No.

IN THE
Supreme Court of the United States

SPIRE MISSOURI INC.; SPIRE STL PIPELINE LLC,

Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Spire STL Pipeline is a critical source of natural gas for the St. Louis region. The pipeline—which became operational in 2019—was constructed to diversify the supply of natural gas to the region by enabling St. Louis to access natural gas from the Rockies and Appalachia. The Federal Energy Regulatory Commission ("FERC") issued a certificate of public convenience and necessity that authorized the construction and operation of the pipeline after finding that there was a need for the project. In the decision below, however, the D.C. Circuit held that FERC had not sufficiently justified its decision to authorize the pipeline. The D.C. Circuit concluded that the appropriate remedy was vacatur of FERC's order, rather than remand without vacatur, even though it acknowledged that "there may be some disruption" from vacating authorization for an already-operational pipeline and despite leaving open the possibility that FERC would be able to rely on existing record evidence to reissue the pipeline's certificate. According to the D.C. Circuit, vacatur was appropriate because it was "far from certain" and "not at all clear" to the court that FERC could rehabilitate its reasoning on remand. As a result, hundreds of thousands of St. Louis-area households and businesses face the prospect of losing their natural-gas service during the winter months.

The question presented is whether remand without vacatur is the appropriate remedy where the record indicates that an agency's inadequately reasoned decision could be corrected on remand and vacatur of the decision could result in serious, and potentially life-threatening, disruptive consequences.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In the consolidated proceedings below, the Environmental Defense Fund was petitioner in Case No. 20-1016, and Juli Steck was petitioner in Case No. 20-1017. The Federal Energy Regulatory Commission was respondent, and Spire STL Pipeline LLC and Spire Missouri Inc. were intervenors in support of respondent.

Pursuant to this Court's Rule 29.6, undersigned counsel state as follows:

Spire Missouri Inc. is a wholly-owned subsidiary of Spire Inc.

Spire STL Pipeline LLC ("Spire STL") is a limited liability company organized and existing under the laws of the State of Missouri. Spire STL's sole member is Spire Midstream LLC, a Missouri limited liability company, which in turn is wholly-owned by Spire Resources LLC. Spire Resources LLC's sole member is Spire Inc.

Spire Inc. (NYSE MKT: SR) is a publicly-traded corporation that has no parent company. BlackRock, Inc. owns 12.0% of Spire Inc.'s common stock, and The Vanguard Group, Inc. owns 10.56% of Spire Inc.'s common stock.

RELATED PROCEEDINGS

Spire Missouri Inc. and Spire STL Pipeline LLC previously filed an Application for a Stay of the Mandate Pending the Filing and Disposition of a Petition for a Writ of Certiorari, which was denied by the Chief Justice. *Spire Mo. Inc. v. Envtl. Def. Fund*, No. 21A56 (Oct. 15, 2021). There are no other directly related proceedings as defined in Rule 14.1 of this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Spire Missouri Inc. ("Spire Missouri") and Spire STL Pipeline LLC ("Spire STL") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The D.C. Circuit's opinion (Pet. App. 1a–40a) is published at 2 F.4th 953. The D.C. Circuit's orders denying rehearing and rehearing en banc (Pet. App. 371a–374a) are unpublished. The orders of the Federal Energy Regulatory Commission ("FERC") on review in the D.C. Circuit (Pet. App. 41a–353a) were published at 164 FERC ¶ 61,085 (2018 WL 3744001), 169 FERC ¶ 61,074 (2019 WL 5556590), and 169 FERC ¶ 61,134 (2019 WL 6242969). The FERC order (Pet. App. 354a–370a) granting an emergency temporary certificate is published at 176 FERC ¶ 61,160 (2021 WL 4192131).

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2021, and a timely petition for rehearing or rehearing en banc was denied on September 7, 2021. Pet. App. 371a–374a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

This petition provides an ideal opportunity to resolve what is perhaps the most significant question of administrative law that this Court has never addressed: When is remand without vacatur, rather than vacatur, the appropriate remedy for an agency's erroneous decisionmaking? That frequently recurring

question has sharply divided the lower courts, which have adopted divergent standards for determining when to remand without vacatur.

In this case, the D.C. Circuit held that FERC relied on flawed reasoning when it issued a certificate of public convenience and necessity authorizing Spire STL to construct and operate a pipeline connecting the St. Louis region to sources of natural gas in the Rockies and Appalachia. In so doing, the D.C. Circuit did not foreclose the possibility that FERC could reissue the certificate based on the record evidence of project need submitted by Spire STL and acknowledged the disruptive consequences that could result from shutting down the already-operational pipeline, which the FERC certificate had required Spire STL to construct and begin operating within two years. The D.C. Circuit nevertheless decided to vacate FERC's order, rather than remand without vacatur, because it was "not at all clear" and "far from certain" to the court that FERC could rehabilitate its reasoning. Pet. App. 39a–40a. That extraordinarily high bar establishes a virtually insurmountable presumption in favor of vacatur—even where, as here, that remedy could have potentially life-threatening consequences—and is impossible to reconcile with the remedial standards applied by multiple other circuits. *See*, *e.g.*, *Tex. Ass'n of Mfrs. v. CPSC*, 989 F.3d 368, 389 (5th Cir. 2021) ("only in rare circumstances is remand for agency reconsideration *not* the appropriate solution") (emphasis added; alteration and internal quotation marks omitted).

Powerful legal and practical considerations support review of the D.C. Circuit's decision. The question whether to vacate agency action, or remand without vacatur, has far-reaching real-world consequences

for agencies, litigants, and the regulated community, especially where, as here, a company has invested hundreds of millions of dollars in new infrastructure in reliance on an agency authorization. By generating disparate remedial outcomes on indistinguishable facts, the circuits' conflicting approaches to remand without vacatur sow confusion, uncertainty, and unfairness, and undermine the uniform procedural framework that Congress sought to establish in the Administrative Procedure Act ("APA"). The D.C. Circuit's outlier approach is particularly problematic because that court decides a substantial volume of challenges to federal agency action and possesses outsized influence in the field of administrative law. And, as for this particular case, the stakes could not be higher because the D.C. Circuit's vacatur exposes hundreds of thousands of St. Louis-area households and businesses to the risk of prolonged and potentially fatal natural-gas service disruptions.

The Court should grant certiorari to establish a uniform nationwide remedial standard for cases challenging federal agency action, to reject the D.C. Circuit's unduly restrictive approach to remand without vacatur, and to ensure that the people of the St. Louis region enjoy uninterrupted natural-gas service to heat their homes and businesses while FERC carries out its proceedings on remand.

STATEMENT

1. For decades, the St. Louis region was heavily dependent on natural gas from Texas and surrounding States. C.A. JA586. Most of that gas reached St. Louis through a single pipeline that originated in Texas and traversed the New Madrid Fault, "the most active seismic area in the United States east of the Rocky Mountains," which has produced significant

earthquakes in the past and has a "high" risk of doing so again "in the near future." C.A. JA109–11, 156, 300–02, 381, 933; *see also*, *e.g.*, USGS Earthquake Hazards Program, M 4.0 - 7 km S of Williamsville, Missouri, https://tinyurl.com/53f8szvf (reporting 4.0 magnitude earthquake in southeastern Missouri in mid-November 2021).

In the last decade, however, new sources of natural gas from Appalachia have been developed. C.A. JA293. In 2015, the formerly west-to-east Rockies Express ("REX") pipeline—located just 65 miles from St. Louis—was modified to make it bidirectional, allowing the pipeline to bring westward more than two million Dekatherms ("Dth") a day of natural gas from Appalachia (in addition to existing capacity flowing eastward from the Rockies). C.A. JA293–94, 383; *see* Pet. App. 11a–12a.

These developments prompted Spire Missouri—the gas utility for the St. Louis region—to explore the feasibility of accessing this source of natural gas. *See* C.A. JA293. Tapping into this new source was attractive to Spire Missouri because it would increase the reliability and diversity of Spire Missouri's natural-gas supply, reducing Spire Missouri's vulnerability to a seismic event affecting the older pipeline originating in Texas, and because it would ensure Spire Missouri's access to an affordable gas supply in the face of growing demand for gas sourced from Texas and the Gulf Coast and growing reliability concerns about those existing sources. C.A. JA109, 297–300. It would also allow Spire Missouri to retire the obsolete "propane peaking" facilities that Spire Missouri used to satisfy periods of peak demand, the continued operation of which posed environmental and operational risks. C.A. JA110, 136–37, 295–96, 830–32. These

benefits would help Spire Missouri fulfill its duty as a regulated natural-gas utility to provide its customers with safe and adequate service at just and reasonable rates. C.A. JA134.

After unsuccessful discussions between Spire Missouri and other pipeline developers, Spire STL (an affiliate of Spire Missouri) proposed to construct and operate a pipeline (the "Project") that would provide Spire Missouri with new access to natural-gas supplies from Appalachia and the Rockies while meeting Spire Missouri's requirements with respect to cost, operational date, and environmental conditions. C.A. JA292–93, 822. Spire STL then entered into a "precedent agreement" to provide Spire Missouri 87.5% of the Project's proposed 400,000 Dth/day capacity for an initial term of twenty years. C.A. JA90; Pet. App. 11a.

2. In accordance with the Natural Gas Act, Spire STL applied to FERC for a certificate of public convenience and necessity to construct and operate the Project. *See* C.A. JA87–130. Consistent with FERC precedent, Spire STL cited its long-term precedent agreement with Spire Missouri as evidence that the Project was needed and would serve the public interest. C.A. JA109; *see*, *e.g.*, Millennium Pipeline Co., 100 FERC ¶ 61,277, at 12 ¶ 57 (2002) ("as long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project"). But Spire STL also explained to FERC, in evidentiary submissions that are part of the administrative record, that the Project would provide several additional benefits by diversifying the natural-gas supply to Spire

Missouri and reducing its reliance on a single, vulnerable source of gas from Texas and the Gulf Coast region.

In particular, the Project would connect St. Louis to the REX pipeline, "one of the newest and largest pipeline systems in the United States" with access to substantial natural-gas supplies from "the Rocky Mountains all the way to the Appalachian Basin." C.A. JA108. In so doing, the Project would "enhance overall natural gas supply security and affordability in the region" by making the St. Louis region less reliant on the single pipeline that then provided 87 percent of the "firm"—*i.e.*, contractually locked-in—pipeline transportation capacity to the area. C.A. JA109. It would also "eliminate [Spire Missouri's] current reliance on propane facilities" during periods of peak demand, thereby avoiding environmental and operational risks. C.A. JA110. And it would put Spire Missouri and other shippers using the Project "in a substantially better position to protect their system operations" "[i]n the event of a planned or unplanned service outage on the current pipelines delivering into the region," such as one caused by an earthquake along the New Madrid Fault. C.A. JA110–11. Finally, the Project would "provide natural gas transportation infrastructure" that would "support potential growth in demand for natural gas in the industrial and power generation sectors," should such growth occur. C.A. JA111.

In August 2018, FERC granted Spire STL a certificate of public convenience and necessity (the "Permanent Certificate Order") after concluding that "Spire [STL] has sufficiently demonstrated that the project is needed in the market that the Spire STL Pipeline

Project intends to serve." Pet. App. 90a. FERC's decision was based on the standards governing its review of certificate applications, *see* FERC Certificate Policy Statement, 88 FERC ¶ 61,227 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000), and its conclusion that the relevant public-interest factors weighed in favor of the Project, *see Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959). In making its determination of project need, FERC relied primarily on Spire STL's precedent agreement with Spire Missouri, rather than the other evidence of need submitted by Spire STL. Pet. App. 88a–90a. The Permanent Certificate Order required Spire STL to construct and put the Project into service within two years. *Id.* at 216a.

The Environmental Defense Fund ("EDF") and Juli Steck sought rehearing, which FERC denied more than a year later. Pet. App. 18a–19a. During the intervening period, Spire STL spent nearly $300 million to build the Project within the deadlines FERC had prescribed; the Project has been in operation since 2019. *Id.* at 19a.

3. After FERC denied rehearing, EDF and Steck filed petitions for review in the D.C. Circuit, which issued an opinion vacating the Permanent Certificate Order. *See* Pet. App. 21a, 40a.[1]

The D.C. Circuit concluded that FERC's decision to grant the Permanent Certificate Order was arbitrary and capricious. Pet. App. 31a–38a. The court

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[1] The D.C. Circuit determined that Steck did not have standing to pursue her claims against FERC, but that EDF had associational standing to sue on behalf of four of its members. Pet. App. 23a–28a.

acknowledged that, "[u]nder established law, precedent agreements are 'always . . . important evidence of demand for a project'" and can "demonstrate both market need and benefits that outweigh adverse effects of a new pipeline." *Id.* at 31a (citations omitted; ellipses in original). But the court deemed it arbitrary and capricious for FERC to have relied on the precedent agreement between Spire STL and Spire Missouri because "there was a single precedent agreement for the pipeline" (even though the agreement was for nearly 90% of the Project's capacity for 20 years); "that precedent agreement was with an affiliated shipper" (even though the D.C. Circuit had previously declined to distinguish between precedent agreements with affiliates and those with unaffiliated parties, *see City of Oberlin v. FERC*, 937 F.3d 599, 605–06 (D.C. Cir. 2019); *Appalachian Voices v. FERC*, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019)); and "projected demand for natural gas in the area to be served by the new pipeline was flat for the foreseeable future" and FERC had not made a finding that "the construction of the proposed pipeline would result in cost savings" (even though Spire STL had not identified these as the reasons for the Project and no statute or regulation required either increasing demand or lower prices). Pet. App. 10a–12a, 38a.

Despite identifying purported gaps in FERC's reasoning, the D.C. Circuit did not conclude that there was insufficient record evidence to support issuance of the Permanent Certificate Order or foreclose the possibility that FERC could correct its errors on remand by relying on the evidence of need beyond the precedent agreement that Spire STL had submitted. *See* Pet. App. 38a ("[I]t is not enough that such evidence may exist within the record; the question is whether the Commission's decisionmaking, as reflected in its

orders, will allow us to conclude that the Commission has sufficiently evaluated that evidence in reaching a reasoned and principled decision.").

With respect to the remedy, the D.C. Circuit acknowledged its precedent authorizing remand without vacatur. Pet. App. 39a (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993)). The D.C. Circuit nevertheless concluded that vacatur was required, summarily dismissing the disruption that could result and the possibility that FERC could remedy the identified defects on remand. It recognized that "the pipeline is operational" and that "there may be some disruption" from vacatur—which would eliminate authorization for Spire STL to continue operating the Project—but declined to consider those disruptive consequences because it was "far from certain" and "not at all clear to [the court] at this juncture" that FERC could cure its errors in reasoning on remand. *Id.* at 39a–40a. Citing its opinion from earlier in 2021 vacating an easement for the already-operational Dakota Access Pipeline to cross federal land, the D.C. Circuit also expressed concern that "remanding without vacatur under these circumstances would give [FERC] incentive to allow 'build[ing] first and conduct[ing] comprehensive reviews later.'" *Id.* at 40a (second and third alterations in original) (quoting *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021), *pet. for cert. filed*, No. 21-560 (Sept. 20, 2021)).

4. Petitioners sought rehearing or rehearing en banc from the D.C. Circuit on the remedial question, and attached a declaration from the president of Spire Missouri attesting to the potentially massive disruptive consequences of shutting down the Project. As

the declaration explained, the Project has already produced tremendous benefits for the St. Louis region, including by ensuring the availability of a reliable, reasonably priced natural-gas supply during Winter Storm Uri, a severe winter-weather event in February 2021 that subjected other regions, including Texas and Oklahoma, to widespread energy shortages and extreme price spikes. Pet. App. 378a–383a, 392a–394a (updated declaration filed in support of motion to stay the mandate). The declaration further explained that, once Spire STL put the Project into operation (as it was required to do within two years under the terms of the Permanent Certificate Order), Spire Missouri relinquished much of the firm capacity on the pipeline it had previously utilized; that pipeline, in turn, remarketed Spire Missouri's previously held capacity to other shippers and now has virtually no firm capacity available for Spire Missouri to replace what it currently receives through the Project. *Id.* at 378a–379a, 395a–397a. In addition, Spire Missouri decommissioned its obsolete "propane peaking" facilities—on which it relied to meet peak demand—after the Project became operational. *Id.* at 378a–379a, 397a–398a. Thus, if the Project were shut down, prolonged periods of cold weather during the winter months could result in the loss of natural-gas service to up to 400,000 households and businesses in the St. Louis region, with potentially fatal results. *Id.* at 386a–392a.

Those consequences have been confirmed by the staff of the Missouri Public Service Commission—the primary regulator of the State's gas utilities—which found that "Spire Missouri cannot reasonably reconfigure its system to replace or restore former capacity, or replace reliance on Spire STL for transportation before or during the Winter of 2021-2022," and that

"peak day service interruptions could be expected without access to [the Project's] capacity." Staff's Investigation of Spire STL Pipeline's Application at FERC for a Temporary Certificate to Operate at 3, 7, No. GO-2022-0022 (Mo. Pub. Serv. Comm'n Aug. 16, 2021), https://tinyurl.com/5rjr84ew; *see also id.* at 8 (confirming that the Project provided "overall" savings during Winter Storm Uri, although lower than those calculated by Spire Missouri).

As an alternative that would temporarily ameliorate the consequences of vacatur in the event rehearing was not granted, Spire STL also promptly filed with FERC an application for temporary operating authority, which garnered support from a diverse array of public officials, organizations, public-interest groups, and affected businesses.[2] There is no firm timetable for FERC to issue a decision on Spire STL's still-pending application.

On September 7, 2021, the D.C. Circuit denied the rehearing petition without comment. Pet. App. 371a–374a.

5. Petitioners thereafter filed a motion to stay the mandate in the D.C. Circuit. The motion was supported by two declarations substantiating the potentially dire consequences of vacatur: an updated declaration from Spire Missouri's president and a declara-

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[2] Comments supporting the temporary-certificate application were filed by the Governor, Lieutenant Governor, and Attorney General of Missouri; Missouri's Director of Economic Development; several Missouri federal and state legislators; the mayors of St. Louis, Kansas City, and more than 40 other Missouri municipalities; the Missouri School Boards' Association; the Urban League of Metropolitan Saint Louis, Inc.; and the United Steelworkers of America, District 11, among many others.

tion from Spire STL's president discussing the procedures for and consequences of shutting down the Project. Pet. App. 375a–412a.

Hours after petitioners filed that motion, FERC *sua sponte* issued an emergency temporary certificate ("Temporary Certificate Order") in light of the risk that issuance of the mandate would "potentially jeopardiz[e] Spire Missouri's ability to obtain adequate [natural-gas] supply, a situation that could be dire during the upcoming winter heating season." Pet. App. 358a. The Temporary Certificate Order, which was issued pending FERC's final determination on Spire STL's application for a temporary certificate that would extend through completion of the remand proceedings seeking a reissued permanent certificate, is currently scheduled to expire on December 13, 2021. *Id.* at 361a. The Temporary Certificate Order was issued over the dissent of one Commissioner, who opined that a more appropriate remedy would have been for FERC to have sought rehearing of the D.C. Circuit's vacatur remedy (which a majority of the Commission had voted to seek only to be overruled by the Chairman) or to have sought a stay of the D.C. Circuit's mandate. *Id.* at 362a–370a.[3]

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[3] FERC subsequently denied a request to stay the Temporary Certificate Order, because "the Commission found that an emergency exists, at least temporarily, insofar as the court's vacatur presents the potential for a sudden unanticipated loss of gas supply or capacity that requires an immediate restoration of interrupted service for protection of life or health or for maintenance of physical property." Order Addressing Arguments Raised on Rehearing, Granting Clarification, and Denying Stay, Spire STL Pipeline LLC, 177 FERC ¶ 61,114, at 7 ¶ 13 (Nov. 18, 2021) (internal quotation marks omitted).

The D.C. Circuit denied petitioners' motion for a stay of the mandate on October 1, 2021, and the Chief Justice denied petitioners' application for a stay of the mandate on October 15, 2021. *See Spire Mo. Inc. v. Envtl. Def. Fund*, No. 21A56. FERC's review of Spire STL's application for temporary operating authority pending completion of the remand proceedings—as well as its review of the request for a reissued permanent certificate on remand from the D.C. Circuit's ruling that Spire STL filed after issuance of the court of appeals' mandate—remain ongoing.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because the circuits cannot agree on the standard for determining whether to remand without vacatur in cases challenging agency action—a frequently recurring question of administrative law that has profound practical implications for both litigants and the general public.

Unlike the D.C. Circuit—which applies an overwhelming presumption *in favor of* vacatur—multiple other circuits have applied a strong presumption *against* vacatur in cases challenging agency action. *See*, *e.g.*, *Tex. Ass'n of Mfrs. v. CPSC*, 989 F.3d 368, 389 (5th Cir. 2021); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015). These divergent approaches have produced irreconcilable remedial outcomes in indistinguishable factual settings—as evidenced by decisions that, in direct conflict with the decision below, declined to vacate authorization for operational energy projects due to the potentially serious disruptive consequences of vacatur. *See Town of Weymouth v. Mass. Dep't of Envtl. Prot.*, 973 F.3d 143, 146 (1st Cir. 2020) (per curiam); *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993–94 (9th Cir. 2012) (per curiam). The

exacting showing that the D.C. Circuit requires before granting remand without vacatur—which it has applied with particular rigor to oil and gas pipelines, *see Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1053 (D.C. Cir. 2021), *pet. for cert. filed*, No. 21-560 (Sept. 20, 2021)—gives far too little weight to the disruption that can be generated by vacatur.

In the absence of this Court's review, the D.C. Circuit's aberrant approach to remand without vacatur is likely to proliferate in other jurisdictions and, in the immediate term, will jeopardize the ability of millions of St. Louis-area residents to heat their homes and businesses during the winter months. This Court should grant review to restore the procedural uniformity that Congress sought to establish in the APA and to avert the serious, potentially life-threatening consequences of the D.C. Circuit's decision.

I. THE CIRCUITS ARE DEEPLY DIVIDED REGARDING THE APPROPRIATE STANDARD FOR DETERMINING WHETHER TO GRANT REMAND WITHOUT VACATUR.

Although every circuit that has addressed the question presented agrees that remand without vacatur is appropriate in *some* circumstances, they are sharply split on the question of *when* remand without vacatur is appropriate—both in general and in the specific context of permits for the construction and operation of pipelines and other energy infrastructure.

A. The D.C. Circuit has traditionally articulated two factors to guide its determination whether to vacate an erroneous agency decision or instead to remand without vacatur: (1) the seriousness of the decision's deficiencies (and thus the extent of doubt

whether the agency chose correctly) and (2) the disruptive consequences of vacatur. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). In applying that *Allied-Signal* standard in the past, the D.C. Circuit has generally been solicitous of public-health risks that could be posed by vacatur of agency action. *See Wisconsin v. EPA*, 938 F.3d 303, 336 (D.C. Cir. 2019) (per curiam) ("As a general rule, we do not vacate regulations when doing so would risk significant harm to the public health").

In recent cases, however, the D.C. Circuit has turned its *Allied-Signal* test into a forceful presumption in favor of vacatur, especially in cases challenging agency authorizations for the construction and operation of oil and gas pipelines. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1053 (D.C. Cir. 2021) (vacating easement for oil pipeline crossing federal land due to inadequate analysis under the National Environmental Policy Act), *pet. for cert. filed*, No. 21-560 (Sept. 20, 2021); *see also United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("[i]n rare cases, . . . we do not vacate the action but instead remand for the agency to correct its errors").

This case powerfully illustrates the force of the D.C. Circuit's recent strong presumption in favor of vacatur. The D.C. Circuit vacated FERC's Permanent Certificate Order even though the court did not foreclose the possibility that FERC could remedy its reasoning on remand based on existing record evidence of project need submitted by Spire STL and despite acknowledging that vacatur could generate "disruption" by shutting down an operational pipeline that sup-

plies natural gas to millions of St. Louis-area residents. Pet. App. 38a–39a. In the D.C. Circuit's view, those disruptive consequences did not warrant *any* weight in the remedial analysis because it was "far from certain" and "not at all clear" to the court that FERC could cure its errors in reasoning. *Id.* at 39a–40a. Thus, according to the D.C. Circuit, in the absence of judicial "certain[ty]" that the agency will rehabilitate its reasoning on remand, vacatur is always the appropriate remedy—even if vacatur would produce far-reaching disruptive consequences.

B. Most circuits follow approaches nominally based on the *Allied-Signal* test, but those standards diverge from each other and from the D.C. Circuit's approach, both in formulation and application. Indeed, the overriding presumption in favor of vacatur applied by the D.C. Circuit in this case and other recent cases squarely conflicts with the standards applied by other circuits in determining when remand without vacatur is appropriate.

The Fifth Circuit, for example, has stated that "only in rare circumstances is remand for agency reconsideration *not* the appropriate solution." *Tex. Ass'n of Mfrs. v. CPSC*, 989 F.3d 368, 389 (5th Cir. 2021) (emphasis added; alteration and internal quotation marks omitted). In that circuit, "[r]emand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Id.*; *see also Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (remanding without vacatur because the agency "may well be able to justify its decision" on remand "and it would be disruptive to vacate a rule that applies to other members of the regulated community"). The Fifth Circuit's position that

vacatur is appropriate "only in rare circumstances," *Tex. Ass'n of Mfrs.*, 989 F.3d at 389, squarely conflicts with the D.C. Circuit's diametrically opposite rule that remand without vacatur will be ordered only "[i]n rare cases." *United Steel*, 925 F.3d at 1287.

The Third Circuit and the Eleventh Circuit have applied similar approaches that, in practice, create a presumption in favor of remand without vacatur. *See*, *e.g.*, *Prometheus Radio Project v. FCC*, 824 F.3d 33, 52 (3d Cir. 2016) ("Vacatur typically is inappropriate where it is 'conceivable' that the [agency] can, if given the opportunity, create a supportable rule."); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015) ("where it is not at all clear that the agency's error incurably tainted the agency's decisionmaking process, the remedy of remand without vacatur is surely appropriate").

Several circuits apply tests modeled on the original two-factor *Allied-Signal* test but add a balancing of the equities as a third factor that supports remand without vacatur where vacatur would have disruptive consequences. *See Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001) ("whether to [vacate] . . . depends *inter alia* on the severity of the errors, the likelihood that they can be mended without altering the order, and on the balance of equities and public interest considerations"); *Black Warrior Riverkeeper*, 781 F.3d at 1290 ("a court must [also] balance the equities" "[i]n deciding whether an agency's action should be remanded without vacatur").

Other circuits apply a more amorphous approach that focuses exclusively on equitable considerations. Both the Second and Ninth Circuits apply an open-ended test in which they decline to vacate "'when equity demands'" that result. *Nat. Res. Def. Council v.*

EPA, 808 F.3d 556, 584 (2d Cir. 2015) (remanding without vacatur) (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (remanding without vacatur)).

C. If this case had been litigated in any of these other circuits, remand without vacatur would have been ordered because, as discussed further below, FERC can rehabilitate its reasoning on remand, shutting down the Project would have a profoundly disruptive impact on the supply of natural gas to the St. Louis region, and the equities strongly favor ensuring a reliable supply of natural gas to the millions of St. Louis-area residents who depend on the Project to heat their homes and businesses. *See infra* Part II.

The D.C. Circuit's outlier approach is particularly apparent from examining decisions in which other circuits have refused to vacate authorizations for energy infrastructure despite flaws in the agency's decisionmaking. The First Circuit recently concluded that remand without vacatur was appropriate where a state environmental agency committed error in the course of granting a permit for a compressor station connected to a natural-gas pipeline. *Town of Weymouth v. Mass. Dep't of Envtl. Prot.*, 973 F.3d 143, 146 (1st Cir. 2020) (per curiam). The First Circuit reasoned that the "balance of equities and public interest considerations" supported remand without vacatur because the pipeline otherwise would "be out of operation for most of the New England and Canadian winter heating season, when demand for natural gas in the region is at its peak and shortages most likely." *Id.*

Similarly, the Ninth Circuit applied its equitable standard to hold that remand without vacatur was appropriate where the Environmental Protection

Agency had committed error in the course of approving a state environmental agency's emissions plan, because vacatur would prevent "a much needed power plant" from coming online and, without it, "the region might not have enough power next summer, resulting in blackouts." *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993–94 (9th Cir. 2012).

The remedy ordered in cases challenging agency action should not depend on the circuit in which suit is filed. The APA establishes a single, uniform procedural framework for judicial review of agency action. *See Dickinson v. Zurko*, 527 U.S. 150, 155 (1999) ("The APA was meant to bring uniformity to a field full of variation and diversity."). This Court's review is warranted to restore the uniformity that Congress sought to establish when it enacted the APA.

II. THE D.C. CIRCUIT'S DECISION TO VACATE FERC'S PERMANENT CERTIFICATE ORDER WAS ERRONEOUS.

The pressing need for this Court to grant review is underscored by the serious flaws in the D.C. Circuit's remedial analysis, which resulted in the vacatur of FERC's Permanent Certificate Order despite the substantial possibility that FERC could remedy its reasoning on remand and the massive disruption that could arise from vacatur.

In the decision below, the D.C. Circuit accelerated its recent transformation of the *Allied-Signal* test into an overwhelming presumption in favor of vacatur. The court ordered vacatur even though it acknowledged that there was record evidence on which FERC could rely to justify reissuing a permanent certificate on remand. *See* Pet. App. 37a–38a. And it ordered vacatur in the face of the undisputed possibility of

"disruption" from shutting down a pipeline that already "is operational." *Id.* at 39a.

Notwithstanding these considerations militating in favor of remand without vacatur, the D.C. Circuit concluded that vacatur of FERC's Permanent Certificate Order was warranted. It did so by transforming the first *Allied-Signal* factor (the seriousness of the agency's errors) into an essentially insurmountable barrier to remand without vacatur—requiring that it be "clear" or "certain" to the court that an agency would be able to cure its errors on remand—and by declining to give any weight to the second *Allied-Signal* factor (the disruptive consequences of vacatur) because the court concluded that the first factor had not been satisfied. Pet. App. 39a–40a.

This deficient remedial analysis largely eliminates remand without vacatur as an available remedy—even where, as here, the agency's errors in reasoning could readily be cured on remand and vacatur could be profoundly disruptive. Indeed, the D.C. Circuit suggested (in reliance on its reasoning in the earlier *Standing Rock Sioux Tribe* opinion that is also currently before this Court on a pending petition for a writ of certiorari) that granting remand without vacatur in this case would incentivize FERC to allow "'build[ing] first and conduct[ing] comprehensive reviews later.'" Pet. App. 40a (alterations in original) (quoting *Standing Rock Sioux Tribe*, 985 F.3d at 1052). That reasoning would *always* justify vacatur of completed projects whenever the court finds an agency's review was inadequate.[4]

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[4] In addition, the D.C. Circuit's concern that construction may be completed prior to an opportunity for judicial review has been

The D.C. Circuit's across-the-board presumption in favor of vacatur is inconsistent with the case-specific equitable discretion that courts possess in fashioning appropriate relief, which necessarily takes into account the particular facts and circumstances of the dispute before the court. *See*, *e.g.*, *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001); *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944). An appropriate weighing of the relevant equitable considerations points decisively in favor of remand without vacatur here.

First, FERC could make the requisite finding of need for the Project based on the existing administrative record (as well as additional developments that have occurred in the interim) and reissue a permanent certificate to Spire STL on remand. Spire STL submitted extensive evidence of project need that FERC did not expressly invoke in its initial decision, where it "appeared to rely entirely on the precedent agreement between Spire STL and Spire Missouri." Pet. App. 15a. FERC could rely on that additional evidence of need in reissuing the Project's certificate, in-

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eliminated by recent developments. Last year, in *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc), the court overruled prior cases and held that parties may now seek judicial review of a FERC order 30 days after a rehearing petition is filed, even if the petition remains pending before FERC. Although *Allegheny* was not decided in time to allow immediate judicial review in this case, the combination of prompt judicial review under *Allegheny*, and a 2020 FERC order that no longer allows pipeline construction until the time for rehearing has passed or FERC has acted on that petition, *see* Limiting Authorizations to Proceed with Construction Activities Pending Rehearing, 171 FERC ¶ 61,201 (June 9, 2020), will prevent FERC from intentionally deferring meaningful consideration of a project until after it is completed.

cluding that the Project would "enhance overall natural gas supply security and affordability in the" St. Louis region by diversifying the region's natural-gas supply, C.A. JA109, "eliminate [Spire Missouri's] current reliance on propane facilities" during periods of peak demand, C.A. JA110, and "provide natural gas transportation infrastructure" that would "support potential growth in demand for natural gas in the industrial and power generation sectors," should such growth occur, C.A. JA111. These are all valid indicators of need under the FERC policy that governs this proceeding. *See* FERC Certificate Policy Statement, 88 FERC ¶ 61,227, ¶ 61,748 (Sept. 15, 1999) (evidence of need for a pipeline can include "eliminating bottlenecks," providing "access to new supplies," "lower[ing] costs to consumers, providing new interconnects that improve the interstate grid," providing "competitive alternatives," and "increasing [system] reliability"). It would be inequitable to require Spire STL, Spire Missouri, and the residents and businesses of the St. Louis region to bear the brunt of FERC's decision to rely instead on the precedent agreement in issuing its Permanent Certificate Order.

Second, EDF has never disputed—and, in fact, has conceded—that a shutdown resulting from the vacatur of FERC's Permanent Certificate Order could have dire consequences this winter for the St. Louis-area households, businesses, schools, hospitals, and nursing homes that rely on the Project for heat during St. Louis's harsh winters. *See* EDF Reply Comments at 1, Spire STL Pipeline LLC, FERC Dkt. No. CP17-40-007 (filed Oct. 5, 2021) ("A temporary emergency certificate to permit Spire STL pipeline's operation during the 2021-2022 winter season is appropriate to prevent disruption to natural gas service to St. Louis residents during that period."). And *third*, EDF has

never identified any harm that would result from permitting the Project to remain operational during the remand proceedings.

The relevant equitable considerations therefore weigh unanimously and unequivocally in favor of remand without vacatur. The D.C. Circuit's contrary decision—based on its powerful presumption in favor of vacatur—eschewed the appropriate fact-specific equitable analysis and establishes a pernicious precedent for future cases in which vacatur could similarly result in dangerous, and potentially fatal, consequences.

III. THE QUESTION PRESENTED HAS EXTRAORDINARILY SIGNIFICANT LEGAL AND PRACTICAL CONSEQUENCES.

The resolution of the question presented has great importance for litigants challenging federal agency action, for administrative agencies defending their decisionmaking, and for the hundreds of thousands of St. Louis-area households and businesses that rely on Spire Missouri to supply them with essential natural gas.

The question of when to remand without vacatur arises every time an agency action is held to be invalid. The consequences for the parties and the public of a court's choice between vacatur and remand without vacatur can be profound. If the court decides to vacate, then the agency action is nullified immediately; if the court decides to remand without vacatur, then the agency action remains in force during proceedings on remand. That weighty remedial determination must be governed by a carefully calibrated standard that strikes the appropriate balance be-

tween providing relief to aggrieved parties and preserving the status quo to respect reliance interests and shield innocent nonparties from the consequences of vacatur.

The frequency with which this remedial question arises and its far-reaching consequences make it arguably the most significant question of administrative law that this Court has not addressed in the more than seven decades since the APA was enacted. And, in the absence of authoritative guidance from this Court, the lower courts have developed conflicting standards that generate irreconcilable remedial outcomes in indistinguishable cases. *See supra* Part I.

Litigants challenging agency action—as well as agencies defending their decisions and intervenors supporting agencies' decisionmaking—need a uniform, nationwide remedial standard that accurately distinguishes between those cases in which remand without vacatur is warranted pending further agency proceedings and those cases in which withholding vacatur would improperly deny the prevailing litigant a remedy to which it is entitled. That question is ripe for this Court's review. *See*, *e.g.*, Richard J. Pierce, Jr., Administrative Law Treatise § 7.13, at 693 (5th ed. 2010) ("[T]he Supreme Court needs to resolve the growing dispute about the range of remedies available to a reviewing court when the court detects one or more flaws or gaps in an agency's reasoning in support of a rule.").

The fact that it is the D.C. Circuit that has created an overriding presumption in favor of vacatur—which applies even where an agency's errors can be corrected on remand and in the face of potentially massive disruption—compounds the significance of the circuit

split on the question presented because the D.C. Circuit handles a substantial volume of administrative-law cases and plays an outsized role in formulating the standards that govern judicial review of agency action. *See* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 376–77 (2006). Not only will D.C. Circuit litigants be required to grapple with the court's presumption in favor of vacatur each time the court invalidates agency action, but other circuits that have not yet developed firm approaches may ultimately gravitate toward the D.C. Circuit's flawed approach (as many did when initially looking to the D.C. Circuit's *Allied-Signal* test for guidance).

The application of the D.C. Circuit's presumption in favor of vacatur has significant practical consequences. Whether a court vacates an invalid agency authorization is of immense importance to companies (such as Spire STL) that have invested significant resources, often hundreds of millions of dollars, to construct infrastructure projects in reliance on regulatory approvals, and to companies (such as Spire Missouri) that have organized their business affairs around the new infrastructure. The D.C. Circuit's flawed vacatur analysis enables litigants to use an agency's error in addressing a private party's application to shut down even manifestly critical infrastructure projects that have engendered massive reliance interests and that are supported by record evidence not relied upon by the agency.

Moreover, it is the customers that depend on newly built infrastructure that often have the most to lose from vacatur. Here, the Project provides hundreds of thousands of St. Louis-area households and

businesses with access to a new, reliable source of natural gas. Pet. App. 377a–378a. In the initial proceeding before FERC, Spire STL explained that because St. Louis was then almost entirely dependent on gas from Texas and surrounding areas, it was subject to reliability concerns from "regional events such as supply freeze offs . . . or extreme cold . . . weather [that could] create significant regional price spikes," which the Project's alternative supply would prevent. C.A. JA833. Those expressly anticipated benefits were powerfully demonstrated during Winter Storm Uri in February 2021, when St. Louis experienced none of the life-threatening natural-gas shortages and skyrocketing prices that plagued Texas and other areas of the country that lacked access to the natural gas from Appalachia and the Rockies supplied by the Project. Pet. App. 392a–394a.

During that severe winter storm, freezing weather in Texas disrupted gas supplies and substantially increased their cost; in response, Texas banned the out-of-state shipment of gas that could be used for Texas power generation. *See* Cayla Harris, *Gov. Greg Abbott Mandates Natural Gas Producers Keep Supply in Texas Until Sunday*, Houston Chronicle (Feb. 17, 2021), https://tinyurl.com/3brwnanr. As a result, Kansas City—only 200 miles away from St. Louis but without access to the Project and the diversified gas sources it supplied—experienced skyrocketing prices. *See* Allison Kite, *After Winter Cold Snap Drove Up Natural Gas Prices, Utilities Grapple with Who Should Pay*, KTTN.com (June 17, 2021), https://tinyurl.com/299nmuak. Meanwhile, St. Louis's reduced reliance on natural gas from Texas and surrounding areas—as a result of its access to the natural gas supplied by the Project—protected it from the

shortages, price spikes, and humanitarian emergencies that plagued other parts of the country. Spire Missouri estimates that, without the Project, up to 133,000 homes and businesses in the St. Louis region would have lost service in February 2021, or, alternatively, that total gas costs for St. Louis-area customers would have increased by up to $300 million, assuming Spire Missouri would even have been able to serve all of its customers during the storm. Pet. App. 392a.

Although FERC has provided temporary relief to Spire STL until December 13, it has not set a timetable for further action on either the application for a full temporary certificate or the proceedings on remand from the D.C. Circuit's ruling, and Spire STL will be required immediately to shut down the Project in the event that temporary relief expires for any reason. Pet. App. 361a. Further, temporary FERC relief through the winter of 2021-22 may not address the needs of the St. Louis region during the winter of 2022-23 and beyond. The D.C. Circuit's ruling could therefore deprive St. Louis residents of the substantial benefits of the Project during the pendency of remand proceedings and leave them at risk of prolonged natural-gas outages during St. Louis's dangerous winter months. *Id.* at 386a–392a; *see also* Order Addressing Arguments Raised on Rehearing, Granting Clarification, and Denying Stay, Spire STL Pipeline LLC, 177 FERC ¶ 61,114, at 1 ¶¶ 2, 4 (Nov. 18, 2021) (Christie, Comm'r, concurring) (concurring in denial of request to stay the Temporary Certificate Order because "the people of the St. Louis area are facing a genuine emergency as they head into this winter" and the order was necessary "to stave off the very real potential for harm to life, health, and property").

Those disruptive consequences demonstrate why remand without vacatur was the appropriate remedy in this case and underscore the urgent need for review by this Court.

CONCLUSION

The D.C. Circuit's decision to vacate FERC's Permanent Certificate Order deepens the circuits' disagreement about the remedial standard to apply in cases challenging federal agency action, ignores the compelling considerations weighing in favor of remand without vacatur in this case, and imperils the supply of natural gas to hundreds of thousands of households and businesses in the St. Louis region. The Court should grant the petition for a writ of certiorari or, in the alternative, hold this petition pending disposition of the petition for a writ of certiorari in *Dakota Access, LLC v. Standing Rock Sioux Tribe*, No. 21-560.

Respectfully submitted.

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December 3, 2021