No. 06-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The National Environmental Policy Act requires a federal agency to prepare an Environmental Impact Statement (EIS) before undertaking a major action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The U.S. Department of Housing and Urban Development did not prepare an EIS before approving the transfer of federal land and expenditure of millions of dollars so that a private developer could build a big-box retail store and other large, multi-story buildings in the southern portion of the Lower Garden District. The Lower Garden District is part of historic New Orleans and is listed on the National Register of Historic Places because it retains its mid-Nineteenth Century appearance.

The question presented is:

Whether, as the First, Second, Ninth, Eleventh, and D.C. Circuits have held, an agency must prepare an Environmental Impact Statement whenever a major federal action is likely to significantly affect the quality of the human environment or whether, as the Third, Fifth, and Tenth Circuits have held, an agency need not prepare an Environmental Impact Statement unless a major federal action will certainly significantly affect the quality of the human environment.

PARTIES TO THE PROCEEDING

Coliseum Square Association, Inc.; Smart Growth for Louisiana; Louisiana Landmarks Society, Inc.; Historic Magazine Row Association; and The Urban Conservancy, Inc. are petitioners in this Court, were appellants in the court of appeals, and were plaintiffs in the district court.

Alphonso Jackson, Secretary of Housing and Urban Development, is a respondent in this Court, was an appellee in the court of appeals, and was a defendant in the district court.

The Housing Authority of New Orleans is a respondent in this Court, was an appellee in the court of appeals, and was an intervening defendant in the district court.

RULE 29.6 DISCLOSURE

Coliseum Square Association, Inc. has no parent or publicly held company owning 10% or more of its stock.

Smart Growth for Louisiana has no parent or publicly held company owning 10% or more of its stock.

Louisiana Landmarks Society, Inc. has no parent or publicly held company owning 10% or more of its stock.

Historic Magazine Row Association has no parent or publicly held company owning 10% or more of its stock.

The Urban Conservancy, Inc. has no parent or publicly held company owning 10% or more of its stock.

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS
(continued)

Page(s)

TABLE OF CONTENTS
(continued)

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

FEDERAL REGULATIONS

OTHER AUTHORITIES

BOOKS, TREATISES AND JOURNALS

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 465 F.3d 215 and is reprinted in the Appendix to the Petition (App.) at 1a. The relevant opinions of the United States District Court for the Eastern District of Louisiana are reprinted at App. 52a and App. 68a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on September 18, 2006. The court of appeals denied petitioners' timely rehearing petition on December 13, 2006. (App. 79a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The relevant statutory provisions and regulations are set forth in the Appendix at 82a-88a.

STATEMENT OF THE CASE

A. Statutory Background

Signed into law on January 1, 1970, the National Environmental Policy Act (NEPA) establishes a "national policy [to] encourage productive and enjoyable harmony between man and his environment." 42 U.S.C. § 4321. "NEPA itself does not mandate particular results" in order to accomplish these ends. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Rather, NEPA imposes procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions. *See id.* at 349-50.

At the heart of NEPA is a requirement that federal agencies prepare a "detailed statement" – known as an Environment Impact Statement (EIS) – for "major Federal actions sig-

nificantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS must consider five things:

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. In short, NEPA provides criteria to guide an agency's consideration of the environmental tradeoffs involved in major federal actions.

The Council of Environmental Quality (CEQ) was established by NEPA with authority to issue regulations interpreting that statute. CEQ has promulgated regulations to guide federal agencies in determining what actions are subject to the statutory requirement to prepare an EIS. *See* 40 C.F.R. § 1500.3. The CEQ regulations allow an agency to prepare a more limited document, an Environmental Assessment (EA), when the action will not significantly affect the human environment. *See id.* §§ 1501.4(a)-(b). An EA is to be a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." *Id.* § 1508.9(a). CEQ regulations require an agency preparing an EA to consider "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources." *Id.* § 1508.27(b)(3). If, after preparing an EA, an agency determines that an EIS is not required under applicable CEQ regulations, it must issue a "finding of no significant impact" (FONSI), which briefly presents the reasons why the proposed agency action will not have a significant impact on the human

environment. *See id.* §§ 1501.4(e), 1508.13. *See generally Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-58 (2004).

B. Factual Background

This case involves a well-intentioned, necessary urban public renewal plan, for an historic area of New Orleans, that was hijacked to serve the interests of a developer and a big-box retailer looking for land in an urban area. *See* Stacy Mitchell, *Big Box Swindle* 15 (2006) ("In the heart of historic New Orleans, the demolition of a public-housing complex provided sufficient acreage for Wal-Mart to build a two-hundred-thousand-square-foot Supercenter surrounded by an ocean of parking.").

The historic area of concern here is the Lower Garden District. (*See* App. I) The district is adjacent to downtown New Orleans, the National Historic Landmark Garden District, and the Mississippi River. In the early Nineteenth Century, two plantation owners asked Bartheleme Lafon to draw up plans for subdividing their property. Lafon planed a community with basins, fountains, tree-lined canals, market places, and parks. By the time of the Civil War, the Lower Garden District included many grand houses encircling a central park that Lafon had named Coliseum Place. During the Depression, a housing project – the St. Thomas Housing Development (St. Thomas) – was built in the southern portion of the Lower Garden District. In keeping with the pedestrian scale of the historic neighborhood, St. Thomas originally included 970 units in two- and three-story solid masonry brick buildings arranged around outdoor spaces. In 1952, 540 more housing units were added. The ensuing decades exacted a toll on St. Thomas and, by the early 1990s, the public housing development was decaying, outdated, and dangerous.[1]

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[1] *See generally* History of the Lower Garden District, http://www.coliseumsquare.org/lower_garden_district_pages/history.html.

In 1996, respondent Department of Housing and Urban Development (HUD) granted respondent Housing Authority of New Orleans (HANO) $25 million through the HOPE VI program for the revitalization of St. Thomas. The original plan proposed fifty percent public housing, thirty percent low-income housing, and twenty percent market-rate housing. There was no planned retail. This proposal had broad-based support, including the support of petitioners here.

In 2000, the character of the proposed revitalization changed dramatically. At the urging of a private developer (Historic Restorations Inc. (HRI)), HANO proposed including as part of the urban project a 275,000 square-foot retail center with an 850-space parking lot, a fourteen-story market-rate housing condominium, a thirteen-story continuing care facility, and other small scale commercial ventures.[2] HUD waived income eligibility regulations for the project, so that it would now include very little low-income housing. After the size of the Wal-Mart Supercenter was reduced to 200,000 square feet, HUD approved the revised plan. HUD did not prepare an EIS. (App. 8a.)

Because the Lower Garden District reflects and retains its mid-Nineteenth Century appearance, the area is listed on the National Register of Historic Places.[3] The center of commer-

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[2] Specifically, "the proposed undertaking" included "[n]ew construction of Riverview Continuing Care Retirement Center, consisting of approximately 312 units in one 13-story structure covering one city block with structured parking"; "[n]ew construction of residential condominiums that consist of one 14-story structure of approximately 100 units with structured parking"; and "new construction of Riverview Retail Development of approximately 199,000 square feet, with surface parking for 825 automobiles" "to be occupied by a Super Wal-Mart." (App. 96a.)

[3] As described by the National Park Service, the Lower Garden District is

> characterized by contrasting land uses and a variety of building types and styles including Greek Revival and those of the Victorian era[;] notable are Coliseum Square with its park, surrounding grand dwell-

cial activity in the Lower Garden District offers "an array of coffeehouses, antique stores, restaurants, and light commercial businesses." (Environmental Assessment and Compliance Findings for the Related Laws (hereinafter "HUD EA") at 0003 (on file in the Clerk's Office).)

C. Agency And District Court Proceedings

Petitioners are not-for-profit organizations representing businesses and people that share an interest in the cultural, historic, and socioeconomic vitality of New Orleans.

In July 2002, petitioners filed suit in the Eastern District of Louisiana. Among other things, petitioners sought an injunction compelling HUD to withhold HOPE VI funds until HUD prepared an EIS for the St. Thomas Project. HUD then agreed to reconsider whether to prepare an EIS and restricted work on the project to residential infrastructure work and environmental remediation. In February 2003, HUD again decided that it did not need to prepare an EIS. (*See* HUD EA.) Among other conclusions, HUD found that (1) the project was "compatible with the surrounding development," (2) there were no cumulative effects (other than traffic) that needed to be considered, and (3) no National Historic Landmarks were affected by the project. (HUD EA at 001-005.) The district court denied petitioners' request for a temporary restraining order. In considering HUD's failure to prepare an EIS, the district court applied a "highly deferential standard of review," one with the "least latitude in finding grounds for reversal." (App. 74a.) In a single conclusory paragraph, the district court applied this

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ings and the 19th C. scheme of canals and fountains and the Magazine St. commercial structures, many with 1- and 2- story verandas.

See Lower Garden District – Information, http://www.nr.nps.gov/nrname1.htm (follow "State and Resource Name" hyperlink; then enter "LA" into the "state code" box and "Lower Garden District" into "name" box and follow "Execute" hyperlink; then follow "WEB PAGE" hyperlink).

highly deferential standard and approved HUD's decision not to prepare an EIS. (App. 74a-75a.)

D. The Fifth Circuit's Decision

Petitioners appealed to the Fifth Circuit.[4] The court noted that "[i]t is undisputed that HUD's funding of the project is a major federal action" so that NEPA applies. (App. 12a.) Thus, the question before the court of appeals was "whether HUD acted reasonably and in accordance with law in deciding, based on its EA and FONSI, that its action had no direct or indirect effects that significantly affected the quality of the human environment," and thus no EIS was necessary. (*Id.*) Importantly, the court did not seriously dispute that the project was *likely* to significantly affect the quality of the human environment. Nevertheless, the court of appeals permitted HUD to continue to spend federal funds on the project without preparing an EIS.

The court of appeals upheld HUD's decision not to prepare an EIS – despite the project's likely significant impacts on the environment – by applying a standard of judicial review that permits agencies to avoid the EIS process unless the significant impacts will *definitely* come to pass. The court posed the legal question as 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

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[4] At the outset, the court of appeals rejected respondents' argument that completion of the Wal-Mart portion of the projected rendered this case moot. The court observed that "[t]he following construction was planned but not yet begun: 200 mixed-income rental units, 64 affordable rental housing units for the elderly, a 250-unit market-rate rental retirement community, and 200 market-rate condominium units; additional small-scale commercial ventures, which may be included in some of the new residential construction; and construction or rehabilitation of affordable rental housing (90 units) and affordable individually owned houses (50 units)." (App. 10a.)

quality of the human environment." (App. 17a (emphasis added).) By asking whether the project "would" affect the quality of the human environment, the Fifth Circuit applied a standard of judicial review that is exceptionally deferential to the agency.

By using that standard, the court of appeals was able to sanction HUD's decision not to prepare an EIS despite the likely impact of the Wal-Mart project on the character of the historic Lower Garden District. Many opponents of the project predicted that the project would seriously erode the historic, pedestrian-focused character of the neighborhood.[5] Approving a Wal-Mart Supercenter in historic New Orleans required massive changes in zoning laws. (*See, e.g.*, App. 90a (April 11, 2002 draft study of Lambert Advisory LC) (noting "Wal-Mart's insistence with maintaining a parking lot sized beyond what the City zoning code allows").) The zoning changes were necessary, of course, not because the project called for land use consistent with the status quo, but because it called for a material change: the demolition of the existing affordable residential housing (and the displacement of the community that it supported), in favor of a 200,000 square-foot Wal-Mart Supercenter with associated massive parking requirements; a market-rate retirement community; and high-rise, market-rate apartments.

The private developer – pointing to certain design features, such as the partial use of "bricks" (concrete masonry blocks) – suggested that the big-box store and other high-rise buildings would fit right into the Lower Garden District's mid-Nineteen Century style. In justifying the decision not to prepare an EIS, HUD stated only that the project was "compatible with the surrounding development" and "complied with local zoning ordi-

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[5] As one architect asked, "[w]here is the argument that there are other parking lots of that size [850 spaces] in this neighborhood or anywhere in uptown New Orleans[?]" (App. 90a.)

nances," without explaining how it was compatible or noting that zoning changes were necessary to accommodate the project. (HUD EA 001, 002, 003, 005.) In upholding HUD's conclusion that the future consequences of the Wal-Mart Supercenter would not significantly affect the quality of the Lower Garden District neighborhood, the court of appeals emphasized that the proposed store would be "located on the Tchoupitoulas industrial corridor." (App. 21a.) Even HUD admitted, however, that the Project's area of potential effects was not limited to the Tchoupitoulas corridor, but extended across the rest of the Lower Garden District, and most of urban New Orleans. (*See* App. I.) The court, however, concluded 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, and it thus approved HUD's determination. (*See* App. 20a-21a.)

Similarly, the court of appeals approved HUD's decision not to prepare an EIS even though it was likely that a significant impact on the environment would be caused by other retailers following Wal-Mart into the Lower Garden District. HUD's administrative record contained an economic study showing that the Project, as conceived, would likely lead to a rush of other national chain stores. *See* Appellants' Fifth Circuit Record Excerpt 8, at 1; *id.* at 39 ("it is understandable that local businesses and residents view Wal-Mart as the first wave of the national retailers"). Despite this evidence, HUD never considered the possible effects that a larger migration of businesses might have on the Lower Garden District. In approving HUD's decision, the court declared that this "statistical data discussing general national trends" was "speculative" because there was "nothing concrete" to show that an influx of national chain retailers *will* occur. (*See* App. 29a.)

So too, the court was able to excuse HUD's failure to perform an EIS despite the project's potential impact on historic properties only by suggesting that the impact on the properties was not certain. As the map reproduced in the appendix con-

veys, the project threatened to affect many historic sites, including sixty-eight properties listed on the National Register of Historic Places, twelve National Register Districts, two National Historic Landmark (NHL) properties, and two NHL Districts (the Garden District and the Vieux Carre, more commonly known as the French Quarter). (*See* App. I.) The record is unequivocal that HUD relied exclusively on the opinions of the National Park Service (NPS) in concluding that the Project would not significantly affect any Landmarks. (*See* App. 34a, 38a-40a; HUD EA at 0005.) NPS, however, had not actually come to that conclusion. It informed HUD that "our files contain *insufficient information* to allow us to clarify the [no-impact] position stated previously by this office," and that "we cannot clarify the reasoning for the previous NPS decision." (App. 92a (emphasis added).) Recognizing the potentially significant impact on NHLs, NPS noted that "the National Historic Landmarks are considered to be the most important historic landmarks in the United States. They are national treasures worthy of extra caution." (*Id.*)[6] In affirming HUD's finding, the court of appeals stated that petitioners had not proven that "HUD was . . . arbitrary and capricious in relying on the National Park Service's [inscrutable] determination as support for its conclusion that the project would have no significant impact." (*See* App. 40a.)

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[6] The NPS employee who had surveyed the area and prepared the NPS opinion letters left the NPS between the time he sent the letters and the time HUD reopened the matter, and was thus unable to provide the basis for his opinions. (App. 93a.) Accordingly, the NPS asked HUD to delay the approval process "to provide [the NPS] time to respond adequately on the project's impacts on the National Historic Landmarks." *Id.* Less than a month later, however, the NPS sent HUD a letter withdrawing the request for more time. Rather than providing with any basis or rationale for its earlier no-impact finding, it provided only reasons for allowing HUD to proceed: that "HUD . . . appropriately sought NPS' comments and relied on those comments in good faith." (*Id.* at 94a.)

REASONS FOR GRANTING THE PETITION

There is a longstanding and pervasive circuit disagreement on the standard of review applicable to a federal agency's decision not to prepare an Environmental Impact Statement. An agency considering a project in Colorado or Texas is free to ignore possible but uncertain effects when deciding whether to prepare an EIS.[7] The same agency considering an identical project in Connecticut, Nevada, or Maine must consider all of the likely significant effects of the project in determining whether to prepare an EIS.[8] Thus, once again, "[t]he lower courts [are] in disarray on what standard of review to apply to an agency's decision not to undertake an EIS." *Gee v. Boyd*, 471 U.S. 1058, 1059-60 (1985) (White, J., joined by Brennan and Marshall, J.J., dissenting from denial of petition for writ of certiorari) (citations omitted).

The question of the proper standard for judicial review of an agency decision not to prepare an EIS is exceptionally important. NEPA applies to every federal agency, and the decision to issue an EIS – or not – is at the statute's core. Thus, the standard by which a court reviews that decision vastly impacts the process of federal environmental decisionmaking. Because consideration of environmental risk goes to the heart of the structured environmental assessment mandated by NEPA, those circuits that allow an agency to sidestep the EIS process merely because a future impact is uncertain seriously impede the goals of the statute. Moreover, those circuits that

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[7] *City of Waltham v. U.S. Postal Serv.*, 11 F.3d 235, 240 (1st Cir. 1993); *National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997); *Ocean Advocates v. Army Corps of Engineers*, 402 F.3d 846, 865-67 (9th Cir. 2004); *Hill v. Boy*, 144 F.3d 1446 (11th Cir. 1998); *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983).

[8] *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168 (3d Cir. 2000); *Sabine River Auth. v. Dep't of Interior*, 951 F.2d 669, 677 (5th Cir. 1992); *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257 (10th Cir. 2004).

are sidestepping NEPA are doing so by claiming support from this Court's decision in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). The Court has a special obligation to clarify the law where circuit courts are misinterpreting prior decisions of the Court.

Not only is the circuit split longstanding and the issue exceptionally important, but this is an ideal case for the Court to bring clarity to the issue. In this case, HUD explained its failure to prepare an EIS by stating that the project was compatible with the existing neighborhood, that no other retailers were likely to follow the big-box retailer, and that the National Park Service had found no harm to nearby historic landmarks. In truth, the 200,000 square foot concrete-masonry block building – a building requiring massive changes in local zoning laws – bears little resemblance to the rest of the mixed-use historic district; economic evidence strongly suggested other retailers would follow the Project; and the National Park Service told HUD it could not discern any basis for its no-harm-to-landmarks finding. The only rationale a court of appeals could possibly use to approve HUD's decision not to prepare an EIS is that the court could not be certain that the project "would" significantly affect the quality of the human environment. Thus, the issue of whether an agency must prepare an EIS where a major federal project may have significant effects on the quality of the human environment is squarely presented for the Court.

I. THE DECISION OF THE COURT BELOW EXACERBATED A LONGSTANDING CONFLICT IN THE COURTS OF APPEALS REGARDING WHETHER AN AGENCY MUST CONSIDER A PROJECT'S POTENTIAL EFFECTS BEFORE DECLINING TO PREPARE AN EIS

Courts have long struggled with identifying the appropriate standard of judicial review for agency decisions not to prepare an EIS. More than two decades ago, Justice White urged this Court to grant review and bring order to the then-existing state

of chaos among the circuits regarding the appropriate standard of review of an agency's decision not to prepare an EIS under NEPA. *Gee*, 471 U.S. at 1059-60.[9] Shortly thereafter, this Court's unanimous opinion in *Marsh* attempted to clarify the standard for reviewing an agency's decision not to prepare an EIS.

In *Marsh*, this Court held that such a decision is reviewed under the "arbitrary and capricious" standard articulated in the Administrative Procedures Act, 5 U.S.C. § 706(2)(A). *See* 490 U.S. at 377. In so doing, the Court reaffirmed its longstanding doctrine that the reviewing court "must consider whether" the agency's decision not to prepare an EIS "was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[10] *Id.* Although "the ultimate standard of review is a narrow one," the inquiry must be "searching and careful." *Id.* at 378 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

Eighteen years after *Marsh*, the courts of appeals are again in disarray on the proper standard of review to apply to an agency decision not to prepare an EIS. Consistent with the clear intent of *Marsh*, some circuits apply a "searching and careful" form of arbitrary and capricious review. Other circuits, however, have erroneously relied on *Marsh* to sanction

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[9] Justice White explained: "The First, Second, and Seventh Circuits, like the Fourth, will reverse such agency action only if it is arbitrary or capricious. Four other Circuits have employed a "reasonableness" standard of review. The Third Circuit has assumed, without deciding, that a "reasonableness" standard is appropriate, and the Sixth Circuit has similarly declined to choose between the two standards. The Court of Appeals for the District of Columbia Circuit has developed a four-part test to determine whether the agency action is arbitrary and capricious. . . ." *Gee*, 471 U.S. at 1059.

[10] Although *Marsh* concerned the decision of an agency not to prepare a supplemental EIS, *Marsh* also applies to an agency's decision not to prepare an EIS in the first instance. *See* Daniel R. Mandelker, *NEPA Law and Policy* § 8:7 (2d. ed. 2006).

agency review that is so deferential as to be practically non-existent. In particular, several circuits, including the Fifth Circuit below, have distorted *Marsh* to stand for the proposition that a court will not disturb an agency's refusal to prepare an EIS unless the significant impacts would necessarily occur. *See generally* 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*, 17 Tul. Envtl. L.J. 177 (2003) (discussing the conflict among the courts of appeals regarding appropriate standard of review under *Marsh*).

A. The First, Second, Ninth, Eleventh, And D.C. Circuits Apply A Less Deferential "Substantial Possibility" Standard

The First, Second, Ninth, Eleventh, and D.C. Circuits review an agency's decision not to prepare an EIS under a "substantial possibility" standard that assures the agency has conducted a thorough examination into a project's *potential* effects before determining that no EIS is needed.

The First Circuit reviews an agency determination not to prepare an EIS for whether it shows "a 'substantial *possibility*' that the project '*could* significantly affect the quality of the human environment.'" *City of Waltham v. U.S. Postal Serv.*, 11 F.3d 235, 240 (1st Cir. 1993) (quoting *Sierra Club v. Marsh*, 769 F.2d 868, 870-71 (1st Cir. 1985) (Breyer, J.)) (emphasis added). The First Circuit will reverse an agency's decision not to prepare an EIS unless the agency has adequately considered all substantially probable effects of its project. *See, e.g.*, *Sierra Club*, 769 F.2d at 877 (refusing to uphold agency's decision not to issue EIS where agency failed "to consider adequately the fact that building a port and causeway *may* lead to the further industrial development").

Like the First Circuit, the Second Circuit asks whether an agency considered the "possibility" of significant impacts. For example, in *National Audubon Society v. Hoffman*, 132 F.3d 7,

18 (2d Cir. 1997), the Second Circuit reversed a decision by the National Forest Service not to prepare an EIS. *Id.* Because the Forest Service had failed to consider the *possible* effects of the challenged action, the court concluded that its "determination that preparation of an EIS was not necessary, based on the record before it, was . . . arbitrary and capricious." *Id.* Thus, under the Second Circuit's approach, "NEPA's policy goals require agencies to err in favor of preparation of an EIS when the proposed action is *likely* to have a significant environmental impact," and "a party challenging the agency's decision not to prepare an EIS must [thus] show only that there is a *substantial possibility* that the action may have a significant impact on the environment." 132 F.3d at 18 (emphasis added). The Second Circuit expressly rejects the view (adopted by the Fifth Circuit here) that the challenger must demonstrate that the significant impact will occur. *Id.* ("*not* that it clearly will have such an impact" (emphasis added)).

Similarly, the Ninth Circuit requires federal agencies to inquire into "potential" effects before declining to prepare an EIS. For example, in *Ocean Advocates v. Army Corps of Engineers*, the Army Corps had relied upon "a letter from BP [the refinery operator] stating that only market forces, and not the additional pier [the construction of which required Corps approval], would increase total vessel traffic." 402 F.3d 846, 865-67 (9th Cir. 2004). But because the Corps "failed to demonstrate . . . that it critically evaluated the *potential* increase in tanker traffic from the dock extension alone," the court reversed the Corps' decision, notwithstanding the lack of any concrete evidence proffered by the challengers that the dock addition would in fact increase tanker traffic. *Id.* at 867 (emphasis added). In so doing, the court explained that an "EIS *must* be prepared if substantial questions are raised as to whether a project *may* cause significant degradation of some human environmental factor." *Id.* at 864-65 (internal quotation marks and alterations omitted); *accord Idaho Sporting*

Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992). Like the Second Circuit, the Ninth Circuit has expressly rejected the contrary view: "To trigger this [EIS] requirement a plaintiff need not show that significant effects *will in fact occur*," "raising substantial questions whether a project *may* have a significant effect is sufficient." *Ocean Advocates*, 402 F.3d at 866 (internal quotation marks and alteration omitted).

So too, the Eleventh Circuit has refused to permit an agency to avoid preparing an EIS merely because there is only the "potential" of a significant effect on the quality of the human environment. In *Hill v. Boy*, the Army Corps of Engineers chose not to create an EIS in connection with the issuance of dredge-and-fill permits needed for the construction of a dam and reservoir, the site of which was crossed by an existing underground petroleum pipeline. 144 F.3d 1446 (11th Cir. 1998). The court of appeals reversed due to the corps' failure to "take a 'hard look' at the *potential* adverse environmental consequences of such a pipeline," as the Corps had ignored the possibility that the existing pipeline might leak oil into the reservoir, and instead assumed that the pipeline would be relocated before the dam was built, without procuring any agreement to that effect. *Id.* at 1451.

The D.C. Circuit also requires agencies to consider possible (but not certain) effects. The court requires an agency to prepare an EIS "[i]f *any* significant environmental impacts *might* result from the proposed agency action." *See Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (*Peterson*) (McKinnen, J., joined by Wright and Scalia, J.J.) (second emphasis added); *see also Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002). In *Peterson*, the United States Forest Service decided not to issue an EIS with respect to an oil and gas leasing program. The D.C. Circuit reversed: "NEPA requires that federal agencies determine at the outset whether their major actions *can* result in 'significant' environmental impacts." *Id.* at 1413-14 (emphasis added). The

court thus held that the Forest Service failed to comply with NEPA by foregoing the EIS process despite the potential effects of drilling on the non-highly sensitive lands. *See id.* at 1414-15.

In sum, the First, Second, Ninth, D.C., and Eleventh Circuits all require federal agencies to prepare an EIS where a major federal action may significantly affect the quality of the human environment, even if it cannot be shown that it certainly will.

B. The Third, Fifth, And Tenth Circuits Apply A Highly Deferential Standard, Obliging the Challenger To Show That The Major Federal Action "Would Cause" A Significant Impact

As illustrated by the decision below, some circuits are misinterpreting *Marsh* to require a highly deferential standard of review of an agency's decision to dispense with the EIS process. Under these courts' approach, an agency's decision not to prepare an EIS will be affirmed unless the challenger can show that the project will, in fact, cause significant effects on the human environment.

Thus, in this case, the Fifth Circuit excused HUD's failure to prepare an EIS by noting the slim chance that the events feared by petitioners might not in fact come to pass: placing a Wal-Mart Supercenter and other high-rise buildings in the Lower Garden District might not significantly alter the historic quality of the neighborhood; other national retailers might not follow Wal-Mart into the Lower Garden District; and the project might not significantly impact nearby National Historic Landmarks. (*See* App. 21a-22a, 29a, 40a.) Under the Fifth Circuit's view, a federal agency is free to ignore serious potential effects on the quality of the human environment because there is some modest chance that these feared events might not occur.

Like the Fifth Circuit, the Third Circuit permits an agency to avoid an EIS despite the existence of potentially significant

effects on the quality of the human environment. In *Society Hill Towers Owners' Ass'n v. Rendell*, HUD financed the construction of a hotel and parking complex in downtown Philadelphia without preparing an EIS. *See* 210 F.3d 168 (3d Cir. 2000). In reaching its decision that no EIS was needed, HUD never considered the cumulative effects that would result from building the hotel and parking complex in connection with other projects that had been proposed for the area, including the creation of a "mega" entertainment complex. *See id.* at 182. The court upheld HUD's decision to ignore those potential effects because it was "not at all *certain* that the proposed 'mega' entertainment complex or any of the projects included in the planning documents [would] ever be completed." *Id.* (emphasis added). Because the challengers could not establish that the proposed projects would in fact be built, the Third Circuit held that NEPA did not oblige HUD to consider the possibility of such construction before foregoing the EIS process altogether.

Like the Third and Fifth Circuits, the Tenth Circuit also permits agencies to avoid the EIS process even though a major federal action is likely to significantly affect the human environment. For example, in *Greater Yellowstone Coalition v. Flowers*, the court upheld the Army Corps of Engineers' decision not to prepare an EIS concerning construction of a 359-acre golf course and upscale housing development in the Snake River Canyon. *See* 359 F.3d 1257 (10th Cir. 2004). The site of the proposed construction (which was a wetland subject to the Corps' jurisdiction) contained an "intact and healthy riparian ecosystem" supporting bald eagle nesting territories in addition to moose, elk, mule deer, black bears, mountain lions, trumpeter swans, and Snake River cutthroat trout. *See id.* at 1263. Although the Corps recognized that the impact on the bald eagle nesting grounds left a "continuing potential for disturbance due to increased human activity in the area," it nonetheless dispensed entirely with the EIS process. *Id.* at 1276. In upholding the Corps' decision, the Tenth Cir-

cuit explained that the evidence before the Corps "could not predict with *certainty* how the resident bald eagles would react to the Canyon Club development." *Id* (emphasis added). The court thus affirmed the Corps' decision not to prepare an EIS because "the past behavior of eagle pairs cannot be used to predict the future behavior of these and other eagle pairs within the Snake Unit." *Id.* In other words, the very fact that it was impossible to determine whether the project would certainly cause a significant effect on the nesting eagles was sufficient to support the Corps' decision not to prepare an EIS.

In sum, the Third, Fifth, and Tenth Circuits only require federal agencies to prepare an EIS where a major federal action will definitely significantly affect the quality of the human environment.

II. WHETHER AN AGENCY MUST CONSIDER A PROJECT'S POTENTIAL EFFECTS BEFORE DECLINING TO PREPARE AN EIS IS A QUESTION OF EXCEPTIONAL IMPORTANCE THAT THIS COURT MUST RESOLVE

The deep circuit split is vitally important because resolution of the dispute will have significant consequences for the practice of environmental decisionmaking. And because much of the circuit disagreement turns on this Court's decision in *Marsh*, the Court has a special responsibility to clarify this area of the law.

The standard of review adopted by the Third, Fifth, and Tenth Circuits hands federal agencies *carte blanche* to ignore NEPA's core requirement. The requirement that an agency prepare a fully informed and reasoned EIS before undertaking any "major" action "significantly affecting the human environment" lies at the "heart" of NEPA. *See Pub. Citizen*, 541 U.S. at 757-58 (citing 42 U.S.C. § 4332(2)(C)). Thus, this Court has mandated that courts reviewing agency decisions to forego the EIS process "carefully review[] the record and satisfy[] themselves that the agency has made a reasoned decision

based on its evaluation of the significance – or lack of significance – of the [relevant] information." *Marsh*, 490 U.S. at 378. The environmental consequences of practically every federal action are uncertain because the future is not yet known. The standard applied by the Third, Fifth, and Tenth Circuits permits agencies to ignore the EIS requirement in essentially every case simply by pointing to some mere possibility of uncertain future consequences. Indeed, this highly deferential standard permits agencies to sidestep NEPA *precisely* where careful decisionmaking is needed – when the potential outcome is uncertain.

In contrast, the position of the First, Second, Ninth, D.C., and Eleventh Circuits comports with NEPA and *Marsh*. Under the approach adopted by those courts, doubt is resolved in favor of preparing an EIS. By assuring that agencies prepare an EIS whenever a major federal action is likely to significantly affect the human environment, these circuits assure that agencies undertake to evaluate the environmental tradeoffs when their actions put the quality of the environment at risk.

Notably, those courts of appeals who have adopted a standard at odds with NEPA's core requirement have often attributed their highly permissive standard to *Marsh*. For example, prior to *Marsh*, the Fifth Circuit reviewed an agency's decision not to prepare an EIS for reasonableness, a standard it described as "less deferential" and "more rigorous" than the "arbitrary and capricious" standard. *See Fritiofson v. Alexander*, 772 F.2d 1225, 1237-38 (5th Cir. 1985). Subsequently, however, the Fifth Circuit determined that this Court's *Marsh* decision "plainly emasculated" *Fritiofson* and similar decisions and set a standard of review far more deferential to the agency. *See Sabine River Auth. v. Dep't of Interior*, 951 F.2d 669, 677 (5th Cir. 1992). Like the Fifth Circuit, the Third Circuit has interpreted *Marsh* as permitting an agency to avoid an EIS despite the existence of potentially significant effects on the quality of the human environment. *Soc'y Hill Towers*, 210 F.3d at 178-79 (3d Cir. 2000). Another circuit has displayed

confusion on the point,[11] while other circuits properly interpret *Marsh* as retaining the reasoned decisionmaking standard of review. Although *Marsh* plainly retains the reasoned decisionmaking requirement, the time has come for the Court to bring clarity to this area of the law.

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

This case squarely presents the standard-of-review issue for this Court's resolution. A federal agency has concluded that approving a Wal-Mart Supercenter (and the oceans of parking needed to support it), high-rise complexes, and other commercial ventures built in an historic, pedestrian-scale neighborhood of New Orleans (displacing hundreds of low-income families) does not trigger NEPA's EIS requirement, a requirement that applies to every major federal action that significantly affects the quality of the human environment. Such a strongly counterintuitive agency finding is only sustainable under a judicial standard that permits ignoring all but the most certain effects. The Fifth Circuit's decision below cannot stand if agencies are obliged to consider the likely effects of their actions.

A. The Applicable Standard Of Judicial Review Is Outcome Determinative As To The Compatibility Issue

Only under the Fifth Circuit's highly deferential standard of review is it possible to find that a proposed Wal-Mart with a block of parking and other high-rise buildings could be "compatible" with an historic neighborhood of pedestrian scale. As noted, many opponents of the project predicted that the Wal-Mart Supercenter would seriously erode the historic character

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[11] *Compare Hill*, 144 F.3d at 1451 (requiring agency to "make a convincing case"), *with Preserving Endangered Areas of Cobb's History v. Army Corps of Eng'rs*, 87 F.3d 1242, 1248-49 (11th Cir. 1996) (upholding decision not to create EIS where agency "considered the effects").

of the neighborhood while the private developer suggested that the big-box store would fit right in.[12]

In upholding HUD's conclusion that the future consequences of the Wal-Mart Supercenter would not significantly affect the quality of the Lower Garden District neighborhood, the court emphasized that the proposed Wal-Mart would be "located on the Tchoupitoulas industrial corridor." (App. 21a.) But even HUD admitted that the Project's area of potential effects extended across the rest of the Lower Garden District, and a large portion of urban New Orleans. (*See* App. I.) In the least, then, HUD was required to consider whether the proposed project would fit into the historic neighborhood of homes and pedestrian-scale retail, and not simply – as the court of appeals did – confine its inquiry to some adjacent industrial lands.

Any meaningful inquiry would surely have revealed the likelihood that this car-centered project focusing on a huge big-box suburban style store built largely out of concrete masonry block would almost certainly dramatically alter the character of this neighborhood. Only the most agency deferential standard imaginable – one that relies on even the merest suggestion that a likely event may not occur – could possibly sanction HUD's decision that the Wal-Mart Supercenter would be compatible with a Nineteenth-Century mixed-use neighborhood.

If this case had arisen in either the First, Second, Ninth, Eleventh, or D.C. Circuits, there is no question that HUD would have had to prepare an EIS. For example, in the First Circuit's decision *Sierra Club v. Marsh*, the court refused to defer to an agency's determination that no EIS was required

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[12] (*See, e.g.*, App. 90a ("Where is the argument that there are other parking lots of that size [850 spaces] in this neighborhood or anywhere in uptown New Orleans[?]"); *id.* (noting that the masonry-block exterior of the Wal-Mart Supercenter would constitute a drastic change from the brick veneers of the surrounding historic neighborhood).

where the agency had relied on compliance with local zoning laws without considering the fact that the relevant zoning laws had to be altered to effect compliance. *See Sierra Club v. Marsh*, 769 F.3d at 880-81. As in *Sierra Club v. Marsh*, major zoning changes were necessary here because the project called for land use inconsistent with the status quo. (*See* App. 20a-21a.) HUD's decision to avoid an EIS on these facts simply could not stand under *Sierra Club v. Marsh* and similar cases. *See, e.g., Md.-Nat'l Capital Park & Planning Comm'n v. U.S. Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973) ("When . . . the Federal Government exercises its sovereignty so as to override local zoning protections, NEPA requires more careful scrutiny. NEPA has full vitality, and its policies cannot be taken as effectuated by local land use control, where the proposal of the Federal Government reflects a *distinctive difference in kind* from the types of land use, proposed by private and local government sponsors, that can fairly be taken as within the scope of local controls." (emphasis added)).

B. The Applicable Standard Of Judicial Review Is Outcome Determinative As To The Collateral Effects Issue

A second way in which this case turns on the applicable standard of review concerns whether the Wal-Mart Supercenter might attract other national chains to the vicinity of the St. Thomas Project. Petitioners pointed to an economic market assessment in the administrative record showing that the Project would likely be followed by a rush of other national chain stores. *See* Appellants' Fifth Circuit Record Excerpt 8, at 1, 39. In affirming HUD's decision to ignore that possibility, the Fifth Circuit emphasized that petitioners offered "nothing concrete" to show that specific additional projects are "planned for in this particular project area." (*See* App. 29a.) Short of an actual contract with new developers showing that an influx of national chain retailers *will* occur, however, it is unclear how any litigant is to show a significant possibility that such an in-

flux *might* occur, if not through such a focused economic study predicting that it would.

The cases relied on by the Fifth Circuit to suggest that the statistics were "speculative" do nothing of the sort. Both involve the standards for assessing whether a completed EIS is sufficient, rather than whether an agency must prepare an EIS in the first instance. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989) (upholding a CEQ regulation requiring EIS to include only "reasonably foreseeable" consequences); *City of Shoreacres v. Waterworth*, 420 F.3d 440 (5th Cir. 2005) (upholding agency decision not to include in EIS unlikely event that future dredging would be required).

Again, had this issue arisen in the First, Second, Ninth, Eleventh, or D.C. Circuits HUD would have had to prepared an EIS. An economic study showing that a major federal program might cause a significant impact on the human environment would trigger the EIS requirement in those circuits. Only under the exceptionally deferential standard employed by the Fifth Circuit and its aligned circuits could a court approve of HUD's decision not to prepare an EIS despite this economic evidence of significant potential consequences to the environment.

C. The Applicable Standard Of Judicial Review Is Outcome Determinative As To The National Historic Landmarks Issue

A third illustration that this case turns on the applicable standard of judicial review concerns the real possibility of significant adverse impacts on National Historic Landmarks. The Fifth Circuit's highly deferential decision permitted HUD to rely on another agency's decision. HUD's only basis for its no-impact finding with respect to the NHLs was the NPS opinions, for which the NPS itself disavowed any identifiable basis, cautioning HUD that "extra caution" was required because "the National Historic Landmarks are considered to be the most important historic landmarks in the United States." (*See*

App. 92a.) Nonetheless, the Fifth Circuit approved the HUD's decision to not prepare an EIS, because petitioners had not made a sufficient showing that the Project would harm NHLs. (*See* App. 40a.) By contrast, the courts of appeals that impose a meaningful standard of review will not allow an agency to avoid preparing an EIS by merely deferring to other agencies and assuming that they will prevent significant effects from occurring. *See, e.g., Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 1122-23 (D.C. Cir. 1971) (declaring that each agency must make an independent NEPA determination, and cannot merely defer to certification by separate agency that environmental standards are met).[13] In short, under the Fifth Circuit's approach, unless there was proof that NHLs *would* be harmed, HUD was free to ignore the possibility, and not prepare an EIS.

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[13] *See also, e.g., The Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir. 1984) ("One agency cannot rely on another's examination of environmental effects under NEPA"); *Idaho v. ICC*, 35 F.3d 585, 595-96 (D.C. Cir. 1994) ("Instead of taking its own hard look, the Commission deferred to the scrutiny of others by authorizing salvage subject to conditions that require Union Pacific to consult with various federal and state agencies about the specific environmental impacts that fall within their jurisdictions. An agency cannot delegate its NEPA responsibilities in this manner . . . ."); *Anacostia Watershed Soc'y v. Babbitt*, 871 F. Supp. 475, 484 (D.D.C. 1994) (similar).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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