AUG 15 2007

No. 06-1248

IN THE

Supreme Court of the United States

COLISEUM SQUARE ASSOCIATION, ET AL.,
Petitioners,

v.

ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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Our opening petition describes a long-standing circuit court conflict on the standard governing an agency determination whether or not to conduct an environmental impact statement ("EIS") as required by the National Environmental Policy Act ("NEPA"). In their respective briefs, federal and state respondents attempt to minimize the circuit court disagreement by changing the question presented, misreading the law of two circuits, and obscuring the reasoning of the court below. In the end though, respondents cannot hide the significant and well-known circuit court discord on the question, a question well-presented by this case.

Certiorari is warranted.

I. THE CIRCUITS ARE DIVIDED OVER WHETHER AN AGENCY MUST CONSIDER A PROJECT'S POTENTIAL EFFECTS BEFORE DECLINING TO PREPARE AN EIS

1. Our petition describes (at 13-18) the circuit court disagreement about whether or not an agency must consider potential impacts of a project when declining to conduct an EIS. The federal and state respondents attempt to distract attention from the circuit court disagreement by making an irrelevant observation, pointing out that the circuits all agree that "arbitrary and capricious" is the applicable standard. (HUD Br. at 10; HANO Br. at 6.) Of course, all the circuits formally apply the arbitrary and capricious standard because this Court mandated that standard in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). The appellate courts uniform and mechanical recitation of the arbitrary and capricious standard of review is unexceptional. But the question presented by this petition asks the Court to resolve appellate discord that has developed after *Marsh* regarding the *meaning* of the arbitrary and capricious standard. Specifically, the Court is invited to resolve whether an agency

acts arbitrarily and capriciously when it makes a finding of no significant impact ("FONSI") – and thus avoids having to conduct an EIS – without considering potential impacts.[1] As to the circuit confusion on that question, the courts' uniform statements that arbitrary and capricious review is the relevant overarching standard is beside the point.

Indeed, parsing the careful language of expert Supreme Court pleadings, both the U.S. Solicitor General and private appellate counsel for HANO effectively concede circuit confusion on this issue. The Solicitor General nowhere includes his typical claim of "no conflict" in the courts of appeals, *c.f., e.g.*, Br. For United States In Opp'n, *Cuellar v. United States*, No. 06-1456 at 12-18 (August 3, 2007) ("there is no conflict in the courts of appeals on this issue"), instead arguing there is not "'pervasive'" disagreement. (HUD Br. at 9-10.) The Solicitor General also obliquely hints (at 10) at the circuit court disagreement by acknowledging that "several circuits" ask whether there is a "substantial possibility" of significant environmental effects. For its part, HANO hedges, asserting that there is no "significant split" (at 5), "not a clear conflict" (at 4), and no "true split" (at 20), but, like the federal government, never asserts no circuit court disagreement. Though the writing is careful, the message is clear: there is meaningful and undeniable disagreement among the circuits on the question presented.

2. After implicitly conceding the split, respondents attempt to harmonize the divergent case law. As explained in

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[1] Here, petitioners challenge HUD's conclusion that the St. Thomas Project will not significantly affect the human environment because that conclusion did not include a consideration of potential – as opposed to certain – impacts from the project. We have not argued that HUD is compelled to find that the project *will* significantly affect the human environment (and thus must issue an EIS) on the current record (*cf.* HUD Br. at 8-9; HANO Br. at 22-26); we are challenging the sufficiency of HUD's conclusion that the project will *not* have a significant effect.

the petition (at 13-16), the First, Second, Ninth, Eleventh, and D.C. Circuits do not permit federal agencies to ignore potential impacts when deciding whether to conduct an EIS. Respondents attempt to show that the Third and Tenth Circuits also so hold, but that is wrong. Moreover, as we discuss in Section II, the decision below likewise conflicts with decisions from the First, Second, Ninth, Eleventh, and D.C. Circuits.

The holding of *Society Hill Towers Owners' Association v. Rendell*, 210 F.3d 168 (3d Cir. 2000), is plain: the City was free to ignore potential impacts – such as a proposed "mega" entertainment complex – and therefore decline to prepare an EIS. In the respondents' view, *Society Hill Towers* turns on *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), a case holding that an agency need not consider "less imminent" projects under a "cumulative impacts" analysis. (*See* HUD Br. at 12 (citing *Kleppe*, 427 U.S. at 410 n.20); HANO Br. at 14-15.) But *Kleppe*'s statement that agencies need not consider the cumulative impacts of "less imminent actions" was directed at potential projects that are "less imminent" as compared to actions that "reach the stage of actual proposals." *Kleppe*, 427 U.S. at 410 n.20. *Society Hill Towers*, by contrast, involved a "*proposed* 'mega' entertainment complex," 210 F.3d at 182 (emphasis added), and thus the "less imminent" rationale of *Kleppe* was inapplicable.[2] Instead,

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[2] Contrary to assertions by HUD and HANO, the *Society Hill Towers* holding that the local agency need not consider potential impacts when declining to conduct an EIS is not at all "tempered" by that court's subsequent holding that the complex was not connected to the hotel and parking complex at issue. (*See* HUD Br. at 12; HANO Br. at 15 n.2.). Under Third Circuit law, "an alternate holding has the same force as a single holding; it is binding precedent." *U.S. ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 440 (3d Cir. 1982). *See also Society Hill Towers*, 210 F.3d at 182 ("Moreover, *even if the Residents could establish that these projects were going to be completed*, that finding would not undermine the City's FONSI because the district court [later] concluded that those pro-

the Third Circuit reasoned that the City could ignore the potential impacts of the entertainment complex because those impacts were not certain to occur.

Similarly, respondents misconstrue the Tenth Circuit's decision in *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257 (10th Cir. 2004). Respondents contend that *Greater Yellowstone* turned on the adequacy of the mitigation measures, and not on the lack of certainty as to future effects of the plan. (*See* HUD Br. at 13; HANO Br. at 17.) Neither the Tenth Circuit nor the agency, however, ever considered whether the mitigation measures would independently reduce the potential impacts; it concluded only that they sufficed "[i]n light of the evident difficulty in predicting" future events. *See Greater Yellowstone*, 359 F.3d at 1276. Thus, the Tenth Circuit permitted the agency to ignore potential effects for purposes of deciding whether to conduct an EIS.

Moreover, as we discuss below, the decision of the court of appeals here aligns the Fifth Circuit with the position of the Third and Tenth Circuits.

3. *Amici* law professors confirm that the First, Second, Ninth, Eleventh, and D.C. Circuits are in conflict with the Third, Fifth, and Tenth Circuits. (Law Prof. Br. at 6-10.) As *amici* note, "the circuits have diverged in the application of [the arbitrary and capricious] standard." (*See id.* at 6 (citing 1 Michael Gerrard, *Environmental Law Practice Guide* § 1.11[5] (2006) ("The plaintiff's burden of proof in showing that an agency's action significantly affects the quality of the human environment differs among the various circuits."), and Korey A. Nelson, Comment, *Judicial Review of Agency Action Under the National Environmental Policy Act: We Can't See The Forest Because There Are Too Many Trees*,

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jects and the hotel/parking garage are not sufficiently interdependent." (emphasis added)).

17 Tul. Envtl. L.J. 177, 198 (2003) (recognizing disagreement among circuits regarding arbitrary and capricious review, that "raises the specter of becoming hopelessly mired in multiple meanings of a single term")).)

II. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT

This case is an ideal vehicle to resolve whether an agency must consider potential impacts of a project when declining to conduct an EIS because that question is outcome determinative. Respondents suggest that the court below did not permit HUD to ignore potential effects, that insufficient funds remain to warrant review, and that the land use decision here is of no consequence. Each of these arguments is based on a misreading of the record.

1. The petition observes that the court posed the standard of judicial review as whether HUD considered effects that "would" occur and proceeded to apply that standard to ignore even likely effects caused by the project. (Pet. at 6-7.) Rather than defend this highly deferential standard, respondents attempt to show that the court applied a more rigorous standard. But the decision below – like the decisions from the Third and Tenth Circuits – permits a federal agency to decline to conduct an EIS after ignoring potential impacts. That holding is squarely inconsistent with those circuits that require agencies to consider potential impacts when deciding whether to conduct at EIS. (Pet. at 6, 9, 16.)[3]

The petition demonstrates that only under the highly deferential "would" standard could the court of appeals possibly affirm the decision below. For example, HUD asserted that

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[3] Moreover, the court of appeals expressly applies a "would" standard. (*See* Pet. App. at 17a.) Respondents suggest that the court is simply stating petitioners' argument, but the substance of the court's decision makes clear that the court is in fact applying a "would" standard.

the project complied with local zoning law without considering the potential impacts of the necessary zoning changes (or acknowledging that changes were required). (*See* Pet. App. at 20a-21a; Pet. at 7-8.) Similarly, HUD did not consider the potential impacts of the project on National Historic Landmarks. (*See* Pet. App. at 40a; Pet. at 23-24.) In the same vein, HUD did not consider the potential impacts of other national retailers following this Wal-Mart SuperCenter into the neighborhood. (*See* Pet. App. at 29a; Pet. at 7-9, 22-23.) The only standard of judicial review that could permit the court of appeals to uphold HUD's no-impact finding here is a highly deferential standard that permits HUD to ignore future effects unless the effects certainly "would" occur.[4]

2. Respondents assert that a ruling in petitioners' favor will have little practical effect because "most of the federal funding that triggered the requirement of environmental review ha[s] been disbursed," and thus petitioners can obtain "no meaningful relief." (HUD Br. at 14; *see also* HANO Br. at 3.) Notably, respondents do not (and cannot) say HUD's oversight of the St. Thomas Project will end when the $25 million grant is spent. In fact, as petitioners explained in the court below (*see* Appellants' C.A. Supp. Letter Br. at 3-5), HUD's oversight obligations will continue throughout the construction of the entire $320 million federal housing project. HUD is responsible for overseeing construction of the entire "housing facility," including its "non-public housing units." 24 C.F.R. § 964.604. Thus, as HUD itself advised HANO in 2000, even privately-funded portions of the St. Thomas development are subject to HUD oversight.

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[4] HANO – but not the federal government – asserts that the First, Second, Ninth, Eleventh, and D.C. Circuits would have affirmed HUD's refusal to conduct an EIS here. (*See* HANO Br. at 18-21.) But HANO cannot point to a single case where any of those Circuits has approved a FONSI issued by an agency that failed to consider so many likely (if not certain) impacts from the project.

Similarly, HUD is obliged to ensure that all parties comply with the Memorandum of Agreement ("MOA"), which HUD relied on when declining to conduct an EIS, even after the last HUD dollar is spent. *See* 36 C.F.R. § 800.6(c) ("The agency official *shall* ensure that the undertaking is *carried out* in accordance with the memorandum of agreement." (emphasis added)). The MOA requires continued monitoring of the entire St. Thomas Project site with respect to, *inter alia*, traffic, drainage, and historical impacts. HUD will thus be involved in reviewing the environmental impacts of the project throughout the construction, and will have input in specific planning proposals.

Moreover, large portions of proposed development at St. Thomas remain at the planning stage, and respondents tellingly fail to contend otherwise. For example, not all aspects of Phases I and II are completed, and workers have not yet broken ground on Phase III.

In view of HUD's ongoing monitoring responsibilities and the amount of building work that remains, the preparation of an EIS, even at this point, could significantly assist HUD in mitigating or eliminating the project's environmental impacts.

3. Finally, we must correct the misrepresentation of the St. Thomas Project that permeates HANO's brief. Contrary to HANO's suggestions (at 1-2), this is not a mixed use project with a small retail "component," but a massive retail project with ever-shrinking housing elements. Nor is the project "wholly separate" or "physically separate" from the Lower Garden District (at 1-2). It is right in the heart of the District, as the map (Pet. App. at 98a) plainly shows. Similarly, HANO's claim that the Wal-Mart and related buildings will "return" the St. Thomas area "to the population density and building style of the rest of the Lower Garden District" is ridiculous. Massive amounts of parking and high-rise

condominiums, for example, were not exactly common in the nineteenth century when the St. Thomas area was planned as a pedestrian-scale neighborhood.[5]

* * *

The standards governing an agency decision whether or not to conduct an EIS are of exceptional importance. As the *amici* law professors explain, the preparation of an EIS is necessary to ensure informed environmental decision-making. (*See* Law Prof. Br. at 10-20.) Moreover, as *amicus* National Trust for Historic Preservation observes, failure to conduct a necessary EIS damages the reasoned decision-making regarding historic preservation mandated by the National Historic Preservation Act. (*See* Nat'l Trust Br. at 9-19). The Solicitor General does not deny the importance of the question presented.[6] Because the circuits are divided on a question of exceptional importance that is well presented by this case, review is warranted.

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[5] Despite HANO's asserted concern for low-income residents of New Orleans following Hurricane Katrina (*see* HANO Br. at 1, 28), U.S. District Judge Peter Beer recently reprimanded HANO for its "self-serving actions" in allocating housing units at the St. Thomas site that were designated for low-income occupants to HANO management – at rents designed for poor renters. (*See* Reply App. at 1ra-3ra.) Although merely approving a consent decree, Judge Beer, a former New Orleans City Councilman, felt compelled to assert that HANO took an "'us first' attitude," creating "an un-level playing field for former St. Thomas residents." (*Id.* at 2ra.)

[6] HANO implies (at 28) that the question presented is unimportant because "an EIS would result simply in more paperwork." NEPA's "paperwork," however, is its core mechanism for protecting the human environment through reasoned environmental decision-making. (*See* Law Prof. Br. at 5 (quoting President Nixon's statement regarding NEPA)).

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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