No. 20-70272
(Consolidated with No. 20-70464)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR COMMUNITY ACTION AND
ENVIRONMENTAL JUSTICE, et al.,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, et al.,
Respondents.

On Petitions for Review of an Order of the
Federal Aviation Administration

FEDERAL RESPONDENTS' RESPONSE TO PETITIONS FOR REHEARING EN BANC

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INTRODUCTION

The duties of the Federal Aviation Administration (FAA) include reviewing planned modifications of airport layout plans. Intervenor San Bernardino International Airport Authority (Airport Authority) requested modification of the layout plan at the San Bernardino International Airport (Airport) to allow construction of the Eastgate Air Cargo Facility (the Project) to address unmet market demand. FAA reviewed the Airport Authority's plan, including under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., prepared an Environmental Assessment (EA), and issued a "Finding of No Significant Impact and Record of Decision" (ROD).

Petitioners CCA[1] and the State of California challenged the issuance of the ROD. A divided panel found that FAA fulfilled its NEPA obligations through the EA—which is 223 pages long with more than 3,800 pages of appendices, and contains detailed responses to more than 800 comments, including Petitioners'. FAA thoroughly evaluated the potential environmental impacts of the Project, including on surrounding environmental justice communities. The panel majority explored each point Petitioners raised, dug deep into the administrative record, applied

[1] We use the panel's terminology in referring to Petitioners Center for Community Action and Environmental Justice, Sierra Club, Teamsters Local 1932, Shana Saters, and Martha Romero, collectively, as CCA.

established circuit precedent, and ultimately rejected Petitioners' allegations as unfounded.

Petitioners now seek to have the case reheard en banc. But as explained below, the panel appropriately applied this Court's precedent and correctly concluded that FAA's analysis was not arbitrary or capricious. Rehearing en banc is not "necessary to secure or maintain uniformity of the court's decisions" because the panel's careful application of this Court's NEPA case law did not alter or deviate from existing precedent. Fed. R. App. P. 35. The panel concluded that FAA was not arbitrary or capricious in finding the environmental impacts of building a cargo facility at this existing airport—including environmental justice impacts—were not significant within the meaning of NEPA. That conclusion adhered to the Court's NEPA precedent, and this case does not present any "question of exceptional importance" warranting rehearing by the full Court. *Id*.

This Court should decline to reconsider the panel's thoughtful and thorough work. The petitions for rehearing en banc should be denied.

STATEMENT OF THE CASE

A. Statutory and regulatory background

"NEPA does not provide substantive protections, only procedural ones—it exists to ensure a process." *Conservation Congress v. Finley*, 774 F.3d 611, 615 (9th Cir. 2014) (internal quotation marks omitted). In reviewing an agency's compliance,

courts "must avoid passing judgment on the substance of an agency's decision." *Westlands Water District v. DOI*, 376 F.3d 853, 865 (9th Cir. 2004).

The level of analysis that NEPA requires differs based on the proposed action's effects. NEPA requires a comprehensive Environmental Impact Statement (EIS) only for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.3 (2019).[2] To determine whether a proposed action will have significant effects, an agency may prepare an EA—a "concise" document that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. § 1501.4; *id.* § 1508.9(a).

If based on its EA the agency finds that the proposed action will not significantly affect the quality of the human environment, it may issue a "Finding of No Significant Impact" (FONSI) rather than prepare an EIS. *Id.* § 1501.4(e). A FONSI "briefly present[s] the reasons why an action . . . will not have a significant effect on the human environment." 40 C.F.R. § 1508.13. The EA "need not conform to all the requirements of an EIS, [but] it must be sufficient to establish the

[2] The Council on Environmental Quality recently updated the NEPA regulations. *See* 85 Fed. Reg. 43,304 (July 16, 2020). This response cites the prior regulations in effect when FAA prepared the EA at issue. *Cf.* 40 C.F.R. § 1506.13 (2020) ("An agency may apply the [new regulations] to ongoing activities and environmental documents begun before September 14, 2020.").

reasonableness of the decision not to prepare an EIS." *California Trout v. FERC*, 572 F.3d 1003, 1016 (9th Cir. 2009).

The EA must also "include an analysis of the cumulative impacts of a project," *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895 (9th Cir. 2002), which are impacts that could "result[] from the incremental impact of the action when added to other past, present and reasonably foreseeable actions," *NRDC v. U.S. Forest Service*, 421 F.3d 797, 814 (9th Cir. 2005) (internal quotation marks omitted); *see also* 40 C.F.R. § 1508.7 (defining cumulative impacts). An agency must provide "some quantified or detailed information" to support its cumulative impacts analysis, *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379 (9th Cir. 1998), but agencies may exercise their expertise when defining an appropriate scope, *Kleppe v. Sierra Club*, 427 U.S. 390, 413-14 (1976).

Separately, under the Clean Air Act, the Environmental Protection Agency (EPA) establishes national ambient air quality standards (NAAQS) for certain pollutants, including ground-level ozone. *See* 42 U.S.C. § 7409. EPA then designates areas that do not meet the NAAQS as "nonattainment" areas. *Id.* § 7407(d)(1)(A)(i).

Each state must adopt and submit to EPA a State Implementation Plan (SIP) that provides for the implementation, maintenance, and enforcement of the NAAQS. *Id.* § 7410(a)(1). A SIP must specify emissions limits and other measures to attain and maintain the NAAQS. *Id.* § 7410(a)(2)(A)-(M). In California, local air districts

develop air quality management plans that collectively compose the SIP. The South Coast Air Basin—where the Project is located—is governed by the plan developed by the South Coast Air Quality Management District (SCAQMD). 1-ER-76.

The Clean Air Act prohibits federal agencies from "approv[ing] any activity which does not conform to [a state] implementation plan after it has been approved or promulgated." *Id.* § 7506(c)(1). "[C]onformity" to a SIP generally means that anticipated emissions from a proposed activity will not frustrate an implementation plan's purpose of attaining the NAAQS. *Id.* § 7506(c)(1)(A)-(B).

B. Factual background

The Airport used to be the Norton Air Force base. 1-ER-31. In 1994, it was transferred to the Airport Authority, which has operated it as a general aviation airport (including large commercial air cargo aircraft). *Id*. Demand for cargo facilities in Southern California has swelled, resulting in a market need for larger, centralized, multi-functional air- and ground-sorting facilities. 1-ER-49. In 2018, the Airport Authority agreed to develop the Project to address this demand. 1-ER-44. The air cargo facility has been operating since February 2021. The facility was projected to initially employ 1,700 workers, increasing to around 3,900 workers by 2024. 1-ER-208.

The Airport Authority sought FAA's approval of the part of the airport layout plan that depicts the proposed improvements, triggering FAA's NEPA obligations.

1-ER-40. FAA opened its draft EA to public comment for 47 days and held a public workshop and hearing. FAASER-1-5; *see also* 3-ER-612-787 (excerpts from draft EA). After responding to more than 800 comments on the draft EA, FAA adopted the final EA and issued a FONSI and ROD in December 2019. 1-ER-29-30.

In connection with FAA's Clean Air Act analysis, the Airport Authority asked SCAQMD to examine the Project's projected emissions. In April 2019, SCAQMD concluded that the Project's emissions fell within the air quality management plan's budget, and that the Project would not cause any NAAQS violations or delay the timely attainment of those standards. 2-ER-310 (SCAQMD letter stating that "the Proposed Project emissions are within the General Conformity Budget; therefore, the action would conform to the SIP and would not jeopardize the timely attainment of the NAAQS"). FAA relied on SCAQMD's letter in its NEPA analysis, and the letter was part of the Draft EA and available for public comment. 1-ER-145.

The EA analyzed and disclosed the potential environmental impacts of the Project, including on air quality, environmental justice, and children's health. 1-ER-52-232. FAA also explicitly considered the socioeconomic context of the Project. 1-ER-214. The EA's *Environmental Justice* section explicitly noted the population around the Project is lower-income and has more minority residents than San Bernardino County as a whole. 1-ER-20.

Ultimately, with planned mitigation measures the Project "would not result in surface traffic impacts that would create disproportionately high and adverse human health or environmental impacts on minority or low-income populations." 1-ER-26. And while FAA acknowledged that more than *de minimis* levels of certain air pollutant emissions would occur, 1-ER-20, because those emissions are accounted for within the conformity budget for the area, the "Project would not result in air pollutant emissions that would create disproportionately high and adverse human health or environmental impacts on minority or low-income populations." 1-ER-26. As the Project "meets the purpose and need for the proposed action, would not cause any significant environmental impacts that cannot be mitigated, and is the most reasonable, feasible and prudent alternative," 1-ER-29, 25, FAA approved it. 1-ER-28.

CCA and California petitioned for review of FAA's decision. A divided panel of this Court denied the consolidated petitions, finding that—under this Court's existing NEPA precedent—FAA had not acted arbitrarily or capriciously. The panel held that FAA appropriately analyzed cumulative impacts, Op. 21, that Petitioners failed to raise a substantial question as to whether the Project required an EIS and failed to articulate a potential violation of law, Op. 27, and that FAA reasonably calculated truck trips when assessing air quality effects and any different numbers

appearing in other parts of the record were sufficiently explained or inconsequential, Op. 31. Petitions for rehearing en banc followed.

ARGUMENT

I. This case does not meet the standards for rehearing en banc.

The standard for rehearing a case en banc is an "exacting" one. *Kipp v. Davis*, 986 F.3d 1281, 1282 (9th Cir. 2021) (Paez, J., concurring in denial of rehearing en banc). "The criteria for taking a case en banc are clear and well-established—either necessity 'to secure or maintain uniformity of the court's *decisions*,' or to decide 'a question of exceptional importance.'" *United States v. Burdeau*, 180 F.3d 1091, 1092 (9th Cir. 1999) (Tashima, J., concurring in denial of rehearing en banc) (quoting Fed. R. App. P. 35(a)(1) and (2) (emphasis in original)). The function of the en banc court is "not to maintain uniformity of language or thought by three judge panels, but to maintain uniformity of decisions." *Id*.

Here, in assessing a factually complex case, a panel of this Court considered hundreds of pages of analysis from FAA, applied settled Circuit doctrine, and ultimately determined that the agency did not act arbitrarily or capriciously in issuing a ROD and FONSI.

Petitioners allege that the panel did not follow Circuit precedent, particularly as to the burden of proof petitioners must satisfy and the amount of information agencies must provide. But Petitioners do not raise a credible argument that the panel

incorrectly applied Circuit precedent. As this case does not meet the "exacting" standard for en banc review, the petitions should be denied.

II. The panel appropriately applied this Court's NEPA precedents to FAA's analysis.

Petitioners largely contend that the panel's decision heightened the burden of proof required for NEPA claims, making it harder for petitioners to succeed on such challenges. Cal. Pet. 9; CCA Pet. 3.[3] This is incorrect. The panel applied the same legal standard that Petitioners contend is the correct one, holding "[i]t is enough for the plaintiff to raise substantial questions whether a project may have a significant effect' on the environment." Op. 12 (quoting one of the cases cited by Petitioners for this proposition, *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (simplified)). But Petitioners must still at least *raise* a substantial question. The panel correctly determined that Petitioners failed to meet this threshold. That issue is unworthy of en banc review.

A. The panel applied this Court's precedent to FAA's cumulative impacts analysis.

Petitioners allege that the panel has incorrectly applied this Court's cumulative impacts case law. Cal. Pet. 15; CCA Pet. 15, 16, 20-22. This is incorrect.

[3] The amicus brief submitted by Communities for a Better Environment asserts a similar contention, and is also incorrect for the reasons stated here. Amicus 13.

First, Petitioners allege the panel created a new, heightened burden of proof requirement by demanding Petitioners identify "specific cumulative impacts that the agency did not address" and support those assertions "with record evidence." Cal. Pet. 15; *see also* CCA Pet. 15. Not so. Under this Court's precedent, a NEPA petitioner must "alleg[e] facts which, if true, show that the proposed project may significantly degrade some human environmental factor." *Found. for N. Am. Wild Sheep v. USDA*, 681 F.2d 1172, 1178 (9th Cir. 1982).

That is all the panel required here. This Court, in its extensive NEPA case law, has consistently sided with Plaintiffs who have *identified* specific potential cumulative impacts unaddressed by the agency. *See* Op. 24 (collecting cases in which petitioners identified specific issues that agencies failed to include in cumulative impacts analysis).

Here, FAA considered 26 past, present and reasonably foreseeable projects that could have cumulative impacts within the Project's broad General Study Area. 1-ER-121-24. Petitioners identified an additional 80-plus projects *outside* the General Study Area they asserted should have been considered in the traffic impact analysis. But as the panel noted, FAA *did* consider those traffic impacts. Op. 55-56; 2-ER-51. Then,

> Seemingly conceding this point, the CCA pivots to its argument that the FAA should have considered more than just the traffic effects of the 80-plus projects. But the CCA's failure to identify *any other* specific

> cumulative impact that the FAA failed to consider is what distinguishes this case from the cases on which the CCA relies.

Op. 23 (emphasis added). The "*any other*" language is crucial because it is the central thrust of the panel's conclusion on this issue—that this Circuit's precedent requires petitioners to, at a minimum, "alleg[e] facts which, if true," would mean the agency's analysis was insufficient. *Wild Sheep*, 681 F.2d at 1178. CCA failed to identify emissions as a potential cumulative impact of its 80-plus projects, because, the panel held, CCA's allegation was concerned with *traffic*. Op. 55-56.

At bottom, an allegation that FAA failed to consider "all of the cumulative impacts" is simply an accusation that the analysis was insufficient. CCA Pet. 16; CCA Reply Br. 22-24. And this Court has *not* held that a petitioner can "summarily conclude[]" that a better or more thorough analysis was necessary. Op. 24. The panel concluded that FAA considered the cumulative impact on traffic of the projects Petitioners now identify, and Petitioners do not challenge that holding. CCA's failure to articulate specific, potential impacts—other than traffic volume—of the 80-plus additional projects it claims FAA did not address lends credibility to the panel's determination that none exist.

Second, CCA alleges that the panel "import[ed] [] a separate statutory standard from California law into settled NEPA law." CCA Pet. 20-22. CCA's argument again misconstrues the panel's opinion. The panel did point to a *California* Environmental Quality Act (CEQA) report in its opinion. But it only did so because

that was the only evidence that *CCA* had pointed to in support of its suggestion that the other projects might have a cumulative impact on air emissions. Op. 24. The CEQA Report had concluded that the 80-plus projects CCA had identified "would not be considered to have a significant, adverse air quality impact" under California standards. 4-ER-914; Op. 25. Under these circumstances, it was reasonable for the panel to cite to the same California report to which CCA had cited in evaluating whether CCA had provided *any* plausible evidence to support its allegations. Rather than displacing a NEPA standard with a CEQA one, the panel simply noted that the evidence that CCA had provided did not support its conclusion, a fact-bound determination not worthy of en banc review.

Third, California argues that it did not need to specifically allege that FAA overlooked the effects of the 80-plus projects on emissions, alleging that under Circuit law emissions from the projects are so self-evident that they must be considered even if no commenter raises the issue. Cal. Pet. 11. California is correct that NEPA does not require a petitioner to specify a "particular *project*" that, along with the proposed project, would cumulatively impact that environment. Cal. Pet. 10 (quoting *Te-Moak Tribe v. DOI*, 608 F.3d 592, 605 (9th Cir. 2010) (emphasis added)). But the panel here held that Petitioners failed to specify an *impact* that was not sufficiently addressed, not a project.

California points to case law regarding a "so obvious" exception, Cal. Pet. 9-11; that is, "a flaw 'so obvious' that there was no need for petitioners to point it out" to preserve a NEPA challenge. *Barnes v. DOT*, 655 F.3d 1124, 1134 (9th Cir. 2011). But the "so obvious" doctrine applies to allegations of a different scope. For example, in *Barnes*, the agency glossed over whether increasing capacity at an airport could lead to increased demand, thus having a significant environmental impact. Here, the panel found that FAA had properly considered not just the impacts of the Project itself (conducting a rigorous evaluation of the Project's emissions and impact on air quality) but of 26 more projects within the General Study Area, as well as the traffic impacts of the 80-plus other projects Petitioners identified. Op. 23-26.

In sum, nothing in the panel's decision alters this Circuit's standard for evaluating cumulative impacts. The panel explicitly noted both the importance of cumulative impacts, and that an agency's assessment of those impacts must provide a "useful analysis" beyond mere general statements. Op. 56. Because nothing in the panel's factually-intensive evaluation of the EA contradicted this long-established standard, rehearing en banc is not warranted.

B. The panel applied this Court's precedent in holding that Petitioners failed to articulate a substantial question that the Project may violate federal ozone standards.

CCA alleges that FAA failed to evaluate potential violations of federal ozone standards. CCA Pet. 13-14. It claims, under *Wild Sheep*, that its allegations about

potential violations of NAAQS for ozone raised a substantial question warranting an EIS and since SCAQMD's evaluation established the Project's compliance with only the 1997 8-hour federal standard, it was not a reasonable basis for FAA to address the 2008 federal ozone standard. *Id*. *Wild Sheep* requires a petitioner to "alleg[e] facts which, if true, show that the proposed project may significantly degrade some human environmental factor." 681 F.2d at 1178. Because FAA did consider the Project's impact on ozone emissions, and it reasonably relied on SCAQMD's determinations on whether the Project risked violating the NAAQS in deciding that no EIS was necessary, CCA failed to allege a question FAA had not already addressed.[4]

This area is currently not in attainment for ozone under the NAAQS, but that does not mean that federal agencies must disapprove any project that increases ozone. Rather, under the SIP, SCAQMD has a plan to bring the area into attainment for ozone. SCAQMD concluded that the Project fell within in its emissions budget, and approved FAA's air quality model: "[B]ased on our evaluation the proposed project will conform to the [Air Quality Management Plan (AQMP)] (i.e. project emissions are within AQMP budgets) and is not expected to result in any new or

[4] The panel also addressed FAA's consideration of state air quality standards, *see* Op. 37-38, which Petitioners do not dispute here.

additional violations of the NAAQS or impede the projected attainment of the standards." 2-ER-310.

CCA does not argue that SCAQMD erred, but now claims that the panel misinterpreted the relationship between the 2012 Air Quality Management Plan and the supposedly unconsidered 2008 federal ozone standard. CCA Pet. 14 n.7. But the 2012 AQMP in fact incorporates the 2008 standard; SCAQMD projected attainment of the 2008 standard by July 20, 2032, and SCAQMD also confirmed that Project emissions will not cause any NAAQS violations and will not impede timely attainment of those standards. FAASER-20. FAA's obligation was to consider whether the Project would interfere with attainment of the 2008 ozone standard. Even assuming arguendo that the panel misstated the relationship between the 2012 Plan and 2008 standard, that minor, fact-specific error does not undermine the correctness of the panel's ultimate conclusion, and does not warrant rehearing en banc.

C. The panel applied this Court's precedent to FAA's analysis of truck trips.

California questions the panel's treatment of FAA's truck trip analysis. First, it asserts that FAA's numbers were internally conflicting, and that FAA failed to show its work. Cal. Pet. 15-16. Second, it asserts that FAA unreasonably failed to explain why its calculations on this issue differed from those in California's CEQA

Report. Cal. Pet. 2-3, 8. The panel addressed both arguments in accordance with Circuit precedent.

First, this Court noted in *Bark v. U.S. Forest Service* that an agency must provide some quantified or detailed information to support its analysis. 958 F.3d 865, 869 (9th Cir. 2020). Contrary to Petitioners' claim that the panel misapplied precedent, the panel decision, in painstaking detail, considered FAA's analysis of truck trips. Op. 31-36. Because FAA did not merely make conclusory statements about truck trips, and instead explained the different uses of truck trip calculations within its analysis, the panel concluded that FAA had not acted arbitrarily or capriciously.

Petitioners fault the panel for not crediting their allegations that FAA inexplicably reduced the truck trip numbers in its analysis and that this unexplained reduction was significant. CCA Pet. 17; Cal. Pet. 12-13. Instead, as is fitting for a complex analysis, FAA used different sets of relevant data to evaluate different impacts. FAA analyzed truck trips both to calculate emissions from trucks and to calculate traffic impacts. For the emissions calculation, FAA used actual truck trips. For the traffic calculation, FAA used different numbers based on equating truck trips to passenger car trips (an increased figure). That is why truck trip figures vary depending on the context for which FAA was evaluating Project impacts.

While Petitioners assumed that FAA's use of "192 daily truck trips" and "3,823 daily truck trips" referenced the same, somehow incorrectly adjusted, statistic, the panel detailed how the two numbers arose from different calculations in different contexts. Op. 36. Because the numbers are not analogous in that they basically used different units of measurement, it was Petitioners' burden to articulate why the difference was significant.

To be clear, FAA has acknowledged that it reported an incorrect truck trip number three times within the extensive EA process. FAA Brief 56. The Traffic Impact Analysis in which FAA actually calculated traffic impacts contains accurate figures, as did the emissions model. FAASER-35-36. But in two responses to comments in an EA appendix and in a spreadsheet, FAA mentioned "3,823 daily truck trips," referencing an inflated number and incorrectly labeling it daily truck trips rather than passenger car equivalents. These errors occurred in FAA's discussion of traffic impacts, not in its emissions modeling or its discussion of emissions impacts. 1-ER-133. Any small errors in FAA's analysis were insufficient to warrant a finding by the panel that the agency had acted arbitrarily and capriciously, and certainly do not warrant en banc review.

Second, Petitioners allege that the panel unreasonably required them to do more than just point out an inconsistency in FAA's calculations. Cal. Pet. 14. But what the panel held was *not* that petitioners must do more than point out an

inconsistency, but that what Petitioners here are concerned with was not, in fact, an inconsistency requiring explanation. Op. 33.

As the panel decision extensively discussed, Petitioners asserted without support "that the EA had to use the same number of truck trips that the CEQA analysis used, or that the FAA was required to explain away this difference." Op. 31. The panel conducted a detailed, record-based analysis, looking at the information provided by both FAA and the CEQA Report. In doing so, the panel noted that the CEQA Report did not provide a rationale for its conclusion. Op. 33. And so the panel reasonably concluded that FAA did not have to explain why CEQA's numbers differed from its own, when the CEQA Report itself provided no such explanation and when FAA did not prepare, approve, or otherwise have any involvement with the CEQA Report. *Id.*

Ultimately, the panel's decision on this fact-bound issue was correct and does not warrant rehearing en banc.

CONCLUSION

The petitions for rehearing en banc should be denied.

Respectfully submitted,

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Certificate of Compliance

I certify that pursuant to Circuit Rule 35-4 and 40-1, the above response to the petitions for rehearing en banc is prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and contains 4056 words.

Signature s/ Katelin Shugart-Schmidt

Date March 10, 2022

Certificate of Service

I certify that on March 10, 2022, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature s/ Katelin Shugart-Schmidt

Date March 10, 2022