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.*,

Respondents.

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

BRIEF FOR RESPONDENT HOUSING AUTHORITY OF NEW ORLEANS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Fifth Circuit's decision, upholding the Department of Housing and Urban Development's finding of no significant environmental impact in connection with extending a grant to help finance a public housing and community revitalization project in New Orleans, is a proper application of the arbitrary and capricious standard of review and in accordance with relevant precedent, the National Environmental Policy Act, and regulations promulgated thereunder.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Coliseum Square Association, Inc.; Smart Growth for Louisiana; Louisiana Landmarks Society, Inc.; Historic Magazine Row Association; and The Urban Conservancy, Inc. Respondents are Alphonso Jackson, Secretary of Housing and Urban Development; and the Housing Authority of New Orleans.

Respondent Housing Authority of New Orleans is not a nongovernmental corporation.

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STATUTES AND REGULATORY PROVISIONS

In addition to the statutory provisions and regulations set forth in the Appendix to the Petition, relevant regulatory provisions are included in the Appendix to Respondent Housing Authority of New Orleans' Brief in Opposition at 1a-6a.

COUNTERSTATEMENT OF THE CASE

The Fifth Circuit's opinion below provides a fair and accurate discussion of the facts pertinent to this case. (*See* Pet. App. 6a). Respondent Housing Authority of New Orleans (HANO) offers this Counterstatement of the Case to highlight for the Court certain significant facts that were omitted from or misstated in the Petition.

Petitioners are correct in characterizing the St. Thomas Redevelopment Project (the Project) as a "necessary urban public renewal plan." (Pet. 3). Indeed, the Project avoided significant damage from Hurricane Katrina and already is far along in providing a critical service to present-day New Orleans by replacing an aging, dilapidated, crime-ridden public housing project exhibiting vacancy rates exceeding 50%. The Project will eliminate these problems by providing a mixed use development encompassing low-income and market rate housing, a senior care facility, and a retail component. (*See* Pet. App. 6a-7a). The Project's revitalized mixed use community brings with it upgraded infrastructure and is much more compatible with the surrounding community than was the project it is replacing.

Part of the funding approved for this $320 million Project was a $25 million grant from the HOPE VI program administered by the United States Department of Housing and Urban Development (HUD) to foster innovative and comprehensive approaches to challenges presented by severely distressed public housing. (*See* Pet. App. 7a; Response Brief Filed for Defendant-Appellee The Housing Authority of New Orleans (HANO's Appellate Brief) at 13-14). The HOPE VI grant was but one component among many public and private sources in the financing package supporting this Project. Indeed, this is not a "hijacked" project serving the interests of a developer and big box retailer, as Petitioners suggest. (*See* Pet. 3). Instead, the participation of Wal-Mart and other private interests was and is integral to the financial success of the Project in revitalizing this neighborhood and providing essential housing upgrades in the New Orleans community ravaged elsewhere by recent physical disasters.

Petitioners attempt to highlight the contrast between the Wal-Mart portion of the Project and the residential and light commercial features located along Magazine Street in New Orleans' Lower Garden District as a problematic environmental impact. (*See* Pet. 4-5). However, Petitioners ignore the fact that the Wal-Mart is located in a section of the Lower Garden District wholly separate from the Magazine Street and Coliseum Square areas. Rather than being placed among quaint coffeehouses and bookstores, the Wal-Mart (as well as other parts of the Project Petitioners find objectionable) is physically separate and located along Tchoupitoulas Street, a roadway flanked by warehouses and a retaining wall running alongside the Mississippi River. (*See, e.g.*, Pet. App. 21a,

97a (and accompanying map highlighting the "Project Site")).

It is in this actual physical context that HUD evaluated the Project's impact on an extended area of potential effect, as described by Petitioners. (*See* Pet. 8; *see also* Pet. App. 8a). Specifically, HUD based its Finding of No Significant Impact (FONSI) and its determination not to proceed with an environmental impact statement (EIS) on the itemized evaluation set forth in its environmental assessment (EA). (*See* Pet. App. 9a).

In their continued efforts to revisit HUD's substantive determination, Petitioners introduce in their Petition information of wholly unknown validity which is not part of the administrative record under review in this case. (*See* Pet. 3). They also raise a complaint about HUD's failure to evaluate the impact from an influx of chain stores, a claim that Petitioners have waived because they did not assert it in the district court. Nowhere, however, do Petitioners provide information on any significant impacts that have arisen from the Wal-Mart, which began operating in 2004, or from the significant portions of the Project which have been completed and occupied. (*See* Pet. App. 9a). This is because no impacts contradicting HUD's challenged findings have occurred.

Virtually all of the HOPE VI grant, which constituted the HUD action being challenged by Petitioners in this case, has been disbursed. *See* Federal Defendant-Appellee's Supplemental Letter Brief of Feb. 23, 2006, at 5. In the proceedings below, Petitioners attempted to expand the controversy beyond the federal agency action by seeking an injunction not only compelling HUD to withhold HOPE VI funds until HUD prepared an EIS, but

also to enjoin any construction on the Project regardless of the source of funding. (*See* Pet. 5; Pet. App. 10a, 54a).

ARGUMENT

The decision below upholding HUD's actions under the National Environmental Policy Act (NEPA) was correct. Nevertheless, Petitioners now contend that the Fifth Circuit imposed an improperly deferential standard of review that conflicts with several other courts of appeals by asking whether a significant adverse effect was certain, rather than was likely, to occur. Contrary to Petitioners' contentions, the Fifth Circuit did not evaluate HUD's FONSI on the basis of whether a significant adverse impact was certain to occur. Furthermore, there is not a clear conflict between the courts of appeals in how they review these agency decisions under NEPA. The decision below was correctly grounded in a detailed review of the specific facts of this case, and as such does not present any issues of significance which merit the attention of this Court.

As this Court has settled in a recent unanimous opinion, an agency's decision to issue a FONSI and not to prepare an EIS may be set aside "only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 763 (2004) (quoting the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)). The "arbitrary and capricious" standard of review requires the reviewing court to ask whether a challenger has demonstrated that the agency failed to consider "the relevant factors" and whether the agency committed "a clear error

of judgment." *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). There is no dispute over the propriety of the "arbitrary and capricious" standard.

Petitioners craft their argument by seizing upon distinctions in language from various court opinions in an effort to create the appearance of a conflict where one does not exist. These distinctions do not represent a material difference in how the courts of appeals apply the "arbitrary and capricious" standard of review. First, Petitioners provide a general characterization of the Fifth Circuit's ruling below by focusing selectively on particular snippets of language from that opinion while ignoring other parts of the decision in which the language used is wholly inconsistent with Petitioners' generalizations. Furthermore, the cases Petitioners offer from other courts of appeals as indicative of an incorrect, conflicting standard of review do not ask whether a significant adverse impact certainly will occur before rejecting a FONSI. Instead, these courts and the Fifth Circuit have implemented the "arbitrary and capricious" standard in accordance with the dictates of *Marsh*.

Regardless of whether the Court believes that a significant split exists among the courts of appeals, and that Petitioners' characterization of the appropriate standard of review is the correct standard, application of that standard would not change the result in this instance. Petitioners simply proffered no convincing evidence to show that a significant impact was likely, or that HUD's FONSI, supported by information readily identifiable in the administrative record, was arbitrary, capricious, or not in accord with applicable law and regulations. Instead,

Petitioners rested largely upon their own conclusory assertions. HUD's disbursement of the HOPE VI grant is now nearly complete, the Project itself is well on its way to completion, and the Wal-Mart has been operating for some time. At no point did Petitioners offer evidence sufficient to warrant an injunction preventing these activities from continuing. Preparation of an EIS at this stage would serve no useful purpose under NEPA nor provide any meaningful relief to any injury allegedly sustained due to the challenged HOPE VI funding.

I. PETITIONERS MISCHARACTERIZE THE STANDARD OF REVIEW APPLIED BY THE FIFTH CIRCUIT, WHICH IN FACT FULLY COMPORTS WITH APPLICABLE LAW AND IS NOT PART OF ANY CONFLICT AMONG THE CIRCUITS

A. This Court Has Articulated That The Appropriate Standard For Reviewing An Agency Finding Of No Significant Impact Is Whether The Agency Has Considered The Relevant Factors And Whether The Agency Has Made A Clear Error Of Judgment

There is no dispute that an agency's decision to issue a FONSI and not to prepare an EIS may be set aside "only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Public Citizen*, 541 U.S. at 763 (citing 5 U.S.C. § 706(2)(A); *Marsh*, 490 U.S. at 375-76; *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)).[1] As this Court described in *Marsh*, under

[1] Petitioners cite Justice White's dissent from the Court's denial of a petition for writ of certiorari in *Gee v. Boyd*, 471 U.S. 1058, 1059

(Continued on following page)

the "arbitrary and capricious" standard, "the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" 490 U.S. at 378 (quoting *Citizens to Preserve Overton Park*, 401 U.S. at 416). That is, evaluating whether an agency action is "arbitrary and capricious" requires a reviewing court to ask (1) whether the agency considered the relevant *potential* impacts of the proposed action, and (2) whether the agency made a clear error of judgment regarding the effects of the proposed action on the quality of the human environment. "This inquiry must 'be searching and careful,' but 'the ultimate standard of review is a narrow one.'" *Id.* It is this standard of review that the courts of appeals, including the Fifth Circuit, have faithfully implemented.

B. The Applicable Regulations Require That An Action Will Not Have A Significant Impact On The Quality Of The Human Environment To Support A FONSI And A Decision Not To Prepare An EIS

Pursuant to NEPA, the Council on Environmental Quality (CEQ) has promulgated regulations that govern a federal agency's compliance with the statute. *See* 40 C.F.R. §§ 1500.1-1508.28. Those regulations present an absolute burden that an agency must meet in supporting a FONSI

(1985) as indicative of long-standing chaos in the courts of appeals regarding the appropriate standard of review. (Pet. 10). Petitioners contend this confusion has continued even after this Court's unanimous decision on that issue in *Marsh*. However, in 2004, this Court affirmed that the "arbitrary and capricious" standard of *Marsh* applies to review of a FONSI, and all of the cases upon which Petitioners rely, apart from the decision below, preceded *Public Citizen*.

and a decision not to prepare an EIS; that is, the agency must determine based upon a less intensive EA that its action "*will not* have a significant effect on the human environment." 40 C.F.R. § 1508.13 (emphasis added).

An EIS is required when there is a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). If the agency's proposed action is neither categorically excluded from the obligation to produce an EIS nor would clearly require the production of an EIS, the agency may initially prepare an EA. *See* 40 C.F.R. §§ 1501.4(a)-(b); *Public Citizen*, 541 U.S. at 757. An EA is "a concise public document" by which a federal agency "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact." 40 C.F.R. § 1508.9(a). If an agency determines that a proposed action will not have a significant impact, it prepares a FONSI, which "briefly present[s] the reasons why an action" will not significantly affect the quality of the human environment and for which an EIS is therefore unnecessary. 40 C.F.R. § 1508.13. *See also* 40 C.F.R. § 1501.4(e). HUD has promulgated additional regulations under NEPA which make clear that an EIS is required "when the project is determined to have a *potentially* significant impact on the human environment." 24 C.F.R. § 58.37 (emphasis added). Accordingly, to issue a FONSI, HUD must conclude with reasonable confidence that there will not be a significant impact, and its decision may be overturned if it committed a "clear error of judgment."

C. Petitioners Rely Upon Selective Language From The Fifth Circuit's Decision That Does Not Reflect The Standard Of Review That The Court Actually Applied

The Fifth Circuit did not employ the standard of review Petitioners affix to it. That is, the court did not ask whether Petitioners had demonstrated that there would certainly be a significant impact from HUD's HOPE VI grant to HANO. Petitioners' argument is simply an attempt to re-litigate parts of the case where they were unsuccessful in demonstrating that HUD either had ignored relevant potential impacts or that HUD had committed a clear error of judgment regarding those impacts.

Petitioners rely selectively upon language from the decision below to generate their characterization of the standard of review the Fifth Circuit applied, but ignore other more revealing language. For example, Petitioners do not discuss the court's analysis of their argument that HUD had not considered adequately the impacts of traffic created by the Project. The court explained that the Petitioners argued "that the impacts of traffic were *sufficiently controversial and uncertain* that HUD was required to prepare an EIS." (Pet. App. 34a) (emphasis added). But the court rightly rejected this argument because Petitioners offered nothing to show that these impacts were "highly controversial" or "highly uncertain" other than their own opposition to the Project. (*See id.*; 40 C.F.R. § 1508.27(b)(4)-(5)). This analytical approach indicates that the court was prepared to rule in Petitioners' favor had they demonstrated that the impacts of increased traffic were sufficiently "uncertain" such that it would be a "clear error of judgment" to have concluded that these

impacts were not significant. Petitioners simply did not provide evidence to their point. (*See* Pet. App. 27a-28a).

Similarly, "[Petitioners] offer[ed] nothing concrete to suggest that [an influx of additional national retailers] *will likely occur or [is] planned for* in this particular project area. . . . " (Pet. App. 29a) (emphasis added). Thus, Petitioners had not demonstrated that a potential impact was anything other than speculative, or that even if it came to pass, it might significantly affect the quality of the human environment. Further, the court noted that HUD adequately addressed the Project's "*potential* adverse effects on historic properties" and appropriately determined that those effects would not be significant when Petitioners offered no evidence to suggest otherwise. (*See* Pet. App. 34a, 38a-40a) (emphasis added).

When Petitioners contend that the Fifth Circuit considered the legal question to be "whether 'HUD acted arbitrarily, capriciously, or in abuse of its discretion by failing to prepare an EIS although it knew or should have known that the reasonably foreseeable effects of the project *would* significantly affect the quality of the human environment,' " (Pet. 6-7), they ignore the beginning of the sentence from the opinion below, which is necessary to understand the court's approach. In fact, the court stated the following: "*The theme of [Petitioners'] remaining NEPA arguments is* that HUD acted arbitrarily, capriciously, or in abuse of its discretion by failing to prepare an EIS although it knew or should have known that the reasonably foreseeable effects of the project would significantly affect the quality of the human environment." (Pet. App. 17a) (emphasis added). Petitioners are not citing the Fifth Circuit's characterization of the legal question, but rather attempt to pass off their own view as one held by the court

of appeals. It is not surprising that the Fifth Circuit characterized Petitioners' challenge in the manner it did, as Petitioners sought an injunction requiring HUD to prepare an EIS by arguing that there would *in fact* be a significant impact from the Project. *See, e.g.,* Appellants' Original Brief Filed on Behalf of Coliseum Square Association, Inc., Smart Growth for Louisiana, Louisiana Landmarks Society, Inc., Historic Magazine Row Association, and The Urban Conservancy (Appellants' Original Brief) at 1 ("HUD knew from the beginning that an EIS was required for the St. Thomas Redevelopment Project."); Appellants' Original Brief at 8 ("HUD's Administrative Record shows that there *will be* significant impact to the human environment." (emphasis added)); Appellants' Original Brief at 20 ("HUD's Administrative Record clearly shows that the Project *will have* a significant impact on the human environment, and *therefore* an [EIS] is required under NEPA." (emphasis added)); Appellants' Original Brief at 26 ("Local zoning changes significantly impact the human environment.").

The Fifth Circuit did not require Petitioners to demonstrate that a significant impact was certain to occur. Rather, it appropriately asked whether HUD had in fact analyzed the relevant potential impacts and had conducted its analysis in a reasoned way that supports its FONSI. In so doing, its approach was consistent with the standard set out by this Court in *Marsh* and affirmed in *Public Citizen* and, as shown below, with the practice of other courts of appeals.

II. THE COURTS OF APPEALS ARE NOT IN CONFLICT OVER THE PROPRIETY OF THE "ARBITRARY AND CAPRICIOUS" STANDARD OF REVIEW AND IMPLEMENT THAT STANDARD BY ASKING WHETHER THE AGENCY ANALYZED THE RELEVANT FACTORS AND COMMITTED A CLEAR ERROR OF JUDGMENT

A. The Third, Fifth, And Tenth Circuits Are Applying The Standard Of Review Prescribed By This Court

Contrary to Petitioners' contention, the Third, Fifth, and Tenth Circuits employ the "arbitrary and capricious" standard that this Court in *Marsh* and *Public Citizen* made clear is appropriate. These courts of appeals ask, consistent with this Court's direction, whether the agency considered the possible impacts from the proposed action and whether it made a clear error of judgment regarding those effects. Petitioners have selectively chosen cases from which they embellish distinctions in language to suggest that a wide gulf exists in how the courts of appeals have implemented the "arbitrary and capricious" standard of review. The distinctions that they raise do not expose any major differences.

Critically, some of the distinctions in language arise from relics of the pre-*Marsh* period when some courts employed a "reasonableness" standard of review while others used an "arbitrary and capricious" standard. *See, e.g., Hill v. Boy*, 144 F.3d 1446, 1450-51 (11th Cir. 1998) (citing *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66-67 (D.C. Cir. 1987)); *Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846, 864-65 (9th Cir. 2004) (citing *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998), which cited *Sierra Club v. United*

States Forest Serv., 843 F.2d 1190, 1193 (9th Cir. 1988) which applied a "reasonableness" standard of review to a decision not to prepare an EIS); *City of Waltham v. United States Postal Serv.*, 11 F.3d 235, 239 (1st Cir. 1993) (citing *Quinonez-Lopez v. Coco Lagoon Dev. Corp.*, 733 F.2d 1, 2 (1st Cir. 1984), which noted that courts used different degrees of scrutiny pre-*Marsh*). This Court flatly rejected the "reasonableness" standard in *Marsh*, which Petitioners cited as a less deferential standard of review. (*See* Pet. 19). Nevertheless, the Court emphasized in *Marsh* that its decision "will not require a substantial reworking of long-established NEPA law" because the difference between "reasonableness" and "arbitrary and capricious" standards of review "is not of great pragmatic consequence." *Marsh*, 490 U.S. at 377 n.23. The differences that were "not of great pragmatic consequence" at the time of *Marsh* have shrunken in the intervening years, and there are no relevant and important distinctions today.

The analysis consistently used by the Fifth Circuit comports with the "arbitrary and capricious" standard, which it adopted shortly after *Marsh* in *Sabine River Authority v. Department of Interior*, 951 F.2d 669 (5th Cir. 1992). *See id.* at 677-78 (stating that *Marsh* had "undercut our precedent applying the reasonableness standard with respect to an agency's decision to forego the *original* EIS") (emphasis in original). The Fifth Circuit considers whether the agency has considered the relevant "potential" impacts. *See id.* at 678; *accord Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 16-17 (2d Cir. 1997) (rejecting a FONSI because the Forest Service failed to consider both the likely effects from unauthorized ATV use resulting from expansion of a road in a national forest to accommodate logging, and the adequacy of a proposed mitigation

measure to reduce unauthorized ATV use). It asks whether the agency's decision that those impacts are not significant represented a "clear error." *See Sabine River*, 951 F.2d at 679. For example, the agency's evaluation may not depend entirely upon a clearly wrong fact. *See, e.g., Hill v. Boy*, 144 F.3d at 1450-51 (holding that the record did not support an assumption that an underground petroleum pipeline would be relocated and thus would not be implicated in the NEPA analysis). As in *Sabine River*, the court below conducted "a painstaking review of the agency record" to ensure the proper impacts were analyzed and there "was no clear error in [the agency's] decision." 951 F.2d at 679.

Petitioners' claim that the Third Circuit applies a different standard from what this Court has directed also falls short. In *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168 (3d Cir. 2000), upon which Petitioners rely, the court recognized that "HUD requires preparation of an EIS when a project is determined to have a *potentially* significant impact on the human environment." *Id.* at 173-74 (citing 24 C.F.R. § 58.37(a)) (emphasis added). That is, *Society Hill* did not require the challenger to show that an environmental impact from the project was in fact certain and significant. Rather, the court rejected the challenge because the plaintiffs in that case "[had] not raised a *substantial dispute* regarding the environmental effects identified . . . in [the] EA. . . . " *Id.* at 184 (emphasis added). Specifically, *Society Hill* involved a challenge to HUD's decision to allocate a grant to partially fund construction of a hotel and parking garage, on the basis that HUD had not appropriately considered cumulative impacts from other possible future development in the vicinity of the project. Relying upon this Court's decision

in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), the court held that future hypothetical projects which could have possible environmental impacts were not sufficiently likely to warrant consideration in HUD's cumulative impacts analysis under NEPA. *Society Hill*, 210 F.3d at 180-82.[2] That is, NEPA "does not require an agency to consider possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions." *Id.* at 180 (quoting *Kleppe*, 427 U.S. at 410 n.20). Petitioners do not contest this Court's holding in *Kleppe*, and thus their discussion of *Society Hill* is largely inapposite.

Finally, Petitioners offer the Tenth Circuit case of *Greater Yellowstone Coalition v. Flowers,* 359 F.3d 1257 (10th Cir. 2004) to support their contention that some courts of appeals defer to an agency's FONSI unless a challenger shows that there will certainly be a significant impact. Their reliance upon *Greater Yellowstone Coalition* is misplaced. In that case, in looking at whether the Army Corps of Engineers had appropriately supported its FONSI, the Tenth Circuit analyzed whether the appellants had demonstrated "that the Corps [had] made a clear error in judgment or did not consider the factors relevant to [the proposed golf course's] impacts on bald eagles." *Id.* at 1277. These are precisely the questions that this Court described

[2] The Third Circuit in *Society Hill* independently held that even if the future proposals to develop an entertainment complex in proximity to the hotel and parking garage were "sufficiently certain" to be constructed, the complex had no logical connection to the hotel and parking garage. 210 F.3d at 181-82. The question of whether future but uncertain projects must share some connection to the proposed action to be included in the cumulative impacts analysis was not raised in the proceedings below and is not posed by the Petition.

in *Marsh*. In answering those questions, the Tenth Circuit rejected the argument that the Fish and Wildlife Service's decision not to designate as "critical habitat" the area of a proposed golf course which served as nesting habitat for a pair of bald eagles necessarily implied that "its *potential* destruction should not be considered 'significant' for purposes of NEPA." *Id.* at 1275 (emphasis added). Similarly, the court "[did not] consider determinative [Fish and Wildlife Service's] conclusion that the [golf course project] was *not 'likely to jeopardize* the continued existence of the bald eagle' as a species." *Id.* at 1275-76 (emphasis added). Had the court employed the standard of review Petitioners ascribe to it, the Fish and Wildlife Service's conclusions would have made it impossible for the challengers to show that a significant impact to the species was certain, and the court would not have inquired further.[3]

Instead, the Tenth Circuit analyzed mitigation measures designed to reduce the project's "potential impact" on bald eagles to a level of insignificance, an approach endorsed in the courts of appeals which Petitioners contend apply the appropriate standard of review and to which Petitioners do not raise an objection in their Petition. *See, e.g.*, *Nat'l Audubon Soc'y*, 132 F.3d at 17 ("When the adequacy of proposed mitigation measures is supported by substantial evidence, the agency may use those measures

[3] The *Greater Yellowstone Coalition* decision is comparable to the Ninth Circuit's approach in *Environmental Protection Information Center v. United States Forest Service*, 451 F.3d 1005, 1010-11 (9th Cir. 2006), where the court held that it was not arbitrary or capricious for the Forest Service to conclude that there would not be a significant adverse effect upon the northern spotted owl species even though a proposed timber logging program was projected to have an impact upon the nesting habitat of three pairs of owls.

as a mechanism to reduce environmental impacts below the level of significance that would require an EIS."); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733-34 (9th Cir. 2001) ("An agency's decision to forego issuing an EIS may be justified in some circumstances by the adoption of [mitigation] measures."); *C.A.R.E. Now, Inc. v. Fed. Aviation Admin.*, 844 F.2d 1569, 1575 (11th Cir. 1988) ("When mitigation measures compensate for otherwise adverse environmental impacts, the threshold level of 'significant impacts' is not reached so no EIS is required.") (citing *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982)). Thus, in reviewing an agency's FONSI, the Tenth Circuit does not ask whether the challenger has shown that there will *certainly* be a significant impact.[4]

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[4] *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) is also instructive. In *Davis*, the court held that an EA did not consider adequately the potentially significant impacts associated with a two-phase highway project where a new interchange linking an interstate to a two-lane state highway would be constructed first, and then the existing state highway would be widened and extended later. Specifically, the Department of Transportation had not considered that the persons living along the state highway after the interchange was completed and before the highway was expanded "*may* suffer from pollution, noise and safety impacts." *Id.* at 1124 (emphasis added). Noting that the plaintiffs had demonstrated that the timetable for completing the second phase was unclear and likely to be substantially delayed, the court determined that "[t]he *potentially* significant impacts from phasing have not been adequately studied in the EA." *Id.* at 1124, 1124 n.13 (emphasis added). Further, noting that the EA did not offer a sufficient discussion of cumulative impacts, the court maintained that, based upon the record, those cumulative impacts "*may* be significant" and that there had been a "clear error of judgment." *Id.* at 1125 (emphasis added). Accordingly, the Tenth Circuit does not employ the standard articulated by Petitioners, and does not deviate significantly from the approach in other courts of appeals.

The Third, Fifth, and Tenth Circuits do not employ the standard of review Petitioners ascribe to them. Instead, they implement the "arbitrary and capricious" standard in accordance with this Court's directive in *Marsh* and *Public Citizen*, and do so in a way that is not materially different from the other courts of appeals.

B. The Result Below Would Not Be Any Different In The First, Second, Ninth, Eleventh, Or District Of Columbia Circuits

The result below would not be any different in the First, Second, Ninth, Eleventh, and District of Columbia Circuits, as Petitioners contend. Whether there is in fact a significant impact is a substantive determination for the agency. *See Akiak Native Cmty. v. United States Postal Serv.*, 213 F.3d 1140, 1146 (9th Cir. 2000); *Nat'l Audubon Soc'y*, 132 F.3d at 18; *Greater Yellowstone Coal.*, 359 F.3d at 1274; *see also Marsh*, 490 U.S. at 376 ("The question presented for review in this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise."). Therefore, as the Ninth Circuit recognizes, a reviewing court's duty is to "consider only whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Akiak*, 213 F.3d at 1146. In this fashion, the court reviews whether the agency's decision is arbitrary, capricious, or an abuse of its discretion, just as directed in *Marsh* and as the Fifth Circuit did in this case.

An agency may validly decide that an EIS is not necessary when an adverse impact is likely, or even certain, so long as the effect will not significantly affect the quality of the human environment. There has to be

more than a mere chance that an adverse impact will occur and be significant. For example, in *Akiak*, the Ninth Circuit reviewed a determination by the Postal Service that an experimental program to deliver mail by surface hovercraft rather than by aircraft to remote Alaska Native villages would not have a significant impact on the environment. While the court noted that the EA discussed particular impacts that "could" or "may" result, plaintiffs' objection to the EA could not be sustained because the EA "does not conclude that there were *substantial questions* whether those impacts would occur and be significant" and plaintiffs had not offered any evidence to suggest that those conclusions were wrong. *Id.* (emphasis added) (citing *Idaho Sporting Cong.*, 137 F.3d at 1149). The First Circuit also makes clear that a challenger must demonstrate that an impact is more than merely possible. *See Conservation Law Found. v. Fed. Highway Admin.*, 24 F.3d 1465, 1475 (1st Cir. 1994) (holding that although the record contained evidence that a highway construction project would have a detrimental impact upon some wetlands, the evidence did not sufficiently contradict a conclusion that the project would not significantly affect the environment). The Fifth Circuit requires nothing different.

HUD's NEPA analysis in the present matter stands in contrast to the clear errors of judgment at issue in the cases Petitioners cite. For example, Petitioners discuss *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983), but that case was decided well before both *Marsh* and *Public Citizen* and is distinguishable on its facts. *Peterson* rejected a Forest Service FONSI for an oil and gas leasing program for exploration on federal land. The Forest Service reached its finding of no significant impact based upon a determination that "if unacceptable environmental

impacts cannot be corrected, activities [on the lessee's use of the land] will not be permitted." 717 F.2d at 1413. However, the court noted that once the Forest Service's leasing program was approved, the government was barred subsequently from precluding any activities which the lessee proposed. Thus, the agency's reasoning represented a clear error of judgment and the agency had not adequately considered possible impacts. The Forest Service's logical fallacy in *Peterson* is far from the itemized consideration HUD gave to the possible impacts from the Project in its EA.

National Audubon Society and *Hill v. Boy* are also distinguishable on their facts, and do not reflect a true split among the courts of appeals. In *National Audubon Society*, the Forest Service's own expert concluded that an adverse impact to black bears was likely if improvements to a road necessary to support logging in a national forest increased public access. 132 F.3d at 16-17. Avoiding increased public access depended upon closing off the logging road to all-terrain vehicles, but the Service had not offered any evidence to suggest that its proposed mitigation measures would in fact prevent ATV use that would otherwise occur. Accordingly, the Forest Service did not "adequately consider all relevant environmental factors" prior to issuing its FONSI. *Id.* at 17.[5] *Hill v. Boy* stands for

[5] Nonetheless, the Second Circuit in *National Audubon Society* rejected the portion of the district court's decision that mandated preparation of an EIS to address the "potentially significant" impact to black bears from the logging road extension. Instead, the Second Circuit ruled that the "question is substantive, and consequently not one within the purview of the district court." 132 F.3d at 18. That is, the relief Petitioners seek here – a finding that an EIS is required – was not available and appropriate even when the agency had failed to consider adequately a possible, relevant impact.

the proposition that an agency's analysis must be coherent; it cannot be based solely upon facts that are clearly wrong. In *Hill*, the Eleventh Circuit held that a finding of no significant impact from proposed construction of a dam and reservoir was inadequate when the Army Corps of Engineers ignored possible impacts associated with an underground petroleum pipeline by assuming explicitly that the pipeline would be relocated, in the absence of any evidence to support that assumption and in the face of substantial contradictory evidence showing that the pipeline was to remain. 144 F.3d at 1450-51.

The Fifth Circuit's interpretation of the *Marsh* and *Public Citizen* standard of review is not in conflict with these cases. Petitioners simply could not show that HUD had ignored relevant impacts, based its analysis entirely upon a fact that was clearly wrong, or otherwise committed a clear error of judgment. Petitioners "pointed to nothing casting serious doubt" on HUD's methods of analysis and its conclusion that there was not substantial uncertainty regarding the effect of the action, nor have they "made a serious argument that [the Project] will have a 'significant adverse' impact." *See Town of Cave Creek, Arizona v. Fed. Aviation Admin.*, 325 F.3d 320, 332-33 (D.C. Cir. 2003).

III. THE THREE FACTUAL EXAMPLES PETITIONERS OFFER OF THE FIFTH CIRCUIT'S ALLEGED ERROR DO NOT DEMONSTRATE THAT PETITIONERS WOULD BE SUCCESSFUL EVEN UNDER THE STANDARD OF REVIEW AS THEY CHARACTERIZE IT

Petitioners did not even satisfy the standard of review they offered as appropriate in their Petition. The three

specific complaints Petitioners raise before the Court require a fact-intensive analysis typical under NEPA. First, Petitioners complain that a zoning change to accommodate aspects of the Project implied that it is impossible for HUD to decide that Wal-Mart is compatible with "a Nineteenth Century mixed-use neighborhood." (Pet. 21). But Petitioners provided no evidence below to demonstrate that a zoning change would significantly impact the environment. Merely asserting so is not sufficient. *See City of Waltham*, 11 F.3d at 241-42 (rejecting a complaint that construction of a proposed mail distribution facility would increase road traffic in a local town because the town offered "no factual data" to support that possibility, and finding that the town had not shown "any substantial likelihood that an environmentally significant lessening of stormwater runoff will occur" even though its expert had predicted that construction would cause a 25% to 30% reduction in runoff onto wetlands). Petitioners raise *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) to support their position, but the court below rightfully determined that Petitioners had not, and could not, analogize properly to that case, which involved a drastic change in land use. (*See* Pet. App. 20a-21a).

The record below included substantial evidence to support HUD's judgment. The Wal-Mart is within a corridor of industrial warehouses and a primary center for heavy trucking and freight operations, while the residential portion of the Project borders residential area. (*See id.*). The Project will return the former St. Thomas area to the population density and building style of the rest of the Lower Garden District, and construction is subject to design review to ensure compatibility with surrounding area. *See* Brief for the Federal Defendant-Appellee at 26

(citing AR1366-67, 2648). Petitioners countered this evidence with only a document of questions and comments that petitioner Coliseum Square Association, Inc. authored that singled out the Wal-Mart. *See* Appellants' Original Brief at 27 (citing AR2966). Petitioners contend now that the Fifth Circuit applied an inappropriate standard when it held that Petitioners "had not established that the consequences of the Wal-Mart Supercenter would *necessarily* have a significant effect on the quality of the neighborhood. . . . " (Pet. 8 (emphasis in original)). That contention overlooks Petitioners' argument below. Because Petitioners offered no evidence of possible substantial impacts from the zoning change, they effectively asked the court to endorse a blanket rule that a zoning change by itself implied a significant adverse impact. *See* Appellants' Original Brief 26 ("Local zoning changes significantly impact the human environment."). The Fifth Circuit was not required to make such a holding in the face of HUD's reasoned conclusion. Petitioners offered no real evidence to show why HUD erred and why a significant impact is even substantially likely, let alone certain.

Second, Petitioners argue that HUD and the Fifth Circuit ignore the possibility that Wal-Mart will attract other national chain stores. Petitioners waived this argument because they did not raise it at the district court level, and it was inappropriately considered by the Fifth Circuit. *See* HANO's Appellate Brief at 50-51. Thus, this particular objection would not properly be before this Court. *See United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Cf. Public Citizen*, 541 U.S. at 764-65 (holding that a party had forfeited particular objections to an EA when it failed to raise those objections to the agency which prepared the EA).

Nevertheless, the Fifth Circuit did in effect what Petitioners assert it should have done. It concluded that Petitioners had not demonstrated that national chain stores would likely follow Wal-Mart into the Project area and significantly affect the quality of the human environment. (*See* Pet. App. 22a-23a, 29a).[6] "HUD in fact considered information from a wide range of sources" to support its conclusion, and Petitioners "simply misstate the record when they assert that HUD entirely ignored" an economic study Petitioners emphasize. (Pet. App. 23a). Specifically, HUD used materials such as the findings of an inventory of local businesses, a national economic study, and an environmental justice study to help substantiate its finding that Wal-Mart's presence would not significantly impact the quality of historic properties neighboring the project. In the case of conflicting evidence before the agency, the agency has discretion to accept or reject from the different sources, even where it is relying upon its own experts. *See Marsh*, 490 U.S. at 378; *Sabine River*, 951 F.2d at 678. A reviewing court is not to revisit that

[6] Again, Petitioners criticize the decision below for applying an inappropriately deferential standard of review, but then ignore important aspects of the court's opinion. Petitioners assert that the court rejected their arguments regarding the impact from other national chain stores they say will follow Wal-Mart because "there was 'nothing concrete' to show that an influx of national chain retailers *will* occur." (Pet. 8 (emphasis in original)). But this characterization leaves out the critical word upon which Petitioners have based their argument about a split in the courts of appeals – "likely." In rejecting Petitioners' complaint about cumulative impacts, the court emphasized that "[Petitioners] offer nothing concrete *to suggest* that such changes *will likely occur or are planned for* in this particular project area, but rely on broad statistical data discussing general national trends." (Pet. App. 29a (emphasis added)). The court's language reflects an approach consistent with what Petitioners advocate is appropriate. Petitioners simply disagree with the court's conclusion.

substantive evaluation outside of the *Marsh* standard of review. *See Marsh*, 490 U.S. at 378. Petitioners had to produce "factual data that suggests [the] possibility is other than speculative." *City of Waltham*, 11 F.3d at 241. Petitioners did not, and thus they failed to show that any such impact was substantially likely to occur and to significantly affect the quality of the human environment. (*See* Pet. App. 29a).

Finally, Petitioners argue it was inappropriate for HUD to rely upon the National Park Service's finding that the Project would not significantly impact National Historic Landmarks, contending that the Park Service "disavowed any identifiable basis" for its no-impact finding. (Pet. 23). Petitioners overstate what the Park Service did. The Park Service issued a no-impact letter, the letter's author thereafter left the Service, and the Service subsequently asked for more time to look again at its conclusion. After re-examining its materials, the Park Service decided not to reject its original conclusion. (*See* Pet. App. 39a-40a). NEPA regulations explicitly contemplate that agencies will consult with each other when their jurisdictions overlap in analyzing project impacts. *See* 40 C.F.R. § 1501.6.[7] Thus, when conducting a NEPA analysis, an agency may appropriately give significant weight to the opinion of another agency with expertise on an environmental impact issue. Again, Petitioners offered nothing

[7] "Cooperating agencies" are responsible for "developing information and preparing environmental analyses" in their areas of expertise to assist the lead agency. 40 C.F.R. § 1501.6(b)(3). "Cooperating agencies" include "any other Federal agency which has jurisdiction by law," and an agency "which has special expertise with respect to any environmental issue" and whose assistance is requested by a "lead agency." *Id.* at § 1501.6.

other than speculative, conclusory statements to undercut the Park Service's opinion. Accordingly, Petitioners fell short even under the standard of review of their own devise.

IV. THIS CASE TURNS ON ITS SPECIFIC FACTS, WILL NOT REDRESS ANY INJURY ALLEGED BY PETITIONERS, AND WILL RESOLVE NO QUESTION OF EXCEPTIONAL IMPORTANCE

It is well settled that NEPA is a statute that establishes procedural requirements but leaves a federal agency such as HUD with ultimate discretion to reach substantive conclusions on the significance of environmental impacts. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Petitioners will not be able to overturn HUD's substantive conclusions through this litigation. Even if the Court finds that there is a meaningful difference in the standards of review applied by the courts of appeals, and the Court determines that the standard Petitioners advocate is correct, Petitioners will not prevail on their claims. As discussed in the preceding section, the record is replete with support for HUD's substantive conclusions about the level of impacts from the Project. Petitioners continue to assert that HUD and the lower courts got it wrong because they simply object to Wal-Mart's presence.

Moreover, even if the Court rules in favor of Petitioners' proposed standard of review, and in subsequent proceedings HUD's FONSI is determined to be "arbitrary, capricious, or an abuse of discretion," Petitioners have not demonstrated any relief that would be appropriate. HUD has nearly completely disbursed the challenged HOPE VI partial funding for the Project, and the Project is substantially occupied and well on its way to completion. The

remainder of the Project is not significantly dependent upon the availability of further HUD funding; thus, the relief that Petitioners might seek is not related to their underlying claim regarding the federal agency action at issue.

Preparing an EIS for the Project would not prevent construction of the Wal-Mart. Petitioners sought unsuccessfully an injunction halting all construction, and the Wal-Mart opened for business beginning in 2004 and continues to operate. (Pet. App. 9a, 54a-55a). Petitioners still seek to enjoin further work on the Project until HUD has prepared an EIS, which requires them to establish four factors: (1) actual success on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that the threatened injury to the plaintiff outweighs the threatened injury to the defendant; and (4) that granting injunctive relief does not harm the public interest. *See Harris County, Texas v. CarMax Auto Superstores, Inc.*, 177 F.3d 306, 312 (5th Cir. 1999); *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987) (noting that the standard for a permanent injunction is essentially the same as for a preliminary injunction, except that the plaintiff must show actual success on the merits rather than a substantial likelihood). Petitioners did not offer evidence of this nature in the proceedings below to support entry of an injunction.

An EIS would not serve to elucidate any additional useful information regarding the impacts that already have been thoroughly considered by HUD. The present conditions do not reveal cause for concern about any significant impacts that HUD did not evaluate properly in

its EA.[8] Perhaps most notably, an EIS would not help assure delivery of a badly-needed range of new residential units for a region suffering from severely diminished housing capacity due to the catastrophic effects of Hurricane Katrina. Instead, an EIS would result simply in more paperwork and would prevent the necessary and productive redevelopment of the St. Thomas area from continuing. NEPA was not designed to result simply in more, better paperwork. *See* 40 C.F.R. § 1500.1(c).

Finally, any ruling by this Court can be expected largely to reaffirm the standard of review for agency compliance with NEPA already set forth in *Marsh* and continued in *Public Citizen*. The outcomes of future challenges to federal agency implementation and FONSI determinations will still depend heavily upon the facts applicable in a given case.

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[8] HUD issued its final EA after providing a full opportunity for public comment following numerous general meetings on the Project open to the public. (*See* Pet. App. 8a-9a; *see also* HANO's Appellate Brief at 24-26).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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