No. 20-35412

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL, et al.,
Plaintiffs-Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS, et al.,
Defendants-Appellants.

On Appeal From The United States District Court
For The District Of Montana

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, TEXAS, AND 15 OTHER STATES IN SUPPORT OF DEFENDANTS-APPELLANTS AND SUPPORTING REVERSAL

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

None of the parties asked the district court to transform a case challenging application of the Army Corps of Engineer's Nationwide Permit 12 ("NWP-12") to *one* pipeline project into a nationwide injunction affecting new oil and gas pipelines in *every* State—no matter their length, purpose, or minimal environmental effects. The district court's overbroad, unrequested relief is flawed as a matter of fairness and court procedure, and on the merits.

Amici curiae the States of West Virginia, Texas, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and Wyoming file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). The *amici* States have compelling interests in challenging the district court's May 11, 2020 amended order ("Order"). The Order vacated NWP-12 as applied to "construction of new oil and gas pipelines" and enjoined the Army Corps from using that program to authorize any of these projects, anywhere in the country. 1 Federal Appellants' Excerpts of Record (E.R.) 38. NWP-12 is a streamlined Clean Water Act permitting regime that the Army Corps makes available to utility line and pipeline projects with a "minimal cumulative adverse effect on the environment." 82 Fed. Reg. 1860, 1860 (Jan. 6, 2017). It is a cost- and time-effective alternative to individual permitting for thousands of pipelines, power lines, internet lines, and the like every year: Electrical

power is the lifeblood of the modern economy, and all Americans rely on energy infrastructure every day. Energy-exporting States need this essential infrastructure to bring their goods to market, and energy-importing States need electrical infrastructure to power everything from homes to hospitals to manufacturing centers. With NWP-12 enjoined for new oil and gas pipelines, however, needed infrastructure projects will become significantly more expensive and time-consuming. In some cases, these complications may render projects altogether unfeasible. These are serious consequences for our national economy under any circumstances. And amid the current economic climate in light of the coronavirus pandemic, the economic activity and vitality these projects generate is even more critical.

Further, *amici* States lacked an opportunity to protect their interests earlier in this litigation. They had no notice that the district court would expand this lawsuit beyond Plaintiffs-Appellees' requested relief. To the contrary—and well before granting a nationwide Order affecting projects far afield of the Keystone XL route—the district court had assured the State of Montana that States could "prospectively rely on [NWP-12] until it expires on its own terms in March 2022, *even if Plaintiffs prevail on the merits*." 3 E.R. 457 (emphasis added). The lower court's about-face injured the interests of *amici* States and the nation all the more.

ARGUMENT

I. Enjoining Any New Oil And Gas Pipelines Nationwide Under NWP-12 Is Unjustifiably Broad Relief.

The district court abused its discretion when it entered an Order forbidding any new oil or gas pipeline, anywhere in the country, from relying on NWP-12. There is a growing debate in the judiciary whether injunctions with such broad, nationwide scope are ever appropriate. *See*, *e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). But the Court need not enter that fray to resolve this case. Assuming universal injunctions are appropriate in some cases, that remedy cannot be justified here.

Because "[t]he scope of an injunction is 'dependent as much on the equities of a given case as the substance of the legal issues it presents,'" a court "must tailor the scope 'to meet the exigencies of the particular case.'" *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018) (quoting *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017)). This means courts are bound to issue injunctive relief only as far as is "necessary to give prevailing parties the relief to which they are entitled." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1282 (9th Cir. 2020) (quotation omitted).

The district court's *sua sponte* decision to issue national relief flouted these principles—not to mention the way Plaintiffs-Appellees themselves framed and argued their case below. This action bears all the hallmarks of the type of case where

the Court has recognized broad relief is particularly *in*appropriate, *see*, *e.g.*, *Azar*, 911 F.3d at 583, and the myriad evidentiary and procedural defects below further call for reversal.

A. This Case Is A Poor Candidate For Broad Injunctive Relief.

This case does not warrant a nationwide injunction. The Court has outlined several factors that pull strongly against overbroad relief, and each one is present here.

1. First, this is the type of "regulatory challenge" where national relief is inappropriate because it involves "important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals." *Azar*, 911 F.3d at 583 (quotation omitted); *see also Ramos v. Wolf*, 2020 WL 5509753, at *23 (9th Cir. Sept. 14, 2020) (Nelson, J., concurring) (explaining vacatur of nationwide injunction appropriate in part because "judicial comity" should make district courts hesitant to "award injunctive relief that would cause substantial interference with another court's sovereignty" (quoting *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770 (9th Cir. 2008)).

NWP 12 "governs a broad range of activities that can be undertaken anywhere in the country under a wide variety of circumstances" because it addresses the "construction, maintenance, repair, and removal of all utility lines throughout the

nation." *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1058 (10th Cir. 2015). And not all utility lines are alike. Some carry resources like "water, fuel, and electricity"; others, like "telephone lines, internet connections, and cable [for] television," facilitate communication; still others "remove waste." *Id.* Further, some individual projects eligible for NWP-12 are often subject to "regional conditions" that may be wholly irrelevant for others. 82 Fed. Reg. at 1862.

All this means that evaluating the lawfulness of different applications of NWP-12 turns on a staggering amount of factual detail. Thus, even if the district court was correct on the merits that lack of consultation with other agencies for the Keystone Pipeline put endangered species at risk, the same is not necessarily true for other projects. Yet instead of allowing other courts around the nation to help develop the legal framework in these varied "factual contexts," *Azar*, 911 F.3d at 583, the district court prematurely shut off the valve that would have allowed for more nuanced development of the law.

2. This Court also rightly hesitates to sanction nationwide relief when it would exacerbate "forum shopping, which hinders the equitable administration of laws." *Azar*, 911 F.3d at 583 (citation omitted). Here, some of the Plaintiffs-Appellees previously brought challenges to NWP-12 in other jurisdictions—where they lost. *See Bostick*, 787 F.3d at 1047; *Ohio Valley Envtl. Coal. v. Bulen*, 429 F.3d 493, 500-05 (4th Cir. 2005). Courts in this Circuit are of course not bound by the Fourth and

Tenth Circuits' analyses. But when it comes to the remedies stage, a district court should pause before extending its equitable reach to geographic locales where "individuals similarly situated to the plaintiff lost a similar case." Amanda Frost, In Defense of Nationwide Injunctions, 93 N.Y.U. L. Rev. 1065, 1115 (2018). Blessing the lower court's decision to award nationwide relief would be troubling here where Plaintiffs-Appellees did not even ask for that result—allowing the Order to stand will make the incentive for forum shopping in the next case even more acute.

3. Finally, there should have been no need to consider the propriety of nationwide relief at all because the district court could have protected Plaintiffs-Appellees' interests with a more calibrated touch. In other words, this is not the type of case where plaintiffs would still "suffer their alleged injuries if [the Executive] were enjoined from enforcing the [challenged regulation]" only where the plaintiffs reside. *City & Cnty. of San Francisco v. Barr*, 965 F.3d 753, 765 (9th Cir. 2020). After all, Plaintiffs-Appellees claimed violation of the Endangered Species Act ("ESA") when applying NWP-12 to the Keystone Pipeline. 3 E.R. 487. Restricting NWP-12's scope to developments in States hundreds and thousands of miles away does not plausibly remedy that alleged harm.

This Court has repeatedly held the line on requiring district courts to tailor remedies to a plaintiff's specific injuries. Just last week, for example, this Court vacated a nationwide injunction against termination of several humanitarian

programs administered by the Department of Homeland Security. *Ramos*, 2020 WL 5509753, at *20. As Judge Nelson's concurrence explained, the district court's overbroad relief could have been reversed on the sole basis that the court had "never specifically addressed 'whether a nationwide injunction [was] necessary to remedy [the] alleged harm.'" *Id*. at *23 (Nelson, J., concurring) (quotation omitted). The same is true here. Similarly, in *Skydive Arizona, Inc. v. Quattrocchi*, this Court upheld a district court's refusal to grant a national injunction prohibiting a company from making false statements anywhere in the country. 673 F.3d 1105, 1116 (9th Cir. 2012). In approving that decision, the Court emphasized that an injunction—any injunction—must be "tailored to eliminate only the specific harm alleged." *Id*. (quotation omitted). Whatever a district court might think about the legality of a defendant's conduct more broadly, its equitable powers extend to preventing the damage suffered by the individual plaintiff before it, *and no more*.

B. Numerous Evidentiary And Procedural Failings Further Undercut The District Court's Order.

The district court took it upon itself to fashion expansive relief despite the factors above counseling against a broad injunction. It should not be surprising that the specific facts before it could not support that outcome, nor that the court's process was infected with procedural irregularities that compromised both the integrity of the fact-finding process and fairness to parties and non-parties alike.

1. With respect to the evidentiary basis for nationwide relief, the district court should have stayed its hand unless it concluded that Plaintiffs-Appellees met their high burden to show that a broad injunction was "necessary to provide complete relief." *Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979). Yet Plaintiffs-Appellees did not come close to meeting this burden for the simple reason that they did not ask for the remedy the district court ordered.

Indeed, the district court's approach to the remedies stage was marked by utter disregard for the principle of party presentation. Our system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quotation omitted); *see also*, *e.g.*, *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc) (explaining that "counsel almost always know a great deal more about their cases than [courts] do," and the decision not to ask for specific relief is often due to "some facts or reasoning not readily apparent to judges who view the case, so to speak, from the outside"). Here, however, the district court did not limit itself to only those "questions presented by the parties," but instead "sall[ied] forth . . . looking for wrongs to right." *Sineneng-Smith,* 140 S. Ct. at 1579 (quotation omitted).

This approach led the district court to grant initial relief that no one—not even Plaintiffs-Appellees—desired. Plaintiffs-Appellees asserted grievances with other oil and gas pipelines only after the district court entered its first, even broader, injunction. And these belated attempts to shore up the district court's overreach were not enough to support nationwide relief. For example, one declaration asserted, without detail, that an organization's interests would be "better protected if the Corps undertakes this consultation as the Court ordered, and if the agency continues to be prohibited from authorizing the construction of new oil and gas pipelines." 2 E.R. at 167. Another argued that the Atlantic Coast Pipeline would have "negative impacts on . . . the Roanoke logperch, clubshell, Madison Cave Isopod, rusty patched bumble bee, Indiana bat, and Northern long-eared bat," but provided no facts supporting that position. 2 E.R. 150.

Further, even if this after-the-fact evidence could support some of the Order's applications, it cannot bear its full weight. The purported need for ESA review at the heart of Plaintiffs-Appellees' case does not justify enjoining new natural gas pipelines, for instance, because the Federal Energy Regulatory Commission ("FERC") already conducts ESA review when approving these pipeline routes. *See Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 269 (4th Cir. 2018). As to Plaintiff-Appellees' remaining ESA concerns, NWP-12 project proponents must list any endangered "species or designated critical habitat" affected by the

project, and the Corps reviews these concerns before a project is allowed to proceed. 82 Fed. Reg. at 1873. Similarly, although Plaintiffs-Appellees expressed a desire to vacate NWP-12 to facilitate National Environmental Policy Act ("NEPA") reviews of pipeline projects, *see* 3 E.R 560, 573, the district engineer who verifies preconstruction notices under NWP-12 already conducts a NEPA cumulative effects analysis. *See* 82 Fed. Reg. at 1890.

Rather than crediting broad assertions to buttress even broader injunctive relief, the district court should have followed the lead of its Northern District counterpart in *California v. Wheeler*, 2020 WL 3403072, at *1 (N.D. Cal. June 19, 2020). In that case, plaintiffs sought a nationwide, preliminary injunction to a federal environmental rule from the outset of their challenge, and they submitted multiple declarations attempting to explain how their theory of harm required a national remedy. Pl.'s Reply In Support of Mot. For A Prelim. Inj. Or Stay at 15, *Wheeler*, 2020 WL 3403072. Even so, the district court credited the federal defendants' and intervening States' "substantial" challenge to the plaintiffs' theory of harm, including that it turned "on a number of speculative assumptions." *Wheeler*, 2020 WL 3403072, at *8. The district court ultimately denied the plaintiffs' request, finding that they failed to establish that their alleged injuries "apply with equal force in all parts of the country." *Id*. With an even weaker record of national harm here, the Order does not fare well in comparison.

2. Finally, the highly irregular procedure underlying the Order is itself a reason to reverse, because the district court did not provide entities such as *amici* States—much less the actual defendants in the case—"notice of the case against [them] and opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (quotation omitted).

As explained above, Plaintiffs-Appellees framed their case narrowly, asking the district court for an injunction preventing the "Corps from using NWP 12 to authorize the *construction of the Keystone XL pipeline* in waterbodies or wetlands, or otherwise verifying or approving *the Keystone XL pipeline* under NWP 12." 3 E.R. 573 (emphases added). The district court took Plaintiffs-Appellees at their word when it came to evaluating the participation of entities with interests in other aspects of NWP-12's operation. When the State of Montana sought to intervene in the proceedings as a matter of right, Plaintiff-Appellees opposed, asking for permissive intervention only and an order that would "strictly limit Montana's participation in the case to avoid delay and prejudice to the parties." 3 E.R. 454, 455. Plaintiffs-Appellees specifically disclaimed any request to have "NWP 12 broadly enjoined," emphasizing that they sought "narrowly tailored relief" for oil pipelines that would "not limit Montana's ability to build or repair other types of utility projects" subject to NWP-12 approval. 3 E.R. 477. And the district court granted limited intervention on this same basis: It affirmed that Plaintiffs-Appellees

"do not ask the Court to vacate NWP 12," and thus "as currently pled" the case would be "unlikely to impair or impede" Montana's interests. 3 E.R. 456, 459.

The court and the parties thus proceeded on the assumption that any remedy would be limited. Yet at the eleventh hour and on its own accord, the court transformed the case. The court's first order vacated NWP-12 in its entirety and enjoined the Corps from "authorizing *any* dredge or fill activities" under it. 1 E.R. 64 (emphasis added). The current Order is toned down (but still significantly broader than what Plaintiffs-Appellees themselves sought), and came about in part because even Plaintiffs-Appellees did not defend the district court's egregious overreach. Instead, they urged the court to "narrow the injunction to the use of NWP 12 for the construction of new oil and gas pipelines," 2 E.R. 124-25—and accompanied this new argument with new evidence purporting to justify the need for a broad injunction. 2 E.R. 137-22.

The district court's bait-and-switch was especially problematic because the court credited this newly produced evidence without allowing defendants or other parties a meaningful opportunity to rebut it. 1 E.R. 7, 10. This flawed process raises questions about fairness to the parties and the integrity of the judicial process, but it also poses serious concern for third parties who had even *less* notice that their interests would ultimately be at stake. In an era where challenges to agency rules are common and courts adopt different views about the proper geographic reach of

any remedies they award, assurance about the scope of a particular case from the pleadings and colloquies with a presiding judge become important metrics for entities trying to assess what cases may have serious consequences for their interests.

This is particularly true for other States. States are the primary enforcers of environmental and energy regulation within their borders, so cases like this affect the public interest and not simply private economic concerns. States deserve, at a minimum, fair notice when their interests are affected and the ability to respond in litigation when it matters most. Intervention or timely *amicus* participation are important tools for States to be able to provide a more complete picture before courts issue broad injunctive relief that may have serious consequences for people and entities far afield of where the primary parties live. Allowing the district court's surprise Order to stand sends a message that procedural safeguards and high evidentiary standards are not just a matter of judicial process, but critical protections for the States and the people they serve in our federalism regime.

II. The District Court's Overbroad Order Has Serious Consequences For *Amici* States And The Nation's Economy.

Finally, the Order has serious consequence beyond its lack of evidentiary support and the procedural irregularities that flouted the equities of "non-parties who [were] deprived the right to litigate in other forums." *Azar*, 911 F.3d at 583. By enjoining construction of pipelines throughout the United States, the district court

improperly ignored the interests of workers, consumers, and States throughout the nation. These serious consequences are an independent basis to reverse.

Even where a party seeks nationwide relief from the outset (rather than challenging fact-specific application of a regulation, as here), relief that would have sweeping, disruptive, and harmful consequences for other parties is often inappropriate. For instance, this Court reversed a district court's nationwide injunction of a regulation implementing a cap on Medicare payments to hospice providers, explaining that the injunction's breadth would "significantly disrupt the administration of the Medicare program" with consequences for "over 3,000 hospice providers, and would create great uncertainty for the government, Medicare contractors, and the hospice providers." *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011).

Similar disruption will occur if the Order remains in place. It is irrelevant that—modified after even Plaintiffs-Appellees could not credibly defend the first injunction's scope, 2 E.R. 120—the Order applies "only" to new oil and gas pipelines. 1 E.R. 38. If the Order is not reversed, then *no* entity in *any* part of the country will be able to rely on NWP-12 for construction of new oil and gas pipelines, even ones that do not implicate the concerns that animated the challenge here. Projects meeting the well-understood and long-standing requirements of NWP-12 will be forced to undergo the additional delays and costs associated with

individualized review. *See* Compl., *Sierra Club v. U.S Army Corps of Engineers, et al.*, No. 1:20-CV-460 (W.D. Tex. Apr. 30, 2020) (arguing that existing verifications for Permian Highway Pipeline are invalid under the Order). Delaying any of these projects will directly harm the communities that operate these pipelines and those the pipelines will serve.

The court below trivialized these consequences, noting that developers no longer able to rely on NWP-12 can still "pursue individual permits for their new oil and gas pipeline construction." 1 E.R. 29 (citation omitted). But this is cold comfort given the scope of difference—in time and dollars—between obtaining authorization through NWP-12 and undergoing the full individual permitting process under Section 404 of the Clean Water Act. Individual permitting review is long and costly: "The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (citation omitted). These processes have sped up since *Rapanos* was decided, but the Corps estimates that it still takes nearly six times as long—over 250 days—as applying through NWP-12. 2 E.R. 252, 263.

Moreover, individual permitting forces delays even before the clock starts for the permit-process itself: Under Section 401, an applicant cannot receive an

individual permit without a water quality survey from the State where the discharge will occur. 33 U.S.C. § 1341. State water regulators currently average 130 days to complete these assessments. *See* Ass'n Water Quality Adm's, *401 Certification Survey Summary* 1, May 2019, *available at* https://bit.ly/3fCmlzG. And these averages reflect a regime where NWP-12 remained available for qualified projects—every stage of individual-permitting review will slow down even more if the Order is allowed to channel *all* new oil and gas pipeline projects through individual permitting.

Thus, the Order presents decision-makers for new oil and gas projects with a lose-lose proposition. Taking the district court up on its alternative will require sinking time and money into the individual permitting process—which could potentially add years to the timelines of projects that require substantial capital investment. Some projects likely will not survive these setbacks. Such "nonrecoverable compliance costs" are an "irreparable harm" that should factor into the appropriateness of nationwide relief. *Cf. Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring).

The economic disruption the Order will cause in the energy sector will harm *amici* States and the Nation. Electricity, no less than water itself, is an "essential" and foundational element of modern life. *See*, *e.g.*, *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938, 1950 (2016) (describing water and

electricity as "essential public services"). As the nation's demand for electricity expands, so too must the fuel supply. *See*, *e.g.*, Electric Reliability Council of Texas ("ERCOT"), *ERCOT Reserve Margin up for Summer 2020, Energy Alerts Still Possible*, http://www.ercot.com/news/releases/show/206275 (last accessed Sept. 22, 2020) (forecasting increased demand). And in recent years, this need has been met more and more by oil and natural gas. *See*, *e.g.*, ERCOT, *Capacity Changes by Fuel Type*, http://www.ercot.com/content/wcm/lists/197386/Capacity_Changes_by_Fuel_Type_Charts_March_2020.xlsx (last accessed Sept. 22, 2020) (showing that gas-powered generation increased from 2,867 MW in 1999 to 35,901 MW in 2020).

In the past decade, oil and gas production in the United States has grown at a breakneck speed: Natural gas production was over 60% higher in 2019 than it was in 2009, and oil production more than doubled over the same period. U.S. Energy Information Admin., *U.S. Primary Energy Production by Major Sources: 1950-2019*, https://www.eia.gov/energyexplained/us-energy-facts/ (last accessed Sept. 22, 2020). Oil and gas now account for more than half of all domestic energy production. *Id*.

This growth has brought considerable economic opportunities: Over 704,000 Americans worked at various levels of the oil and gas industry in 2018, earning more than $100,000 on average. *See* U.S. Bureau of Labor Statistics, *Quarterly Census of Employment and Wages*, https://data.bls.gov/cgi-bin/dsrv (last accessed Aug. 24,

2020) (selecting NAICS codes: 211, 213111, 213112, 237120, 33313; Area: US Total; Owner: Private; Type: All employees, Total wages (in thousands)). And many regions of the country are sharing in these opportunities. In Appalachia, new extraction technology has tapped untold reserves of natural gas contained in shale deposits. *See* U.S. Geological Survey, *Appalachian Basin Oil and Gas Assessments*, https://on.doi.gov/3cvDGsh (last accessed Sept. 22, 2020). Similarly, advances in enhanced recovery practices have skyrocketed oil production in the Permian Basin region of Texas. *See* Railroad Comm'n of Texas, *Permian Basin Information*, https://bit.ly/2T7yu6e (last accessed Sept. 22, 2020).

State and local governments have also benefited from the tax revenue that oil and gas projects generate. Along with indirect taxes like sales and income taxes spurred by production, many state and local governments directly tax utilities and the property and equipment they use. For example, Texas imposes a gas utility tax on any entity that transports, conveys, distributes, or delivers natural gas at a rate of one-half of one percent of the utility's gross income. Tex. Util. Code § 122.051. Because of the industry's growth, the amount Texas has collected more than doubled in the last ten years, climbing from $14.8 million in 2010 to $31.2 million in 2019. *See* Railroad Comm'n of Texas, *Utility Audit Gas Utility Tax Collected Calendar Year*, https://www.rrc.state.tx.us/media/57751/7gsd-gu-tax-collected-total-by-cy.pdf (last accessed Sept. 22, 2020).

But a stable fuel supply cannot be brought to bear without a dynamic distribution network. Oil and natural gas are distributed mostly—and for natural gas, almost exclusively—through pipelines. And as one could expect, expanding the supply of oil and gas involves expanding the capacity of the nation's pipeline system. To illustrate, the new trove of oil extracted from the Permian Basin significantly exceeded what existing refineries and pipelines could support. *See* U.S. Energy Information Admin., *New Pipeline Infrastructure Should Accommodate Expected Rise in Permian Oil Production* (May 9, 2017), *available at* https://bit.ly/2Z1SGu0. New pipeline additions will continue to be needed to add capacity and thus realize the Basin's potential. *Id*. Similarly, the National Energy Technology Laboratory's review of trends in natural gas consumption concluded that "between $470 million and $1.1 billion" was a "conservative estimate" for the new investment in pipeline infrastructure needed to meet seasonal demand spikes. *See* U.S. Nat'l Energy Tech. Laboratory, *Additional Pipeline Capacity and Baseload Power Generation Needed to Secure Electric Grid* (Feb. 20, 2020), *available at* https://netl.doe.gov/node/9516.

Nor is the need for new pipeline projects mere speculation. New projects are analyzed and documented in robust administrative proceedings at the individual level. Prospective operators must prove to FERC that any new natural gas pipeline is "of public . . . necessity" to meet demand before construction may begin. 15

U.S.C. § 717f(c). States impose similar requirements for oil pipelines. *See*, *e.g.*, Alaska Stat. § 42.06.240(a) (requiring an oil pipeline builder to obtain a "certificate of public convenience and necessity" from the state public service commission before beginning construction). Indeed, the only pipeline that Plaintiffs-Appellees challenged in their complaint has received this exacting scrutiny—and approval. *See In re Application No. OP-0003*, 932 N.W.2d 653, 660 (Neb. 2019) (affirming Nebraska Public Service Commission's determination that Keystone XL route was "in the public interest").

The district court was too cavalier when dismissing these concerns as mere "temporary economic harms." 1 E.R. 34. The costs are serious enough to constitute irreparable injury for pipeline operators, *see Thunder Basin*, 510 U.S. at 220-21, and if they come to pass the public will be deprived of crucial energy infrastructure. And some of that deprivation—of jobs, tax revenue, and energy resources—will become permanent if these "temporary" harms force projects to shut down altogether. The Order does not grapple with these consequences, but relief tailored to the precise injuries alleged would have avoided them. Even if the Court concludes that some form of relief would have been appropriate here, it should make clear that the district court's heavy-handed, surprise approach was well outside its discretion.

CONCLUSION

The court should reverse the Order of the district court.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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[x] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature _____s/ Lindsay S. See_____ **Date** ____September 23, 2020_____
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I certify that on September 23, 2020, the foregoing document was served on counsel of record for all parties through the CM/ECF system.

s/Lindsay S. See	September 23, 2020
Lindsay S. See	Date