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 PROFESSORS OF ENVIRONMENTAL, LAND USE PLANNING, AND ADMINISTRATIVE LAW JAMES SALZMAN, DAVID CALLIES, ALYSON FLOURNOY, ROBERT GLICKSMAN, THOMAS MCGARITY, CLIFF RECHTSCHAFFEN, ROBERT R.M. VERCHICK AND DAVID VLADECK AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

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[1] Both parties have consented to the submission of this brief in letters filed with the Clerk. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part. The Program in Public Law at Duke University School of Law paid for the printing and submission of this brief.

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SUMMARY OF ARGUMENT

The Circuit Courts have applied different standards in reviewing a federal agency's decision not to prepare an EIS. The "arbitrary and capricious" standard as announced by this Court in *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989) has failed to create uniformity because the circuits have diverged in the application of this standard. The First, Second, Ninth, Eleventh, and D.C. Circuits uniformly review an agency's decision not to prepare an

Environmental Impact Statement ("EIS") under a "substantial possibility" standard. By permitting an agency to avoid conducting a full environmental analysis even though adverse environmental effects are substantially likely, the standard of judicial review applied by the Fifth Circuit undermines NEPA's vital functions and fails to implement NEPA "to the greatest extent possible." In contrast, the Third, Fifth, and Tenth Circuits require EISs in a much narrower range of circumstances.

The standard of judicial review applied by the Fifth Circuit undermines NEPA's vital functions and fails to implement NEPA "to the greatest extent possible." Specifically, the Fifth Circuit allowed the Department of Housing and Urban Development ("HUD") to transgress its legal boundaries, undercutting NEPA's mandate of informed decision making and public participation, because it misread this Court's decision in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). That case did not, as the Fifth Circuit construed it, rule that all environmental concerns not nearly certain are perforce "highly speculative." Rather, it noted that even remote and poorly understood concerns could be "reasonably foreseeable" and therefore deserving of the EIS process.

By dispensing with an EIS in favor of a less demanding Environmental Assessment ("EA"), HUD was able to sidestep NEPA's mandate of informed analysis and meaningful public participation, since EAs require less analysis and little or no public participation. Under such circumstances, the Fifth Circuit's more deferential standard toward EAs should be reversed to comport with this Court's decision in *Robertson*, the majority of federal circuits, and the policy objectives of NEPA.

ARGUMENT

I. THROUGH AN EIS, NEPA MANDATES INFORMED DECISION MAKING AND PUBLIC PARTICIPATION.

The National Environmental Policy Act ("NEPA") establishes a national policy designed, in the words of President Nixon, to "regain a productive harmony between man and nature." Richard M. Nixon, *Statement about the National Environmental Policy Act of 1969* (Jan. 1, 1970). The act sets out three visionary tasks. It commits the nation to a long-range mission of broad and uniform environmental policy. It directs federal agencies to prepare an EIS on all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). And it establishes broad channels of public participation to help improve proposed federal actions.

The centerpiece of the act is the EIS. Through the process of examining potential environmental harms and evaluating alternatives to proposed action, agencies further the act's long-range mission of informed decision making. By requiring multiple opportunities for inter-agency communication and public participation throughout the EIS process, the EIS requirement similarly realizes NEPA's goal of promoting public deliberation and enhancing the democratic process. Congress knew that government actors might be reluctant to change their methods and incorporate environmental concerns into their decision making; thus Congress expressly mandated that "to the fullest extent possible," the laws of the United States be interpreted and administered in accordance with NEPA's policies. 42 U.S.C. § 4332(1).

A trailblazer at the time of enactment, NEPA's precautionary, "look before you leap" attitude is now a foundation of environmental policy in the United States and around

the world. Its directive to consider potential environmental impacts and feasible government alternatives has "unquestionably improved the quality of federal agency decision-making" in environmental terms, minimizing the risks of dangerous emissions, saving billions of dollars in inefficient construction plans, and perhaps helping to provide essential habitat for the recently rediscovered Ivory-billed woodpecker. Robert G. Dreher, *NEPA under Siege, The Political Assault on the National Environmental Policy Act* 4-7 (2005); Council on Envtl. Quality, *The National Environmental Policy Act – A Study of Its Effectiveness After Twenty-Five Years* 8, 18 (Jan. 1997), *available at* <http://ceq.eh.doe.gov/nepa/nepa25fn.pdf>. NEPA has proved so attractive that similar laws now exist "in the statute books of 19 states and over 130 nations throughout the world." James Rasband, James Salzman & Mark Squillace, *Natural Resources Law and Policy* 253 (2004).

II. THE FIFTH CIRCUIT'S DECISION HEIGHTENS THE CONFLICT AMONG THE CIRCUITS AND UNDERMINES NEPA'S VITAL FUNCTIONS.

The Circuit Courts have applied different standards in reviewing a federal agency's decision not to prepare an EIS. The "arbitrary and capricious" standard as announced by this Court in *Marsh* has failed to create uniformity because the circuits have diverged in the application of this standard. This is widely recognized by practicing lawyers. Indeed the Environmental Law Practice Guide plainly states that "[the] plaintiff's burden of proof in showing that an agency's action significantly affects the quality of the human environment differs among the various circuits." 1 Michael Gerrard, *Environmental Law Practice Guide* § 1.11[5] (2006); *see also* 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, 198 (2003) (confusion among the circuits "raises the specter of becoming hopelessly mired in multiple meanings of a single term.").

A. The First, Second, Ninth, Eleventh, and D.C. Circuits Require EISs Whenever There Is a "Substantial Possibility" of a Significant Environmental Impact.

The First, Second, Ninth, Eleventh, and D.C. Circuits uniformly review an agency's decision not to prepare an EIS under a "substantial possibility" standard. Under this standard, the agency must conduct a thorough investigation into a project's *potential* effects before concluding that no EIS is needed. *See City of Waltham v. United States Postal Serv.*, 11 F.3d 235, 240 (1st Cir. 1993) (an EIS would be required if there was "a substantial possibility that the [Postal Service's] project could significantly affect the quality of the human environment." (internal quotation marks omitted)); *National Audubon Society v. Hoffman*, 132 F.3d 7, 18 (2d Cir. 1997) (a challenger to a finding of non-significance need "show only that there is a substantial possibility that the action may have a significant impact on the environment"); *Anderson v. Evans*, 371 F.3d 475, 489-90 (9th Cir. 2002) ("the possible impact on the whale population . . . [was] sufficiently uncertain and controversial to require the full EIS protocol."); *Fund for Animals v. Rice*, 85 F.3d 535, 546 (11th Cir. 1996) ("the purpose of an [Environmental Assessment] is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement" (quoting *River Road Alliance, Inc., v. Corps of Eng'rs of U.S. Army*,

764 F.2d 445, 449 (7th Cir. 1985)); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002) (Federal Aviation Administration must "fully assess the possible environmental consequences of activities which have the potential for disturbing the environment." (internal quotation marks and alterations omitted)).

In the Ninth Circuit case, *Anderson*, for example, the federal government approved a quota for whale hunting by the Makah Indian Tribe. *Anderson*, 371 F.3d at 480. In reversing the government's decision not to prepare an EIS, the court of appeals held that "the plaintiffs need not demonstrate that significant effects will occur." *Id.* at 488. Instead, a showing of "substantial questions whether a project may have a significant effect on the environment" was sufficient to require preparation of an EIS. *Id.* (internal quotation marks omitted). Indeed, it was the very uncertainty of the impacts that convinced the court of the need for an EIS. *See id.* at 489-90 ("the possible impact on the whale population . . . [was] sufficiently uncertain and controversial to require the full EIS protocol."). The federal government thus erred in not issuing an EIS when "[there was] at least a substantial question whether killing five whales . . . could have a significant impact on the environment." *Id.* at 490.

Similarly, the D.C. Circuit also requires an agency to review possible, rather than likely or certain, environmental effects. In *Grand Canyon Trust*, the Federal Aviation Administration decided not to issue an EIS for the construction of a replacement airport near Zion National Park. *Grand Canyon Trust*, 290 F.3d at 339. Holding that an agency must "fully assess the possible environmental consequences of activities which have the potential for disturbing the environment," the court of appeals remanded the case. *Id.* at 342 (internal quotation marks and alterations omitted). The court held that the EA could

not focus solely on the incremental impacts of the project; it must also address the potential cumulative impacts because the replacement airport, in connection with the noise impacts from other sources, could potentially create significant impacts on the Park. *See id.* at 346.

B. In Contrast, the Third, Fifth, and Tenth Circuits Require an EIS Only When a Significant Environmental Impact Is Nearly Certain.

In contrast to the circuits discussed above, the Third, Fifth, and Tenth Circuits require EISs in a much narrower range of circumstances. Indeed, a challenger to a finding of non-significance must show that significant environmental impacts are nearly certain in order to demonstrate the need for an EIS. *See Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 182 (3d Cir. 2000) (upholding the Department of Housing and Urban Development's decision to ignore the cumulative 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."); *Louisiana Crawfish Producers Ass'n v. Rowan*, 463 F.3d 352, 358 (5th Cir. 2006) (requiring evidence that a potentially harmful project be "formulated"); *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 431 (10th Cir. 1996) (Federal Aviation Administration's failure to analyze extensively the remaining components of a master plan was not inappropriate because "[u]pgrading Runway 3-21 does not *necessarily* signal a commitment to proceed with the rest of the Master Plan") (emphasis added).

Thus, the Third Circuit allows federal agencies not to prepare an EIS despite the existence of potentially significant effects on the quality of the human environment. In

Soc'y Hill Towers, for example, HUD approved a grant for the construction of a hotel and parking garage in downtown Philadelphia without issuing an EIS. *See Soc'y Hill Towers*, 210 F.3d at 172-73. In deciding that an EIS was unnecessary, HUD did not consider the cumulative effects that would result in connection with other proposed constructions in the area, including the building of a "mega" entertainment complex. *See id.* at 182. 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), the court upheld HUD's decision to disregard the cumulative impact regarding the other proposed projects.

III. THE FIFTH CIRCUIT'S STANDARD, ALONG WITH THOSE OF THE THIRD AND TENTH CIRCUITS, UNDERMINES NEPA'S MANDATE OF INFORMED DECISION MAKING AND PUBLIC PARTICIPATION.

By permitting an agency to avoid conducting a full environmental analysis even though adverse environmental effects are substantially likely, the standard of judicial review applied by the Fifth Circuit undermines NEPA's vital functions and fails to implement NEPA "to the greatest extent possible."

A. Through the EIS Requirement, NEPA Promises Informed Decision Making and Public Participation.

The EIS requirement serves both a "decision making" role and a more public, "informational" role. *Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 768 (2004). In the decision making role, the EIS requirement "'ensures that the agency, in reaching its decision will have

available, and will carefully consider detailed information concerning significant environmental impacts.'" *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). This consideration is both searching and, to some degree, speculative. Thus, as the Council on Environmental Quality ("CEQ") put it on the statute's twenty-fifth anniversary, the success of NEPA follows from its insistence that agencies "take a hard look" at even "the potential environmental consequences of their actions." Council on Envtl. Quality, *supra*, at iii.

Such precaution is consistent with the act's history. Lawmakers at the time of NEPA's passage argued that in contrast to past practices, where environmental factors had "frequently been ignored and omitted from consideration in the early planning stages" a "vital requisite" of environmental management under NEPA would be broad evaluation of the "full environmental impacts and the full costs – social, economic, and environmental – of Federal actions." 115 Cong. Rec. 40415, 40419 (Sen. Henry Jackson). Where conflicts arose, Senator Henry Jackson argued that agencies should "err on the side of environmental protection." Matthew J. Lindstrom & Zachary A. Smith, *The National Environmental Policy Act: Judicial Misconstruction, Legislative Indifference & Executive Neglect* 78 (2001). Necessarily, this new kind of decision making would require *new* information gathering to supplement present knowledge. As Senator Henry Jackson suggested decades ago, "the inadequacy of present knowledge" was, in fact, the major problem – manifesting itself in "haphazard urban and suburban growth," "congestion," and conditions that "detract from man's social and psychological well-being." 115 Cong. Rec. 29066, 29067. Ironically, nearly forty years later, these ills are the same ones that the Fifth Circuit now contends are beyond the reach of NEPA's EIS requirement.

In its second role, the EIS requirement "'guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.'" *Public Citizen,* 541 U.S. at 768 (quoting *Robertson,* 490 U.S. at 349). Such information is vital, since "Congress recognizes that . . . each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. § 4331.

Public participation, which occurs mainly at the comment stage of an EIS, serves two functions. First, public participation enhances informed decision making by providing policy makers with important information from community members, local government, and surrounding businesses that often lead to improved projects and less damaging impacts on the environment. *See* Council on Envtl. Quality, *supra,* at 17. Second, public deliberation enhances democratic involvement, increasing "public knowledge of . . . environmental issues" and "providing agencies an extraordinary opportunity to respond to citizen needs and build trust in surrounding communities." *Id.* Together, these two functions emphasize that "[e]nvironmental problems are not just a government problem, they are a community problem." *Id.*

B. The Fifth Circuit Misread This Court's Decision in *Robertson* and Undermined NEPA's Vital Functions.

While HUD is entitled to judicial deference, there are limits. NEPA's commitment to information gathering, and public participation are hardwired into the statute. Congress also directs that "to the fullest extent possible," the laws of the United States, including the Administrative Procedure Act, be interpreted in accordance with NEPA's

policies. 42 U.S.C. § 4332(1). Nor should deference principles allow a federal agency to convert its broad judgment into a "roving license to ignore the statutory text." *Massachusetts v. E.P.A.*, ___ U.S. ___, 2007 WL 957332, *20 (2007) (reviewing EPA inaction under the Clean Air Act). The Fifth Circuit allowed HUD to transgress its legal boundaries, undercutting NEPA's objective, because it misread this Court's decision in *Robertson*.

The problem seems to arise from an apparent confusion over when a potential effect should be considered so speculative as to fall outside the bounds of what is "reasonably foreseeable," which is to say, outside the bounds of NEPA review. In the case at bar, the Fifth Circuit defined a "reasonably foreseeable" event as one that must be either very likely or actually planned. For instance, one of petitioners' (collectively, "Coliseum Square") most important challenges to the Finding of No Significant Impact ("FONSI") focused on HUD's refusal to consider the possible effects that a larger migration of national chain stores would have on the historical Lower Garden District. (*See* Pet. Brief at 8.) The concern was based in part on an economic study in HUD's own administrative record, which described the view that Wal-Mart represented a "first wave" of brand-name stores as "understandable." Appellants' Fifth Circuit Record Excerpt 8. Nonetheless, the Fifth Circuit freed HUD from having to examine the role a Wal-Mart might play in drawing national chains to the area on the implausible grounds that such an effect was not "reasonably foreseeable." (Pet. App. 29a.) In rejecting as unforeseeable the influx of more chain stores, the appellate court did not claim that the concern was fanciful or even unsupported by evidence (recall the economic study), but that Coliseum Square had failed to provide "concrete" evidence that such commercial changes "will likely occur." *Id.* Without "concrete" evidence of a

"likely" occurrence, the court dismissed the feared result as a "'highly speculative harm'" – a term borrowed from this Court's decision in *Robertson*. *Id.* (quoting *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005), and citing *Robertson*, 490 U.S. at 356).

The Fifth Circuit's conclusion is mistaken in terms of both language and law. In terms of plain language, the court's conclusion is dubious. "Likely," when used as an adverb, means "probably," or "without much doubt." Merriam-Webster Eleventh Collegiate Dictionary 721, 989 (2003) (defining *likely* and *probably*). "Foreseeable," on the other hand, means "lying within the range for which forecasts are possible." *Id.* at 490. Because it is possible to make reasonable forecasts about events for which there may be some doubt, the two terms are not interchangeable. For the same reason, one cannot conclude that *any* event about which there is some doubt is perforce "highly speculative."[2]

In terms of controlling law, the appellate court's interpretation is also flawed: its references to "highly speculative harm" and the *Robertson* decision miss the point. The issue in *Robertson* was whether NEPA required an agency to make a "worst case analysis" in its EIS in situations where lack of information prevented the agency from making a reasoned assessment of the possible environmental impacts of a proposed ski resort. One concern of the plaintiffs challenging the EIS involved the effect that the project might have on the migration patterns of local mule deer. *Robertson*, 490 U.S. at 347. Because a lack of

[2] Indeed, logic suggests that most members of a finite set of events about which there is some doubt – if evenly spaced – would *not* be "highly speculative," as that phrase suggests a location near the extreme end of the range.

information made it too costly or impossible to assess the problem in empirical, site-specific ways, plaintiffs argued the agency must conduct a "worst case analysis," a method once required by CEQ regulations in such cases, but which had since been replaced by an updated rule requiring a less aggressive form of analysis using "theoretical approaches and research methods." *Id.* at 354.

This Court refused plaintiffs' demand for a "worst case analysis," noting that such an analysis might "overemphasiz[e] highly speculative harms." But, significantly, this Court never once suggested that the mysteries of mule deer migration were out of bounds. Rather, Justice Stevens, writing for a unanimous Court, endorsed the "well-considered" replacement of the "worst case scenario" model with a more flexible model that continued to require agencies to "describe the consequences of a remote, but potentially severe impact." *Id.* at 354-55 (quoting 50 Fed. Reg. 32237 (1985)). Despite the lack of concrete, empirical information about mule deer migration, this Court never doubted that a possible disruption of deer migration was "reasonably foreseeable." *Id.* To put it another way: this Court acknowledged that a potential harm could be remote, poorly understood, *and* "reasonably foreseeable" all at the same time.[3]

[3] To be sure, there is a limit to what is reasonably foreseeable, as suggested by this Court's refusal to re-impose the study of "highly speculative harms" under "worst case analysis." But such speculative "worst case" harms occupy a small universe of mostly scientific issues in which a causative link (between, say, an occurrence of cancer and exposure to a chemical) cannot be supported by any scientific data and is therefore "pure conjecture." *See* 50 Fed. Reg. 32234-01. In the case at bar, HUD does not claim that as a matter of scholarly research, there is no known link between the development of large box stores and the later appearance of smaller brand-name stores. On the contrary, the link seems more than plausible.

In the case at bar, Coliseum Square's concerns about the migration of brand-name stores is anything but remote or poorly understood. Yet the Fifth Circuit's mistaken interpretation of foreseeability turns even the most common-sense theory ("Super Wal-Marts attract more retailers") into something unacceptably exotic. To require EIS study only for harms about which there is "not much doubt" mocks the very idea of precaution. NEPA's "revolutionary" mandate for new analysis and public input rings hollow if applied only to events that are already basically understood. As the second stage of the development project goes forward, Coliseum Square is entitled to see more thoughtful examination and public participation than what the Fifth Circuit allowed.

C. Substituting an EA for an EIS Defeats NEPA's Mandate Because an EA Demands Less Analysis and Requires Little or No Public Participation.

By dispensing with an EIS in favor of a less demanding EA, HUD was able to sidestep NEPA's mandate of informed analysis and meaningful public participation. The EIS lies at the heart of the NEPA process. The EIS process requires an agency *to consider* and *to disclose to the public* a series of elements, from potential environmental impacts to alternatives to the proposed action. 42 U.S.C. § 4332(2)(C).

NEPA's inquiry "ensures that important effects will not be overlooked or underestimated, only to be discovered after resources have been committed or the die otherwise cast." *Robertson*, 490 U.S. at 349 (internal quotes and citations omitted). The EIS "inevitably" propels federal agencies "to respond to the needs of environmental quality." *Id.* (same). At the same time, the EIS process provides

broad opportunities for members of the public, including individuals, businesses, and local governments to involve themselves in decisions affecting their interests. Dreher, *supra*, at 3. Through the EIS process, members of the public can help define the issues to be studied through "scoping meetings." They have the right to propose alternatives to proposed actions and to respond to "gaps and misunderstandings in the agency's analysis at the draft stage of the EIS." *Id.*

1. EAs Demand Less Analysis and Require Little or No Public Participation.

In contrast, the EA process is meant simply as a "brief analysis," to identify potentially significant environmental effects in need of further evaluation, not to resolve those issues. *See* Council on Envtl. Quality, *supra,* at 19. To facilitate a "first cut" at the issues, EAs are expected be short, generally not exceeding 45 pages. *See Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18037 (1981) (recommending length of 10-15 pages); Gerrard, *supra*, at § 1.07 (noting that most EAs are 10-45 pages). Significantly, they are also relieved of the traditional requirements of public participation. For instance, notice of EA/FONSIs are not required to be published in the Federal Register; and the documents themselves need not be transmitted to CEQ, EPA, or any other supervisory agency. Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 Colum. L. Rev. 903, 937 (2002).

2. Lengthy EAs that Identify and Dismiss Multiple Concerns Threaten to Undercut the EIS process and Are Thus Highly Suspect.

CEQ has warned for years against the practice of using the EA process as a rough substitute for an EIS. Lengthy EAs that purport to identify and then dismiss multiple environmental concerns through a FONSI, have, therefore, become highly suspect. For instance, CEQ guidelines warn that "[i]n most cases . . . a lengthy EA indicates that an EIS is needed." 40 C.F.R. § 1502.7 (1984), *cited in Sierra Club v. Marsh,* 769 F.2d 868, 874 (1st Cir. 1985). More recently, CEQ has noted the concern that EA/FONSIs based on mitigation agreements (called "mitigated FONSIs") threaten to displace EIS protections and gut NEPA's central requirements. Such findings, it noted, "may be used simply to prevent the expense and time of the more in-depth analysis required by an EIS. The result is likely to be less rigorous scientific analysis, little or no public involvement, and consideration of fewer alternatives, all of which are at the very core of NEPA's strengths." Council on Envtl. Quality, *supra,* at 20; *see also* Karkkainen, *supra,* at 937 (noting that mitigated FONSIs "largely escape review by the public, the press, Congress, the White House, the agencies," creating "the risk of unsupervised and unaccountable exercises of agency discretion").

Indeed, the First Circuit raised this very concern in *Sierra Club,* 769 F.2d 868, where it rejected the findings of a 350-page collection of EAs concluding that a proposed cargo port and causeway in Maine would not significantly affect the environment. Observing that an EA was not a "*substitute*" for an EIS, a unanimous court (per then-Judge Stephen Breyer) explained that the two documents "serve very different purposes." *Sierra Club*, 769 F.2d. at 875.

The court noted the functional concern that an EA, unlike an EIS, "does not balance different kinds of positive and negative environmental effects, one against the other; nor does it weigh negative environmental impacts against a project's other objectives, such as, for example, economic development." *Id.* It then raised the political concern that confusing EAs and EISs runs the risk that "neither the agency nor those outside it could be certain that the government fully recognized and took proper account of environmental effects," noting that "those outside the agency have less opportunity to comment on an EA than on an EIS" and that "those inside the agency might pay less attention to environmental effects when described in an EA than when described in an EIS." *Id.* (citations omitted).

3. Because HUD's Lengthy EA and FONSI Undercut NEPA Goals, It Should Be Rejected in Favor of a Proper EIS.

HUD's EA, which totaled more roughly 450 pages, dismissed myriad environmental concerns based on little or, in the case of the migration of name-brand stores, no data. It also relied on mitigation agreements to defuse important environmental issues. (Pet. App. at 30a.) While these facts do not render the EA/FONSI invalid per se, they match exactly the profile of a process that the CEQ, legal scholars, and the courts have found suspect – a process that avoids "the spirit and intent of NEPA" and that ducks the "in-depth analysis required by an EIS." *See* Council on Envtl. Quality, *supra,* at 20. HUD's actions effectively allowed it to truncate its analysis of alternatives and to tailor public participation to meet voluntary, but not required goals. As suggested by the court in *Sierra Club,* the process may also have suffered from more

relaxed interagency requirements and lower public credibility. Under such circumstances, the Fifth Circuit's more deferential standard toward EAs and FONSIs should be reversed to comport with this Court's decision in *Robertson*, the majority of federal circuits, and the policy objectives of NEPA.

CONCLUSION

For these reasons, this Court should grant Coliseum Square's petition for certiorari.

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