No. 18-1584

In the Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL.,
PETITIONERS

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals erroneously held that national forest lands underlying the Appalachian National Scenic Trail (Appalachian Trail) are in the National Park System and ineligible for the grant of rights-of-way under the Mineral Leasing Act, 30 U.S.C. 181 *et seq.* Although respondents defend the decision below, minimize its importance, and argue that review would be premature, their contentions lack merit. This Court should grant certiorari.

A. The Court Of Appeals' Decision Is Wrong

1. The National Trails System Act (or Act), 16 U.S.C. 1241 *et seq.*, established the Appalachian Trail as a footpath that crosses the surface of federal, state, and private lands without altering the legal status of the lands it traverses. See Pet. 15-19. Accordingly, when the Appalachian Trail runs through a national forest,

the United States Forest Service (Forest Service) retains its preexisting jurisdiction and authority over federal land underlying the Trail and, as relevant here, may grant rights-of-way through that land under the Mineral Leasing Act. See Pet. 19-25.

Respondents defend the court of appeals' contrary decision by arguing that the Appalachian Trail is a corridor of land approximately 1000 feet wide that encompasses not only a right-of-way on the surface, but the subsurface through which a pipeline would run 600 feet below the Earth's surface. That conception of the Trail conflicts with the plain text of the National Trails System Act. The Act establishes the Appalachian Trail as "a trail" that runs along a "right-of-way" and "shall be administered primarily as a footpath by the Secretary of the Interior." 16 U.S.C. 1244(a)(1). In addition, the Act specifies that "[n]othing contained in [the Act] shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System." 16 U.S.C. 1246(a)(1)(A). The Act thus gives the Secretary of the Interior responsibility only for a path that runs across the surface of lands, and not for the lands themselves.

Respondents assert (Br. in Opp. (Opp.) 28) that Section 1244(a)(1) charges the Secretary of the Interior with administering lands traversed by the Appalachian Trail because that provision states that "the right-of-way" for the Trail "shall include lands protected for it" under certain agreements. 16 U.S.C. 1244(a)(1). But that language does not task the Secretary with administering such lands, and Section 1246(a)(1)(A), quoted above, removes any doubt on the issue. Other provisions of the National Trails System Act confirm that the

establishment of a national trail does not transfer any preexisting land-management responsibilities from another agency to the Secretary charged with the overall administration of the trail. See Pet. 17-19. Respondents argue otherwise (Opp. 31-33), but the statutory sections they invoke address a trail administrator's authority to take certain actions in furtherance of the administration of the trail itself, *i.e.*, the path that runs across the surface of lands. Although some of those actions may also affect lands traversed by the trail, that possibility does not mean that the Act has given the trail administrator jurisdiction over those lands for other purposes.

To the contrary, some of respondents' cited provisions confirm that other federal agencies with preexisting jurisdiction remain responsible for administering and managing federal lands traversed by a national trail. See, *e.g.*, 16 U.S.C. 1246(c) ("Where the trails cross lands administered by Federal agencies [uniform] markers shall be erected * * * and maintained by the Federal agency administering the trail."); 16 U.S.C. 1246(i) (allowing the Secretary administering a trail to issue certain regulations only "with the concurrence of the heads of any other Federal agencies administering lands through which [the] trail passes"); see also 16 U.S.C. 1246(a)(2) and (b). And although the Act allows a trail administrator to acquire certain non-federal lands for a national trail, that acquisition authority does not give the trail administrator any land-management responsibilities over existing federal lands under the jurisdiction of another agency. 16 U.S.C. 1246(f)(2); see also 16 U.S.C. 1249(a).

2. Respondents contend (Opp. 22-24, 27-28) that all federal lands underlying the Appalachian Trail are in

the National Park System because the National Park Service (Park Service) and other federal agencies have described the "entire" Appalachian Trail as a "unit" of the National Park System. Respondents invoke a statute that defines the term "System unit" to mean an "area of land and water" in the National Park System, 54 U.S.C. 100501; see 54 U.S.C. 100102(6), and argue that, in light of that statute, the agencies' referring to the Appalachian Trail itself as a "unit" of the National Park System means that all lands traversed by the Trail (and their subsurface) are in the National Park System.

Respondents' position does not withstand scrutiny. The "System unit" definition on which respondents rely was first enacted in 2014, long after the Park Service began referring to the Appalachian Trail and other areas as "units" of the National Park System. See, *e.g.*, Nat'l Park Serv., *Appalachian National Scenic Trail Resource Management Plan* I-3 (Sept. 2008)[1] (Resource Management Plan); Nat'l Park Serv., *Management Policies 2006* § 1.2.[2] Furthermore, the Park Service's designation of the Appalachian Trail as a "unit" of the National Park System coexists with the Park Service's longstanding position, shared by the Forest Service, that lands traversed by the Appalachian Trail within national forests remain in the National Forest System and under the jurisdiction and management authority of the Forest Service. See Pet. 19-21.

In addition, respondents acknowledge (Opp. 30) that the geographic boundaries of what they refer to as "the Appalachian Trail park unit" contain private and state lands. If, as respondents contend, the Park Service's

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[1] https://www.nps.gov/appa/learn/management/upload/appalachian_trail_resource_management_plan.pdf.

[2] https://www.nps.gov/policy/MP_2006.pdf.

designation of the Appalachian Trail as a "park unit" means that all lands over which the Trail runs are in the National Park System, then the Secretary of the Interior's internal decision to delegate the Trail's administration to the Park Service, and the Park Service's subsequent decision to describe the Trail as a "unit," changed the legal status of private and state lands traversed by the Trail. Respondents identify nothing to suggest that Congress intended to give the Secretary of the Interior or the Park Service unilateral power to transfer such state or private lands into the National Park System. Cf. Pet. 23-24.

Nor do the evolving statutory definitions of the term "National Park System" bolster respondents' position. When Congress enacted the National Trails System Act, a separate statute defined "National Park System" to mean certain "federally owned or controlled lands" administered by the Park Service in accordance with certain requirements. Act of Aug. 8, 1953, ch. 384, § 2(a), 67 Stat. 496. That definition demonstrates that the establishment of the Appalachian Trail in 1968, which did not give the Secretary of the Interior any management responsibilities over lands under the jurisdiction of other agencies, see 16 U.S.C. 1246(a)(1)(A), did not transfer any lands to the National Park System. Likewise, Congress did not alter the status of any lands underlying the Appalachian Trail when it redefined "National Park System" in 1970 to "include any area of land and water" administered by the Park Service. National Park System General Authorities Act, Pub. L. No. 91-383, § 2(b), 84 Stat. 826; see also Pet. 21-22 (discussing application of successor statute with similar definition).

Respondents nevertheless assert that "Congress established the Appalachian Trail park unit," which "includes a 'protective corridor of land' approximately 1,000 feet wide." Opp. 29 (citation omitted). But respondents identify no congressional enactment that describes the Appalachian Trail as a "park unit," and the 2008 Park Service document that respondents cite to support the proposition that all land within that corridor (as opposed to the trail that crosses over it) is to be administered by the Park Service in fact refutes that proposition. See Resource Management Plan III-1 ("[T]he Appalachian Trail * * * crosses an extensive land base administered by many other federal and state agencies * * * in accordance with [their] own administrative jurisdictional responsibilities."); *id.* at I-3 ("More than 99% of the Trail now lies *within* a protective corridor of land.") (emphasis added).

B. This Court's Review Is Warranted Now

1. Certiorari is warranted because the decision below, if allowed to stand, would disrupt the management of national forests within the Fourth Circuit. See Pet. 19-21, 28-30. Historically, the Forest Service has managed each national forest traversed by the Trail as a coherent whole, subject to a single land-management plan. Although respondents contend (Opp. 19-21) that the court of appeals' decision does not change that status quo, the court expressly ruled that national forest lands underlying the Appalachian Trail are under the administrative authority of the Park Service. See Pet. App. 58a-59a.

At a minimum, that holding raises questions regarding whether the Forest Service may continue to administer and manage those slivers of forest land crossed by

the Appalachian Trail in accordance with the same Forest Service authorities, priorities, and objectives that apply to the surrounding forest lands. And because the court of appeals stated that the Park Service is responsible for administering national forest lands underlying the Appalachian Trail, the decision below also casts doubt on the validity of existing rights-of-way and easements granted by the Forest Service for power and telephone lines, roads, water facilities, and other infrastructure components that cross national forest lands underlying the Appalachian Trail.

In addition, respondents do not dispute that the decision below prevents federal agencies from granting new pipeline rights-of-way through federal lands underlying the Appalachian Trail in the Fourth Circuit. And respondents are wrong to assert (Opp. 6, 14-15, 17) that no federal agency had granted such a right-of-way under the Mineral Leasing Act until 2017. Several years earlier, the Forest Service authorized construction of a natural-gas pipeline on a route that, at the time of the authorization, crossed the Appalachian Trail on national forest land. See Forest Serv., *Decision Notice and Finding of No Significant Impact for the Natural Gas Pipeline Construction Project* 1-3, 9 (Nov. 22, 2013).[3] Although the Forest Service was aware that the Trail was scheduled to be rerouted away from that proposed crossing, and the rerouting ultimately occurred before the pipeline's construction, the Forest Service's decision accounted for the possibility that the pipeline would cross the Trail. See *ibid.*

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[3] https://www.fs.usda.gov/nfs/11558/www/nepa/93590_FSPLT3_1462661.pdf.

2. Respondents contend (Opp. 12-13) that review is unwarranted in the absence of a circuit conflict. But certiorari is appropriate when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The question presented here is important and warrants this Court's review. See Pet. 25-30. And to the extent respondents suggest (Opp. 12-13) that other courts have agreed with the Fourth Circuit's resolution of the question presented, that is incorrect. None of the cases cited by respondents addressed that question or the application of the National Trails System Act and the Mineral Leasing Act.

3. As respondents note, the Fourth Circuit remanded the case to allow the Forest Service to address certain issues relating to the agency's environmental analysis of the Atlantic pipeline project. Those remand proceedings, however, are in service of a single question: whether the Forest Service may again grant Atlantic a special use permit to construct a pipeline along the route through national forests approved by the Federal Energy Regulatory Commission (FERC). The FERC-approved route crosses underneath the Appalachian Trail within a national forest, see Pet. App. 2a-3a, and no matter what happens on remand, the court of appeals' decision categorically bars the Forest Service from granting a pipeline right-of-way through federal lands in national forests traversed by the Trail. Accordingly, even respondents acknowledge (Opp. 12) that the court of appeals' decision precludes the Forest Service from reissuing the same special use permit that the court vacated.

Respondents nevertheless contend (Opp. 8-12) that certiorari is unwarranted because, on remand, the For-

est Service could find additional reasons to decline to reissue the vacated permit. In respondents' view, the question presented would not be ripe for this Court's review unless and until the Forest Service resolves the remand issues in Atlantic's favor and "properly approves the same route following a remand." Opp. 11. But again, and as respondents recognize, in light of the Fourth Circuit's decision, the Forest Service cannot grant a pipeline right-of-way through federal lands underlying the Appalachian Trail.[4] See Opp. 12.

Respondents argue (Opp. 9-10) that the Forest Service may discover on remand that the Atlantic project's needs "can be reasonably met" by an alternative pipeline route that avoids national forest lands. Pet. App. 34a; see *id.* at 30a-34a. During the original review of the Atlantic project, however, FERC prepared an environmental impact statement (EIS) that evaluated alternative pipeline routes that avoided national forests, and the EIS determined that those paths would not "provide a significant

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[4] Respondents report that one of Atlantic's owners has asserted that the Department of the Interior and the Department of Agriculture "have the authority to resolve the Appalachian Trail crossing issue administratively." Opp. 18 (citation omitted). To the extent that Atlantic's statement was referring to the possibility of a land exchange akin to the one described in a recent proposal submitted by Mountain Valley Pipeline, LLC, the Department of the Interior and the Department of Agriculture have informed this Office that, in their judgment, substantial questions would have to be resolved to determine whether the relevant statutory authorities would authorize such an exchange. See Pet. 27-28 n.15. This is to say nothing of the environmental-review process that may be required if an exchange were possible. See generally 42 U.S.C. 4332(2)(C). Furthermore, the government should not be required to exchange lands in response to an erroneous interpretation of the National Trails System Act, and a land exchange would not solve the other problems created by the decision below.

environmental advantage when compared to the shorter proposed pipeline route through the National Forests." Joint C.A. App. 1542; see *id.* at 1541-1544. The EIS also found that those alternative routes would increase the length of the pipeline by 15 to 43 miles and that lengthening a pipeline route typically increases "the amount of environmental impacts on various resources." *Id.* at 1542. Respondents do not explain why the Forest Service would be likely to conclude on remand that the alternative pipeline routes described in the EIS would reasonably meet the needs of the Atlantic project.

Nor do respondents explain why Atlantic or the Forest Service would be likely to identify additional alternative routes that the EIS did not address. In preparing the EIS, FERC received comments from more than 1200 parties and evaluated 27 major pipeline route alternatives and several route variations to determine if those alternatives "would avoid or reduce impacts on environmentally sensitive resources, including land use impacts." Joint C.A. App. 1533; see *id.* at 1465-1466, 1478, 1533-1573. Respondents provide no basis to conclude that further study would reveal any viable alternative routes that more than 1200 public commentators failed to discover.

In addition, as a practical matter, any alternative route must still cross the Appalachian Trail and thus would likely have effects on the Trail's surrounding landscape that are comparable to the FERC-approved route. Under respondents' view of the relevant statutes, "pipelines can cross the Appalachian Trail on state or private land," Opp. 16, and the Forest Service may grant pipeline rights-of-way within national forests under the Mineral Leasing Act, see Opp. 11. Respondents do not explain why their arguments regarding the national forest

lands traversed by the Appalachian Trail would not also apply to state and private lands the Trail crosses. But in any event, respondents posit an arbitrary statutory scheme that would permit pipeline rights-of-way across both the Appalachian Trail and national forest lands, but preclude any federal agency from granting a pipeline right-of-way through those national forest lands that happen to underlie the Appalachian Trail.

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

Respectfully submitted.

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Solicitor General

SEPTEMBER 2019