Nos. 18-1584 and 18-1587

In The Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL.,

Petitioners,

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION, ET AL.,

Respondents.

ATLANTIC COAST PIPELINE, LLC,

Petitioner,

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF MOUNTAIN VALLEY PIPELINE, LLC AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Mountain Valley Pipeline, LLC ("Mountain Valley") is developing the Mountain Valley Pipeline ("MVP" or "Project"), a 303.5-mile natural gas pipeline from northeastern West Virginia to southern Virginia. MVP's route crosses the Appalachian National Scenic Trail ("Appalachian Trail" or "Trail") along the West Virginia-Virginia border within the Jefferson National Forest. Bureau of Land Mgmt., Mountain Valley Pipeline Project Record of Decision, at v (Dec. 20, 2017).[2]

Like the developers of the Atlantic Coast Pipeline ("ACP"), Mountain Valley sought and obtained a right-of-way to cross national forest land traversed by the Appalachian Trail. *See* Fed. Energy Regulatory Comm'n, Mountain Valley Pipeline Project Final Environmental Impact Statement ES-2, 1-8, 2-3 (2017).[3] But after the Fourth Circuit's decision in this case, no federal agency can lawfully issue a Mineral Leasing Act right-of-way to either pipeline to cross the Trail on national forest lands.

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[1] Counsel for all parties in Nos. 18-1584 and 18-1587 have provided written consent to this filing. Pursuant to this Court's Rule 37.6, no person or entity other than Mountain Valley and its counsel authored this brief in whole or in part, and Mountain Valley has exclusively funded the brief's preparation.

[2] https://eplanning.blm.gov/epl-front-office/projects/nepa/75521/130130/158226/BLM_MVP_Record_of_Decision.pdf.

[3] https://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20170623-4000. MVP's Trail crossing is roughly 200 trail-miles/105 air-miles southwestward from ACP's crossing.

The Fourth Circuit's decision forced Mountain Valley to suspend construction of its Trail-crossing. By that time, Mountain Valley had already completed most of the Project and was preparing to drill a borehole to place the pipe under the Trail.[4] MVP's Trail-crossing remains unfinished today—a key missing link in the almost-completed Project.

MVP is approximately 90% complete. More than 264 miles of pipe are welded and in place. The Project's three compressor stations and three interconnections with other pipelines are complete. More than $4.3 billion has been invested in the Project, which, in turn, has created more than 8,900 direct and indirect jobs and generated significant sources of additional state and local tax revenues.

Every alternative route potentially available to Mountain Valley also crosses the Trail. Thus, as a direct result of the Fourth Circuit's decision, energy consumers have been cut off from a major new source of domestic natural gas and any future prospect of new pipeline infrastructure to serve the Eastern Seaboard has been cast into doubt.

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[4] The United States Forest Service required Mountain Valley to construct a bore approximately 600 feet long, roughly 80 feet beneath the ridgetop and Trail. The condition preserved an undisturbed forested buffer nearly a football field in length (300 feet) on each side of the Trail to protect the visual experience on the Trail near the pipeline crossing and minimize any impacts during the temporary downslope construction activities. No construction would occur on or near the footpath.

SUMMARY OF ARGUMENT

This Court stated over a century ago that "it is not for the courts to say how" the nation's public lands "shall be administered. That is for Congress to determine." *Light v. United States*, 220 U.S. 523, 536-37 (1911). When the Fourth Circuit held that the segment of the Appalachian Trail crossed by ACP is land in the National Park System—even though the land is located within a national forest—it usurped Congress's exclusive constitutional prerogative to allocate jurisdiction over federal lands. The Fourth Circuit obliterated the carefully delineated jurisdictional boundaries that Congress has drawn between the Department of the Interior and the Department of Agriculture, conflated the limited coordinating role that Congress assigned to the Secretary of the Interior with the comprehensive land management jurisdiction assigned to the Secretary of Agriculture, and erected a 2,192-mile-long barrier that cuts off the East Coast from the vast natural-gas resources west of the Trail.

That outcome is incompatible with the text of the Weeks Act, National Trails System Act, and Mineral Leasing Act; with the legislative record both preceding and following the enactment of those statutes; and with the executive branch's implementation of these congressional mandates over the past five decades. All of those interpretive guideposts make clear that national forest land traversed by the Appalachian Trail's footpath is not "land[] in the National Park System" within the meaning of the Mineral Leasing Act of 1920. 30 U.S.C. § 185(b)(1), 41 Stat. 427.

In 1911, Congress unambiguously declared in the Weeks Act that national forest lands shall be "permanently reserved . . . and administered" as national forests subject to the jurisdiction of the Department of Agriculture. 16 U.S.C. § 521. Congress did not alter that mandate when it created the Appalachian Trail in the National Trails System Act of 1968, 16 U.S.C. §§ 1241-1251 ("Trails Act"). Because the Trail crosses land held by different owners, including multiple federal land management agencies, the Trails Act assigns responsibility to the Department of the Interior to coordinate the footpath. But the Trails Act expressly states that it does not "transfer among Federal agencies any management responsibilities established under any other law for federally administered lands," 16 U.S.C. § 1246(a)(1)(A), and thus does not extinguish the Department of Agriculture's jurisdiction over the nearly 1,000 miles of national forest lands traversed by the Trail's footpath. Indeed, the Trails Act *omits* language used by Congress in other contemporaneously enacted public-lands statutes that expressly transferred jurisdiction over federal land from one agency to another.

In overriding the jurisdictional lines drawn by the plain language of the Weeks Act and Trails Act, the Fourth Circuit afforded dispositive weight to the Secretary of the Interior's authority to "administer" the Trail "as a footpath" and the supposed relegation of the United States Forest Service ("Forest Service") to a mere "management" role. 16 U.S.C. § 1244(a)(1); *see also* Pet. App. 58a (No. 18-1584). But the terms

"management" and "administration" are used interchangeably in the Trails Act and throughout other federal public-lands law. Neither term has a single, fixed meaning nor necessarily implies superior authority. The Fourth Circuit relied on an artificial distinction between those terms to conclude that the Secretary of the Interior's administration of the Trail's footpath transferred jurisdiction over Forest Service land underlying the footpath to the National Park Service ("Park Service").

The flaws in the Fourth Circuit's decision are confirmed by the history preceding enactment of the Trails Act as well as the actions of both the relevant federal agencies and Congress over the past 50 years. The Johnson Administration's proposed national-trails legislation embodied an agreement between the Secretary of the Interior and the Secretary of Agriculture to respect the Departments' existing jurisdictional boundaries. In accordance with that agreement—and the plain statutory language—the executive branch has consistently interpreted the Trails Act as preserving the Forest Service's jurisdiction over national forest lands used for the Trail's footpath. Congress has been fully aware of the executive branch's interpretation and has ratified it on multiple occasions, including by repeatedly amending the Trails Act without adding language expressly transferring jurisdiction over national forest land and by providing the Park Service with annual budgets for Trail-related administration that are demonstrably inadequate to discharge the far-reaching jurisdictional responsibilities contemplated by the Fourth Circuit.

Finally, the Fourth Circuit's decision is also impossible to reconcile with the congressional objectives animating the pipeline right-of-way provisions of the Mineral Leasing Act, which Congress added to the law during the oil embargo and energy crisis of the early 1970s specifically to facilitate issuance of pipeline rights-of-way on Forest Service and other federal lands. By converting all federal land along the Trail into a barrier to pipeline rights-of-way, the Fourth Circuit eviscerated the purpose of that law—to the profound detriment of American consumers and Congress's goal of promoting energy independence.

ARGUMENT

I. The Text and History of the Trails Act Provide No Indication That It Was Intended to Transfer Jurisdiction Over National Forest Land.

Congress has a consistent record of carefully delineating departmental jurisdiction over public lands. Congress has been especially deliberate when deciding how to assign jurisdiction over public forest lands between national forests and national parks because they serve different public purposes.[5] National forests

[5] Departmental jurisdiction over federal forest lands has long generated discussion within Congress and the executive branch. *See*, *e.g.*, U.S. Gov't Accountability Office, GAO-09-223, *Federal Land Management: Observations on a Possible Move of the Forest Service into the Department of the Interior* 56-61 (2009); *see also* T.H. Watkins, *Righteous Pilgrim: The Life and Times of*

are administered by the Department of Agriculture's Forest Service for an array of utilitarian "multiple use" purposes, including commercial activities such as logging, mining, grazing, and energy development, as well as recreation and wilderness preservation. Multiple Use-Sustained Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified at 16 U.S.C. §§ 528-531). National parks, by contrast, are administered by the Department of the Interior's Park Service "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of same . . . unimpaired for the enjoyment of future generations." Nat'l Park Serv. Organic Act of 1916, ch. 408, § 1, 39 Stat. 535 (codified as amended at 54 U.S.C. § 100101).

The plain language of the Trails Act reflects Congress's intent to leave the allocation of jurisdiction between the Department of the Interior and the Department of Agriculture undisturbed by the creation of national trails. For example, the Trails Act provides that the "Secretary charged with the administration of a national scenic . . . trail may relocate segments of a national scenic . . . trail right-of-way," but only "*with the concurrence of the head of the Federal agency having jurisdiction over the lands involved*." 16 U.S.C. § 1246(b) (emphasis added). The Secretary also "may issue regulations," but only "*with the concurrence of the*

Harold L. Ickes, 1874-1952, at 556-61, 584-91 (1990) (illustrative discussion of political divisions during President Franklin D. Roosevelt's administration related to potential transfer of national forest jurisdiction away from Agriculture Department).

heads of any other Federal agencies administering lands through which a . . . national scenic . . . trail passes." *Id.* § 1246(i) (emphasis added). In the context of trail markers, the Trails Act further provides that "[w]here the trails cross lands *administered by Federal agencies* such markers shall be erected at appropriate points along the trails and maintained by the *Federal agency administering the trail* in accordance with standards established by the appropriate Secretary." *Id.* § 1246(c) (emphasis added). Thus, Congress recognized that the federal agency administering the *land* traversed by the trail may be different from the federal agency administering the *trail*.

Moreover, while providing for inter-agency coordination, the Trails Act makes clear that it does not "transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System." *Id*. § 1246(a)(1)(A).

In contrast, Congress is explicit when it intends to transfer jurisdiction from one federal agency to another. On the same day President Johnson signed the Trails Act, he signed legislation establishing North Cascades National Park from lands previously under Forest Service jurisdiction:

> Federal property within the boundaries of the park and recreation areas is hereby transferred to the administrative jurisdiction of the Secretary [of the Interior] for administration by him as part of the park and recreation areas. *The national forest land within such*

> *boundaries is hereby eliminated from the national forests within which it was heretofore located.*

Act of Oct. 2, 1968, Pub. L. No. 90-544, § 301, 82 Stat. 927 (codified at 16 U.S.C. § 90b(a)) (establishing the North Cascades National Park) (emphasis added); *see also* Wild and Scenic Rivers Act, Pub. L. No. 90-542, § 6, 82 Stat. 906, 912 (1968) (codified at 16 U.S.C. § 1281(c)) (contemporaneous legislation expressly making "component[s] of the national wild and scenic rivers system . . . part of the national park system").

Similarly, when establishing Great Basin National Park some years later, Congress specified that "[l]ands and waters . . . within the boundaries of the park which were administered by the Forest Service . . . prior to [the date of enactment of this Act] are hereby transferred to the administrative jurisdiction of the Secretary [of the Interior]." 16 U.S.C. § 410mm-2. In addition, the statute that established Great Sand Dunes National Park and Preserve directed that "[a]dministrative jurisdiction of lands and interests therein administered by the Secretary of Agriculture within the boundaries of the preserve is transferred to the Secretary of the Interior, to be administered as part of the preserve." Great Sand Dunes National Park and Preserve Act of 2000, Colorado, Pub. L. No. 106-530, § 5(a)(2), 114 Stat. 2527 (Nov. 22, 2000); *see also* 16 U.S.C. § 192b-9 (boundary adjustments for Rocky Mountain National Park).

The example of the Blue Ridge Parkway, which parallels and, in some locations, adjoins the

Appalachian Trail, is also instructive. More than 100 miles of the parkway, a Depression-era scenic road connecting Shenandoah and Great Smoky Mountains National Parks, is located inside four national forests, including the George Washington and Jefferson National Forests. The land used for the parkway inside the national forest boundaries was originally acquired for the federal government by the Forest Service under the Weeks Act. The parkway was at first under joint Forest Service and Park Service jurisdiction. However, in 1936, Congress consolidated management responsibility for the land used for the parkway in the Park Service. Pub. L. No. 74-883, 49 Stat. 2041 (1936).

Congress was clear in its direction to the executive branch, mandating "a right-of-way for said parkway . . . through Government-owned lands . . . as designated on maps heretofore or hereafter approved by the Secretary of the Interior, shall be known as the Blue Ridge Parkway and shall be administered and maintained by the Secretary of the Interior through the National Park Service." 16 U.S.C. § 460a-2. In accordance with that plain language, the legislative history of the bill clearly reflects the sponsors' intent to transfer jurisdiction over the land from the Forest Service to the Park Service.[6]

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[6] The bill's sponsor explained, "a considerable part of this highway goes through forest lands under control of the Department of Agriculture. This parkway should be under the control of the Park Service, which is in the Department of the Interior." Statement by Cong. Doughton, 80 Cong. Rec. 10566, 10584 (1936).

The language and legislative history of the Trails Act contain no trace of similar intent to transfer jurisdiction over land traversed by the Trail's footpath from the Forest Service to the Park Service. The Trails Act also lacks any of the other organizational provisions that might reasonably be expected to accompany a major change in allocation of executive branch responsibilities across eight national forests in a 14-state region. The Trails Act makes no mention of budget authority, personnel and property reassignment, or transition schedule or process.

Moreover, it would be a mistake to read into the policy-making environment of 1968 any suggestion that Congress simply assumed based on prior practice that all federal land management jurisdiction related to the Trail naturally belonged to the Park Service.

The Park Service had spent the post-World War II years promoting automobile-based visitation, including thousands of miles of new or improved park roads and more than 100 visitor centers. Ronald A. Foresta, *America's National Parks and their Keepers* 52-55 (1984). It is representative of the Park Service's orientation at that time that its chosen right-of-way for the Blue Ridge Parkway in the George Washington and Jefferson National Forests displaced nearly 120 miles of Appalachian Trail footpath from the Blue Ridge Mountains in Virginia, an impact later described by Appalachian Trail conservationists as "the major catastrophe in Appalachian Trail history." Appalachian Trail Conservancy, *The Appalachian Trail* 76 (2012)

("[N]o other single external act has displaced so much Trail mileage.").

If Congress had intended fundamentally to alter the Park Service's role or jurisdiction in the Trails Act, that legislation would have been a matter of great controversy in Washington. Congress had rejected at least eight proposals to transfer the national forests to the Department of the Interior in the years preceding enactment of the Trails Act. Ross W. Gorte, Cong. Research Serv., RL34772, *Proposals to Merge the Forest Service and the Bureau of Land Management: Issues and Approaches* CRS-14 (2008) ("Proposals to transfer the FS to DOI or the BLM to USDA, or to merge the FS and BLM (or its predecessor), date back to 1911, and have been made under Presidents Taft, Harding, Hoover, Roosevelt, Truman, Eisenhower, Nixon, Carter, and Clinton."). Agency personnel and constituencies were highly attuned to any hint of jurisdictional shifts. Even if lawmakers had wished to do so, it is inconceivable that Congress could have transferred nearly 1,000 miles of national forest land in eight national forests spanning 14 states without generating substantial public and Forest Service opposition and extensive congressional debate. Yet, the legislative record bears no evidence of any such controversy.

The Trail is simply an overlay of a particular use—a recreational footpath—on national forest land that is coordinated with and connected to the same use of other federal, state, and private lands. The coordinated use of Forest Service land in Virginia with other lands to the north and south does not change the legal status

of the land or dispossess the Forest Service of its jurisdiction over that land. The inter-agency and stakeholder coordination administered by the Secretary of the Interior is a procedural requirement of the Trails Act, not a reallocation of land management jurisdiction from the Department of Agriculture to the Department of the Interior.

To be sure, as the Fourth Circuit emphasized, the Park Service considers the Trail "a *unit* of the National Park System." Brief for Fed. Pets. at 45 (No. 18-1584) (emphasis added) (internal citation omitted). But the Trails Act did not designate the Trail a "unit" of the National Park System. The Park Service categorized the Trail a "unit" for its internal operational purposes. The term "unit" is a discretionary administrative catch-all, evident from the fact that National Park System "units" often include areas of non-federal ownership or areas under other agencies' jurisdictions.[7]

Of course, some segments of the Trail are on lands inside national parks, such as Shenandoah and Great Smoky Mountains, or on land purchased in fee by the Park Service specifically for the Trail. Those segments are "lands in the National Park System" within the meaning of the Mineral Leasing Act. 30 U.S.C. § 185(b)(1). But there is no basis in the Trails Act or

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[7] The Park Service's practice of granting "unit" status to some areas but not others reflects discretionary internal budgeting and resource management considerations. *See* the Nat'l Park Serv., Management Policies 8-10, § 1.3 (2006), https://www.nps.gov/policy/MP_2006.pdf (discretionary criteria for designation of "units").

any other statute for concluding that the rest of the federal land traversed by the Trail has been transformed into land "in the National Park System" by the Park Service's labeling conventions.[8]

II. The Terms "Administration" and "Management" Are Used Interchangeably Throughout Public Land Law and Do Not Have Fixed, Independent Meanings.

In concluding that the entire Appalachian Trail is "land[] in the National Park System," 30 U.S.C. § 185(b)(1), the Fourth Circuit relied on 16 U.S.C. § 1244(a)(1), which provides that the Trail "shall be administered primarily as a footpath by the Secretary of the Interior." According to the court, the Forest Service merely "manages land underlying components" of the Trail under 16 U.S.C. § 1246(a)(1)(A). Pet. App. 58a (No. 18-1584). In addition to the Federal Petitioners' argument (*see* Brief for Fed. Pets. at 17, 47-48), the Fourth Circuit's attempt to draw a rigid distinction between "administration" and "management" under the

[8] In 2014, Congress recodified many Park Service-related statutes into new Title 54 of the U.S. Code. Pub. L. No. 113-287, § 3, 128 Stat. 3094 (Dec. 19, 2014). Under 54 U.S.C. § 100102(6), a "system unit" is defined by reference to the description of the National Park System as "any area of land and water administered by the Secretary, acting through the Director, for park, monument, historic, parkway, recreational, or other purposes." 54 U.S.C. § 100501. That definition is circular and begs the question whether Congress has afforded the Park Service specific jurisdictional responsibility over a given area of land or water via another law.

Trails Act is inconsistent with Congress's historical usage of those terms and unsupported by the language of the Trails Act.

Most importantly, Congress had already directed in the Weeks Act of 1911 that lands acquired for the national forests traversed by the Trail must be "administered" for national forest purposes. 16 U.S.C. § 521. Nothing in the Trails Act displaced that prior congressional direction. Under the plain terms of the Weeks Act's controlling statutory language, the Fourth Circuit's characterization of Forest Service authority as mere "manage[ment]" is wrong.

Congress has used the terms "administration" and "management" (or variations thereof) throughout the public-land statutes. But Congress has never defined these terms. Nor has it used them consistently, even within the same statutory sections.

For instance, the Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (Sept. 3, 1964) (codified at 16 U.S.C. §§ 1131-1136), uses the terms "administered" and "managed" interchangeably, without definition, and sometimes within the same statutory section. Section 1131(a) directs that wilderness areas "be *administered* for the use and enjoyment of the American people," while Section 1131(c) defines wilderness as "an area of undeveloped Federal land . . . which is protected and *managed* so as to preserve its natural conditions." 16 U.S.C. § 1131(a), (c) (emphases added).

Similarly, the National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (Oct. 22, 1976)

(codified at 16 U.S.C. §§ 1600-1614), describes the Forest Service as both "administer[ing]" and "manag[ing]" national forest system lands, often using these terms interchangeably.[9]

The same is true of the Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2743 (Oct. 21, 1976) (codified at 43 U.S.C. ch. 35 §§ 1701-1785), which establishes the responsibilities of the Department of the Interior's Bureau of Land Management ("BLM") over public lands. The statute blurs any possible distinction between the two terms. BLM is responsible for "*manag[ing]* the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a) (emphasis added); *see also id*. §§ 1701(a)(7); 1712(e) ("Secretary may issue *management* decisions to implement land use plans") (emphasis added). However, land acquired through an exchange "shall be *administered* in accordance with the same provisions of law" as the exchanged-for lands, *id.* § 1715(e) (emphasis added), while simultaneously "be[ing] *managed* in accordance with all laws, rules, and regulations applicable to such unit or area" into which the acquired land is placed. *Id*. § 1716(c) (emphasis added). Moreover, the Secretary of the Interior is to issue regulations "with respect to the *management*, use, and protection of the public lands," *id.* § 1733(a) (emphasis added), and also

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[9] *Compare* 16 U.S.C. § 1609(a) (defining the "National Forest System" as including "lands, waters, or interests therein which are *administered* by the Forest Service"), *with id.* § 1600 ("the Forest Service, by virtue of its statutory authority for *management* of the National Forest System") (emphases added).

cooperate with state regulatory and law enforcement officials on "the *administration* and regulation of the use and occupancy of the public lands." *Id*. § 1733(d) (emphasis added).

The language of the Trails Act also reflects this congressional pattern of intermixed and imprecise use of the words "administration" and "management." In Section 1244 for instance, the Trails Act uses the terms "federally-administered" and "federally-managed" interchangeably to describe land that may be acquired for various trails.[10]

Congress's choice of terminology establishes no clear distinction between "administration" and "management," let alone the clarity of meaning and purpose sufficient to effectuate a wholesale repeal and reassignment of Forest Service jurisdiction. The terms do not have distinctly different meanings within the Trails Act or within the larger body of public-lands law.

Accordingly, the Fourth Circuit relied on an artificial and erroneous distinction between "administration" and "management" when it concluded that the Park Service's overall administration of the Appalachian Trail under 16 U.S.C. § 1244(a)(1) converted

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[10] 16 U.S.C. § 1244(a)(23)(D) ("exterior boundary of any federally-managed area"); (24)(F) ("exterior boundary of any federally-administered area"); (25)(D) ("exterior boundary of any federally-managed area"); (26)(D) ("exterior boundaries of any federally administered area"); (29)(D) ("exterior boundary of any federally-managed area"); (30)(D) ("the exterior boundary of any federally-managed area").

Forest Service land underlying the footpath into "lands in the National Park System." 30 U.S.C. § 185(b)(1).

III. Congress Has Affirmed the Executive Branch's Consistent Interpretation and Implementation of the Trails Act.

The Trails Act has been on the books for over 50 years, a span of 10 presidential administrations. Each administration has implemented the Trails Act in a manner consistent with the Weeks Act's requirement that lands acquired for the national forests—even when traversed by a national trail—"be permanently reserved, held, and administered" by the Forest Service. 16 U.S.C. § 521. Congress has been fully aware of the executive branch's interpretation of the Trails Act and long ago ratified it. The shared understanding of the legislative and executive branches is that the federal land inside national forests traversed by the Trail's footpath are under the jurisdiction of the Forest Service. As such, they may be used for pipeline rights-of-way under the Mineral Leasing Act. 30 U.S.C. § 185(b)(1).

A. The Executive Branch Proposed National Trails Legislation That Embodied the Jurisdictional Approach Supported by Petitioners.

The Trails Act began as a proposal developed by the Secretaries of Agriculture and the Interior responding to direction from President Johnson to provide

recommendations for a national system of recreational trails. President Lyndon B. Johnson, Special Message to the Congress on Conservation & Restoration of Natural Beauty, 1965 Pub. Papers 155 (Feb. 8, 1965). The Administration's legislative proposal accompanied a lengthy report submitted to Congress in 1966. U.S. Dep't of the Interior, Bureau of Outdoor Recreation, *Trails for America: Report on the Nationwide Trail Study* (1966) ("*Trails for America*").[11] The report carefully addressed the Administration's intention regarding departmental responsibilities where the path of a national trail crosses federal lands under the jurisdiction of several different federal agencies:

> *The land management agency having jurisdiction of the land on which any particular segment of the trail lies, should be responsible for management*.

Trails for America at 25 (emphasis added).

The Administration's proposal did not recommend that Congress transfer areas of federal land from one cabinet department to another in order to grant a single agency jurisdiction over the land spanning the entire length of a trail. The proposal recognized, however, that national trails comprising many segments under different owners and managers required a degree of coordination. "Primary administrative authority" would therefore need to be assigned to either the Department of the Interior or the Department of

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[11] https://www.nps.gov/noco/learn/management/upload/trails-for-america-1966.pdf.

Agriculture "to [e]nsure continuity" and "coordinate the efforts" of the various participating agencies. *Id*. In short, for each national trail, one department or the other would need to make sure the different segments connected and that the various agencies with jurisdiction over land traversed by the trail had a centralized mechanism for coordination.

In its status-quo approach to agency jurisdiction, the Administration's proposal embodied the "Treaty of the Potomac," a 1963 written agreement between Secretary of the Interior Stewart Udall and Secretary of Agriculture Orville Freeman, both of whom led their departments during development of the *Trails for America* proposal and continued their service throughout the period of congressional consideration and enactment of the Trails Act. *See* Appendix 1, Letter from Orville L. Freeman, Secretary of Agriculture, and Stewart L. Udall, Secretary of the Interior, to President John F. Kennedy (Jan. 28, 1963), Papers of Stewart Udall, University of Arizona Libraries, Special Collections No. AZ 372 (discussed in Samuel T. Dana & Sally K. Fairfax, *Forest and Range Policy* 209 (1980); Michael Frome, *The Forest Service* 278 (1984)). In the inter-department "Treaty," the two secretaries promised "to help implement the outdoor recreation program of the Administration" by ending decades of competition between their respective departments to seize control of federal lands from each other.[12] The agreement

[12] "This agreement settles issues which have long been involved in public controversy, we have closed the book on these disputes. . . ." Appendix 1, Letter from Orville L. Freeman,

was submitted to and publicly endorsed by President Kennedy. Appendix 1, Letter from President John F. Kennedy to Orville L. Freeman, Secretary of Agriculture, and Stewart L. Udall, Secretary of the Interior (Jan. 31, 1963).

B. Congressional Oversight of Executive Branch Implementation of the Trails Act Reflects the Same Understanding of Agency Jurisdiction.

Since passage of the Trails Act in 1968, both the executive branch and Congress have repeatedly confirmed the understanding embodied in the Johnson Administration's legislative proposal: the Trails Act did not alter existing departmental jurisdiction over federal land traversed by the Appalachian Trail or other national trails.

The executive branch has been consistent in its interpretation and implementation of the Trails Act, as illustrated by the earliest actions taken by the key departments after passage of the Trails Act. For example, in May 1969, the Secretaries of Agriculture and the Interior executed the first in a series of implementation agreements. The agreement establishes a joint task force to address trail markers, standards and regulations, and affirms that each department retains authority to revise routes proposed by the other. Memorandum of Agreement between the U.S. Dep't of Agriculture and

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Secretary of Agriculture, and Stewart L. Udall, Secretary of the Interior, to President John F. Kennedy (Jan. 28, 1963).

the U.S. Dep't of the Interior for the Development and Operation of the National Trails System (May 10, 1969), Record Group 48, Entry 976, CCF, 1969-72, P&S-Trails, National Archives at College Park, College Park, MD. There is no suggestion of any changes in jurisdiction. Similarly, the Interior Secretary's order issued several months later delegating the various new Trails Act duties within the Department of the Interior leaves no room for any interpretation of the Trails Act as transferring jurisdiction:

> The [Interior Department] bureaus have the responsibility for development and management of Interior lands under their jurisdiction which may be included in components of the [National Trails System] where administration is assigned to the Department of Agriculture.

Sec'y of the Interior Order 2924, § 3(e), Sept. 4, 1968, superseded by U.S. Dep't of the Interior Departmental Manual Part 710.1.3 (Jan. 14, 1972) (same Nat'l Archives at College Park record location).

This statement demonstrates the Department of the Interior's understanding that, where the Department of Agriculture is assigned administrative responsibility for a trail, the Department of the Interior retains jurisdiction over those lands traversed by the trail that were subject to Interior's jurisdiction before enactment of the Trails Act. In other words, the Trails Act did not transfer jurisdiction between the two agencies.

The record of congressional oversight of Trails Act implementation shows that the executive branch was equally clear in explaining to Congress how the Forest Service and Park Service understood their respective statutory authorities.

In March 1976, senior officials from the Department of the Interior, Park Service, Forest Service, and Appalachian Trail Conference (now Appalachian Trail Conservancy ("ATC")) testified at an oversight hearing on implementation of the Trails Act.[13] Nothing in the 441-page report on the hearing supports the Fourth Circuit's interpretation of the Trails Act as effectuating a jurisdictional transfer between agencies. *Oversight on the National Trails System Act of 1968: Oversight Hearings before the Subcomm. on Nat'l Parks and Recreation of the H. Comm. on Interior and Insular Affairs*, 94th Cong., 2nd session (1976) ("*Oversight Hearings*").

Instead, the hearing record is replete with statements by all key witnesses that unmistakably affirm continuing Forest Service jurisdiction over the lands inside the eight national forests traversed by the Trail

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[13] The ATC is a non-governmental organization that works in partnership with the Forest Service and Park Service to maintain the Trail. The ATC's role as a partner was formalized in the Trails Act and implemented through a variety of agreements with federal, state, and other parties. *See* National Park Service and Appalachian Trail Conservancy, Appalachian National Scenic Trail Resource Management Plan I-5 (2008), https://www.nps.gov/appa/learn/management/upload/Appalachian_Trail_Resource_Management_Plan.pdf (discussion of cooperative management system).

and the limited administrative and coordinating role assigned to the Department of the Interior.

For example, correspondence from the Chief of the Forest Service included in the hearing record explained: "The Department of the Interior is responsible for the [Appalachian] trail *outside* National Forest boundaries. . . . The Forest Service is responsible for maintaining 828 miles of the Trail *within* National Forests." *Oversight Hearings* at 170, 175-76 (Letter from John R. McGuire, Chief, U.S. Forest Service, to Hon. Roy A. Taylor, Chairman, Subcomm. on Interior and Insular Affairs (Mar. 20, 1976)) (emphases added).

Similarly, the Forest Service witness, Deputy Chief Thomas C. Nelson, testified that, while the Forest Service "cooperate[s] with" the Park Service and the Appalachian Trail Conference in the development, administration, and maintenance of the Appalachian Trail, the Forest Service "administers about 830 miles of the trail within the national forests" and has responsibility for construction and reconstruction of hundreds of miles of existing Trail footpath, acquisition of hundreds of miles of rights-of-way from private landowners within the boundaries of the national forests, and enforcement of Trail use rules on segments of the footpath inside national forests. *Id*. at 18-19, 22 (Statement of Thomas C. Nelson).[14]

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[14] Subsequent Park Service testimony before the Senate confirmed that the Park Service would conduct maintenance work "if the trail goes through the Great Smoky Mountains National Park, which it does, . . . and *the Forest Service would maintain the*

A letter from the Park Service included in the hearing record also makes clear that the Park Service held the same view of agency responsibilities under the Trails Act: "[T]he U.S. Forest Service and the National Park Service, respectively, acquire and maintain portions of the trail which pass through areas under their separate jurisdictions." *Oversight Hearings* at 72 (Letter from William C. Everhart, Assistant to the Director, National Park Service, to Mr. Edward B. Garvey, Dec. 15, 1975).

Likewise, testimony from an Appalachian Trail Conference witness echoed that understanding of the jurisdiction of the Forest Service and Park Service. Stanley Murray, the prior Chairman of the Appalachian Trail Conference, testified:

> While the National Park Service has done relatively little to protect the Trail in these 7 years, the U.S. Forest Service, the other Government Agency sharing responsibility for the A.T. has purchased enough tracts of land to provide protection for 77 miles of the A.T.—and, through trail relocation work it has moved an additional 24 miles of trail from private land to Government-owned land.

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trail through those national forest areas that it passes through." Dep't of the Interior and Related Agencies—Appropriations, Hearings Before the S. Comm. on Appropriations, 95th Cong. 1445, 1st Sess. (1978) (statement of former Park Service Director Gary E. Everhardt).

Oversight Hearings at 68 (Testimony of Stanley Murray, former Chairman, Appalachian Trail Conference).

Mr. Murray's testimony quoted the memorandum of agreement between the Park Service and Forest Service regarding administration of the Trail that was in effect when the Trails Act was passed and for at least two years thereafter. The agencies would cooperate "insofar as consistent with their established policies, and subject to appropriate authority under Acts of Congress" to designate a corridor for "those portions of [t]he Appalachian Trail which pass through areas under their separate jurisdiction." *Id*. at 75-76.

Mr. Murray's testimony in support of the Forest Service's land acquisition efforts inside national forest boundaries makes clear that, even though the acquisitions were to secure the Trail footpath, the lands would be managed by the Forest Service under the general "multiple use" principle that governs nearly all Forest Service activities and that stands in contrast to the Park Service's preservation mission. *Id*. at 85.

Congress ultimately approved significant amendments to the Trails Act in 1978. Consistent with the record established through the 1976 House oversight hearing, the 1978 amendments centered on Congress's dissatisfaction with the pace and scale of Park Service efforts to acquire private lands needed for the Trail.[15]

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[15] A contemporaneous description of the first several years of efforts by the Forest Service, Park Service, states and nongovernmental organizations to implement the Trails Act for the Appalachian Trail is provided in Sally K. Fairfax, *Federal-State*

Congress changed nothing related to Forest Service jurisdiction or the agency's interpretation and implementation of the law. Indeed, Congress has amended the Trails Act 38 times since 1968 and has never declared that the responsibility for management of national forest land used for the Appalachian Trail should be moved to the Department of the Interior.[16] Congress has, instead, added dozens of new trails to the system and this unambiguous statement of Congressional intent: "[n]othing contained in [the Trails Act] shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands." 16 U.S.C. § 1246(a)(1)(A). These amendments confirm that Congress shares the understanding of both the Forest Service and Park Service that the Trails Act does not effectuate a jurisdictional transfer between the two agencies.

Moreover, after passage of the Trails Act, the Forest Service has requested and received from Congress funding for management of the lands inside the eight national forests that include segments of the Trail footpath.[17] There is nothing in the record of appropriations

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Cooperation in Outdoor Recreation Policy Formation: The Case of the Appalachian Trail 26-27 (1974) (Ph.D. dissertation, Dep't of Pol. Sci., Duke University).

[16] Trails Act amendments are listed in Appendix 2.

[17] U.S. Dep't of the Interior and Related Agencies Appropriations for 1972, Hearings Before the S. Subcomm. of the S. Comm. on Appropriations, 92nd Cong. at 2721 (1971) (The Forest Service explaining that its request for an increase in funding compared to FY 1971 would "be used for *cleanup and administration* necessary

for Forest Service management activities—or in any other legislative history—to suggest Congress understood the Trails Act as diminishing Forest Service jurisdiction over the lands used for the Trail's footpath.

C. The Level of Congressional Support for the Park Service Confirms the Agency's Limited Role.

In light of this clear historical record, it should come as no surprise that the ATC recently expressed concern that the Fourth Circuit's decision in this case threatens the settled and successful management structure of the Trail.[18] Among other good reasons for

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to accommodate the 600,000 visitor-days of use expected on over 2,000 miles of the recently established Appalachian and Pacific Crest National Scenic Trails on the National Forests.") (emphasis added); U.S. Dep't of the Interior and Related Agencies Appropriations for 1972, Hearings Before the S. Comm. on Appropriations, 92nd Cong. at 2878 (1971) (The Forest Service remarking that requested funding would be used, in part, to "[p]rovide for new *construction and reconstruction of trails and particularly . . . portions of Appalachian Trails, within Forest Service areas of responsibility*, to handle the increased use and assure public safety.") (emphasis added).

[18] "The *Cowpasture* decision has presented fundamental challenges to the cooperative management system that A.T. managers have used since before the Trail was blazed. . . . *Cowpasture* is a step toward removing the primacy of the non-Park Service land managers and isolating it (and in the case of permitting natural gas pipelines, eliminating it) within the Park Service. . . . The *Cowpasture* decision has altered the Forest Service's historical authority on Forest Service lands within the Fourth Circuit." Appalachian Trail Conservancy, *The Cowpasture Decision*, http://www.appalachiantrail.org/home/community/blog/ATFootpath/2019/08/30/the-cowpasture-decision (last visited Dec. 4, 2019).

such concern, the Park Service has neither the personnel nor budget to match the responsibilities that would follow from the Fourth Circuit's decision. In fact, Congress has funded the Park Service's Trail-related responsibilities at a level evidencing Congress's understanding that the Park Service's authorized role is quite limited.

In 2018, Congress allocated only $1.6 million and just nine full-time employees ("FTEs") to the Park Service for Appalachian Trail operations. U.S. Dep't of the Interior, Nat'l Park Serv., Budget Justifications and Performance Information, Fiscal Year 2020, at ONPS-89. The level of congressionally-approved funding and staffing for the Trail resembles the staffing and budgets for park units that are orders of magnitude smaller and less complex than the 180,238 acres of all federal property and resources within the 239,604-acre area used for the Trail. *Id*. at ONPS-105 (acreage). For example, the following units have similar funding or staffing:

- Brown v. Board of Education National Historic Site: $1.6 million, 11 FTEs, 1.9 acres
- James A. Garfield National Historic Site: $0.78 million, 10 FTEs, 7.8 acres
- Rosie the Riveter WWII Home Front National Historic Park: $1.3 million, 10 FTEs, 0 acres.

Id. at ONPS-90 – ONPS-96 (funding and FTEs); ONPS-106 – ONPS-112 (acreage).

The 2018 Park Service budgets for several national park units that are roughly the same size as the area of federal lands used for the Trail are considerably larger than the Trail budget. For example:

- Lassen Volcano National Park: $5.4 million, 70 FTEs, 106,505 acres
- Padre Island National Seashore: $5.8 million, 67 FTEs, 130,356 acres
- Petrified Forest National Park: $3.7 million, 48 FTEs, 147,024 acres.

Id. at ONPS-94 – ONPS-95 (funding and FTEs); ONPS-11005 – ONPS-112 (acreage). Congressional support for park units near the Appalachian Trail offers additional perspective:

- Blue Ridge Parkway: $16.5 million, 171 FTEs, 88,636 acres
- Chesapeake & Ohio National Historic Park: $9.7 million, 73 FTEs, 14,465 acres
- Shenandoah National Park: $12.5 million, 200 FTEs, 198,355 acres
- Delaware Water Gap National Recreation Area: $9.9 million, 111 FTEs, 58,369 acres.

Id. at ONPS-89 – ONPS-96 (funding and FTEs); ONPS-105 – ONPS-107 (acreage).

As these budgets make clear, Congress matches park funding to the statutory responsibilities of the Park Service. The Fourth Circuit's decision would override congressional intent and require the Park Service

to manage a 2,192 mile-long, 14-state area with a budget and staff scaled to match only the operational demands of a single small site or historic structure. In doing so, the decision would place the Trail's fate entirely in the hands of an agency without authority or resources to manage the land.[19]

IV. The Mineral Leasing Act's Pipeline Right-of-Way Provision Was Intended to Facilitate Pipeline Siting and Should Be Interpreted to Further That Congressional Objective.

At least 16 major interstate gas pipelines appear to have crossed the lands traversed by the Trail at the time Congress approved the Trails Act.[20] The interstate pipelines were then, as today, subject to federal

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[19] There is no reason to assume that Trail funding could be found in existing Park Service accounts. The Park Service's deferred maintenance backlog exceeds $12 billion. *See* Laura B. Comay, Cong. Research Serv., R44924, The National Park Service's Maintenance Backlog: Frequently Asked Questions, 2, 3 (Aug. 23, 2017); Cong. Research Serv., R42757, National Park Service Appropriations: Ten-Year Trends, 4 (July 2, 2019). The Park Service recently reported approximately $18,875,476 in deferred maintenance for the Appalachian Trail. *See* Nat'l Park Serv., NPS Deferred Maintenance by State and Park (Sept. 30, 2018), https://www.nps.gov/subjects/infrastructure/upload/NPS-Deferred-Maintenance-FY18-State_and_Park_2018.pdf.

[20] A 1968 map prepared by the Federal Power Commission, the Federal Energy Regulatory Commission's predecessor agency charged with implementation of the Natural Gas Act, shows multiple major gas pipelines in the area of the Trail. That map is included as Appendix 3. Appendix 4 shows the approximate route of the Trail superimposed on the map by *amicus* Mountain Valley using contemporary geographic information system data.

approval under the provisions of the Natural Gas Act of 1938, Pub. L. No. 75-688, 52 Stat. 821 (June 21, 1938) (codified at 15 U.S.C. ch. 15b §§ 717-717z). Had Congress sought to change in any substantive way the federal approval process for gas pipelines intersecting the path of the Trail, it would have done so explicitly—especially if the intended change amounted to an outright prohibition on federal rights-of-way crossing the hundreds of miles of Forest Service land used for the Trail corridor. There is nothing in the Trails Act or the Mineral Leasing Act that even hints at such a far-reaching prohibition on pipeline development.

Indeed, Congress was intensely focused on domestic energy policy during the five-year period spanning enactment of the Trails Act and the 1973 amendments to the Mineral Leasing Act relevant here. Even before the oil embargo of 1973-74, Congress and the Federal Power Commission were struggling to stimulate domestic energy supplies. *See* Philip L. Cantelon, *The Regulatory Dilemma of the Federal Power Commission,* 1920-1977, Federal History J. 76-80 (2012);[21] Peter H. Dominick & David E. Brody, *The Alaska Pipeline: Wilderness Society v. Morton and the Trans-Alaska Pipeline Authorization Act*, 23 Am. U. L. Rev. 337 (1973); Fed. Power Comm'n, 1972 Fifty-Second Annual Report; Fed. Power Comm'n, 1973 Fifty-Third Annual Report.

The same congressional committees that produced the Trails Act also had jurisdiction over the Mineral

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[21] http://www.shfg.org/resources/Documents/FH%204%20(2012)%20Cantelon%202.pdf.

Leasing Act and key facets of national energy policy. The Senate Committee on Interior and Insular Affairs held 25 hearings on natural gas policy and legislation between 1968 and 1973. *See*, *e.g.*, S. Rep. No. 93-207, 28-29 (1973) (S. Comm. on Interior and Insular Affairs, *Federal Lands Right-of-Way Act of 1973*). During the same period, the House Committee on Interior and Insular Affairs held six hearings on natural gas policy and legislation. *See*, *e.g.*, *Oil & Natural Gas Pipeline Rights-of-Way, Hearings Before the Subcomm. on Public Lands of the Comm. on Interior & Insular Affairs on H.R. 9130 To Amend Section 28 of the Mineral Leasing Act of 1920, and To Authorize a Trans-Alaska Oil & Gas Pipeline, and for Other Purposes*, H.R., 93rd Cong. (1973).

Against this historical backdrop, it would defy reason to conclude that Congress intended the 1973 Mineral Leasing Act amendments to be applied in a way that would substantially impede new pipelines transporting domestic oil or gas to the Eastern Seaboard or constrict the opportunity for domestic producers of oil and gas to reach some of the largest domestic energy markets.

If in 1973 Congress had intended that the set of federal lands exempted from federal pipeline rights-of-way should include not just national parks such as Shenandoah and Great Smoky Mountains but also the other federal lands used for the Appalachian Trail, Congress would have said so. Congress's silence confirms that it did not intend the Mineral Leasing Act to transform the hundreds of miles of Forest Service

lands used for the Appalachian Trail into a barrier to pipeline development.

The best explanation for Congress's silence about the Appalachian Trail (and other national trails) when crafting the 1973 amendments to the Mineral Leasing Act is that it was not relevant—the lawmakers, who had approved the Trails Act just five years before, did not consider the entirety of the Trail to be a national park or the areas of federal land inside national forests used for the Trail to be lands in the National Park System. Every Congress and every administration before and since have, without exception, acted with the same understanding of the law.

CONCLUSION

The Fourth Circuit's decision upends the jurisdictional framework embodied in the Trails Act, Weeks Act, and Mineral Leasing Act, which carefully delineate lines of responsibility between the Forest Service and Park Service that have been consistently honored by the executive branch and repeatedly confirmed by Congress. That jurisdictional framework reflects Congress's well-established plenary power—long-recognized by this Court—over federal lands, including its authority to decide which federal executive department should administer those lands and for what purposes and uses. The Trails Act did not alter that purposefully structured jurisdictional arrangement. The Fourth Circuit erred in holding otherwise.

As a result of that decision, the Department of Agriculture, 14 states and hundreds of private landowners abruptly find themselves hosting a court-created national park. The Fourth Circuit would assign to the Park Service a 2,192-mile-long, 245,000-acre park without the resources or legal authority to manage it. And a highly successful management regime that relied on a century-old partnership among the Forest Service, Park Service, and ATC would be fundamentally disrupted. To restore the careful balance struck by Congress, this Court should reverse the court of appeals' judgment.

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