclear licensing in the 1970s and 1980s, NRC has enacted comprehensive licensing and hearing reforms. Several NRC initiatives faced vigorous opposition but were upheld after judicial review. See, *e.g.*, *Citizens Awareness Network, Inc.* v. *United States*, 391 F.3d 338 (1st Cir. 2004); *Nuclear Info. Res. Serv.* v. *NRC*, 969 F.2d 1169 (D.C. Cir. 1991) (en banc). As a result, NRC now has in place a "licens-

ing and oversight regulatory framework that is effective, predictable, and continues to meet the changing demands of the country." *Senate Hearings* 59 (statement of Chairman Nils J. Diaz). That framework could be jeopardized as to projects in the Ninth Circuit, however, by the new and unpredictable NEPA-terrorism inquiry required by the Ninth Circuit.

The issue could also be relevant to other federal agencies. The Ninth Circuit recently relied on its decision in this case to invalidate a NEPA analysis conducted by the Department of Energy concerning a proposed biological weapons research laboratory. *Tri-Valley Cares* v. *Department of Energy*, No. 04-17232, 2006 WL 2971651 (Oct. 16, 2006). In that case, as in this one, the court of appeals remanded for the agency "to consider whether the threat of terrorist activity necessitates the preparation of an Environmental Impact Statement." *Id.* at *2.

ii. At this juncture, it is unclear how substantial a burden the court of appeals' decision will impose on NRC or other agencies. The court emphasized its view that NRC had decided the issue "categorically" and "as a matter of law," Pet. App. 18a, 21a, and stated that its decision "should not be construed as constraining the NRC's consideration of the merits on remand," because "[t]here remain open to the agency a wide variety of actions it may take," *id.* at 30a, 31a.

Accordingly, the Ninth Circuit's decision does not necessarily foreclose agencies from determining as a factual matter, on either a facility-specific or across-the-board basis, that the risk of terrorism is too speculative to warrant NEPA analysis. Indeed, Ninth Circuit precedent generally allows agencies to determine that a particular impact is too unlikely to require NEPA re-

view. See, *e.g.*, *Ground Zero Ctr.*, 383 F.3d at 1090-1091; *No GWEN Alliance of Lane County, Inc.* v. *Aldridge*, 855 F.2d 1380, 1385-1386 (1988). The panel in this case did not purport to overrule or limit those decisions.

Nor does the court of appeals' decision necessarily foreclose agencies from analyzing the consequences of terrorist attacks by reference to other, previously evaluated impacts. In *Limerick Ecology Action, Inc.* v. *NRC*, 869 F.2d 719 (1989), the Third Circuit upheld NRC's decision not to analyze the potential impacts of sabotage on a facility where the agency had concluded that such an analysis would add little to its existing analysis of the potential impacts of severe accidents, such as fires and earthquakes. *Id.* at 741-742. The Ninth Circuit may permit agencies to follow a similar approach by determining that a terrorist attack could reasonably be assumed to cause impacts similar to those caused by other events, such as natural disasters, that the agency would evaluate under NEPA in any event. Thus, the court of appeals' decision will not *necessarily* require significant additional analysis in most or all cases. That said, however, the Ninth Circuit may construe its decision differently and require burdensome and counter-productive analyses that would delay important projects for years, risk the disclosure of sensitive security information, and divert the agencies' resources from productive pursuits.

e. The federal respondents decided not to file a petition for a writ of certiorari in this case because the Ninth Circuit's decision does not squarely conflict with decisions of other courts of appeals, and because it is not yet clear how burdensome the decision will be. Nonetheless, the federal respondents remain firmly of the view that the decision is incorrect, and that the Ninth Circuit erred in failing to apply the "reasonably close

causal relationship" test required by decisions of this Court. Accordingly, if the Court grants the petition, the federal respondents will support the position of petitioner.

2. Petitioner also challenges (Pet. 18-24) the court of appeals' holding that risks must be analyzed even if they are not quantifiable. Pet. App. 24a. That issue does not independently warrant this Court's review.

Petitioner relies (Pet. 19-20) on a CEQ regulation addressing the evaluation of "reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement" in circumstances where "there is incomplete or unavailable information." 40 C.F.R. 1502.22. In such circumstances, the agency must include in the EIS a "statement that such information is incomplete or unavailable," a description of the relevance of the information, some limited discussion based on any available information, and the agency's evaluation based on generally accepted methods. 40 C.F.R. 1502.22(b)(1)-(4). The regulation provides that, "[f]or the purposes of this section, 'reasonably foreseeable' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." 40 C.F.R. 1502.22(b).

As petitioner acknowledges (Pet. 20 n.7), that regulation is inapplicable here because it applies only to an EIS, not an EA, and the agency prepared only an EA here. The regulation expressly refers to "an environmental impact statement," and provides that its definition of "reasonably foreseeable" applies only "for purposes of this section," namely Section 1502.22, which

addresses the preparation of an EIS, not an EA. See 40 C.F.R. 1502.22.

Moreover, the Ninth Circuit's holding that risks need not be quantifiable to be analyzed under NEPA, Pet. App. 24a-25a, is not necessarily contrary to Section 1502.22. That regulation contemplates that an EIS will include some limited discussion of some low-probability risks notwithstanding the absence of complete information.

While petitioner asserts that the Ninth Circuit's holding conflicts with *Limerick*, the current version of Section 1502.22 did not apply in *Limerick*, see 869 F.2d at 743 n.29, because the NEPA process at issue there commenced in the early 1980s, see *id.* at 728, well before the current version of Section 1502.22 became effective in 1986, see 40 C.F.R. 1502.22(c). Moreover, while the Third Circuit held that NRC did not violate NEPA when it declined to consider the threat of sabotage, the court of appeals tied its conclusion to the record in that case. See *Limerick*, 869 F.2d at 743-744. Here, in contrast, the Ninth Circuit concluded (albeit incorrectly) that "the agency fails to show adequately that the risk of a terrorist attack is unquantifiable." Pet. App. 25a.

To be sure, the question presented, like the Commission's decision, is not limited to the issue of quantifiability, but also asks whether the risk can be meaningfully analyzed. See Pet. (i), 19-21; Pet. App. 39a ("[A]ttempts to evaluate th[e] risk even in qualitative terms are likely to be meaningless and consequently of no use in the agency's decisionmaking."). On the latter issue, however, petitioner does not even allege the existence of a circuit split. The question whether a particular risk can be meaningfully analyzed is relatively narrow and factbound, especially compared to the first question pre-

sented. The impracticality of meaningfully assessing a remote and improbable risk is relevant, however, to the rule-of-reason analysis required by *Public Citizen* and *Metropolitan Edison*. See pp. 8-9 & n.2, *supra*.[5]

CONCLUSION

The decision of the court of appeals is incorrect, and the United States would participate in support of petitioner if certiorari were granted, but the petition for a writ of certiorari does not clearly satisfy the Court's criteria for plenary review, and accordingly the petition should be denied.

Respectfully submitted.

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[5] The Ninth Circuit erred in imposing the burden on NRC to show that the risk could not be quantified or meaningfully analyzed. See *Limerick*, 869 F.2d at 743-744 (imposing the burden on the party challenging the agency's NEPA analysis). Standing alone, however, that burden-shifting issue would not warrant this Court's review.