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.

ATLANTIC COAST PIPELINE, LLC, PETITIONER

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE WINTERGREEN PROPERTY OWNERS ASSOCIATION, THE FAIRWAY WOODS HOMEOWNERS CONDOMINIUM ASSOCIATION, AND FRIENDS OF WINTERGREEN, INC., AS AMICI CURIAE SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Miscellaneous—continued:

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INTEREST OF AMICI CURIAE

Amici are three associations collectively representing thousands of stakeholders in Wintergreen, a popular resort and scenic mountain community spanning 10,000 acres along the Blue Ridge Mountains. Wintergreen is home to 8000 full- and part-time residents, and it attracts

as many as 400,000 annual visitors with its outdoor activities and stunning natural beauty.[1]

The Wintergreen Property Owners Association is an organization of more than 3500 property owners at Wintergreen, and responsible for maintaining the communities' roads, recreational facilities, and municipal services (including police and fire and rescue). The Fairway Woods Homeowners Condominium Association is an organization of all owners in the Fairway Woods condominiums, situated near the top of the mountain community. Friends of Wintergreen, Inc., is a non-profit organization created and funded by Wintergreen owners to preserve the environment and safety of the Wintergreen community and its surrounding area.

The Wintergreen community is surrounded by dense forest, mostly on land in national parks or subject to conservation easements. There is a single point of entry and exit for the entire community. This access point lies around 2100 feet above sea level. The road immediately climbs about 700 feet to reach the community's lowest point. The climb is steep and proceeds through a narrow, heavily forested canyon. No pumped water is available along that climb, for emergencies or otherwise.

The Wintergreen amici have a significant interest in this case. The pipeline proposed by Atlantic Coast Pipeline (Atlantic) cuts across the sole access point for the Wintergreen community. It crosses underneath the Ap-

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[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person other than amici, their members, or their counsel have made a monetary contribution intended to fund the preparation or submission of this brief. The private parties have entered blanket consents to the filing of amicus briefs, and the federal petitioners have provided written consent to the filing of this brief.

palachian Trail in a long tunnel, descends down the remaining slope of the Blue Ridge Mountains, and steeply ascends an adjacent mountain. The proposed path makes a sharp bend near Wintergreen's entrance, surrounded by terrain prone to landslides. *E.g.*, Pet. App. 45a. As the court of appeals noted, a landslide in similar terrain recently caused a nearby pipeline to "rupture and explode." *Id.* at 47a.

The risks of Atlantic's pipeline at Wintergreen's entrance are both grave and obvious. If the pipeline ruptures and explodes at its proposed location, it could generate a fire blast with a one- to two-mile perimeter, threatening to ignite the surrounding forests. A forest fire on the north side would climb up the canyon and reach the Wintergreen community within an hour. Given the pipeline's location at Wintergreen's sole access point, any person on the mountain at the time would be effectively trapped. The consequences, predictably, would be fatal and catastrophic.[2]

When Atlantic sought approval of its project from the Federal Energy Regulatory Commission (FERC), a Wintergreen group commissioned an engineering study to examine workable alternatives to Atlantic's planned route. The engineering firm identified a viable alternative that does not cross the Wintergreen entrance, and likely avoids the Appalachian Trail over any Federal lands (thus mooting any issues under the Mineral Leasing Act, 30 U.S.C. 181 *et seq.*). This alternative path would cross at a break in the Trail, where it is connected by a sidewalk

[2] A similar scenario tragically occurred during the recent California wildfires, as residents of the Paradise mountaintop community were trapped after a fast-moving blaze blocked multiple escape routes. See Reuters, *Evacuation Plan "Out the Window" When Fire Hit California Town* (Nov. 17, 2018) <https://tinyurl.com/reuters-paradise-fire>.

along a road that already intersects with two highways; the location is industrial, with a railway tunnel and parking lot surrounded by abandoned buildings. Atlantic could use this option to minimize any disturbance to the Trail, avoid serious dangers to the Wintergreen community, and quite possibly moot the present controversy. Yet it has chosen to stick by its initial route.[3]

The Wintergreen amici have a strong interest in ensuring that important safeguards in federal law—including those in the Mineral Leasing Act—are enforced and respected. Eliminating those safeguards would curtail Congress's intended control over lands in the National Park System, and invite unnecessary, and dangerous, intrusions on protected federal lands.

SUMMARY OF ARGUMENT

As respondents have carefully explained, the Mineral Leasing Act's text, context, structure, history, and purpose all point in a single direction: the Forest Service lacks the authority to grant rights-of-way to gas pipelines through the Appalachian Trail. Congress provided agency heads robust authority to grant pipeline access to most federal lands, but it expressly reserved that power in three enumerated areas—including "lands in the National Park System." 30 U.S.C. 185(a), (b)(1). Under any sensible reading, the Appalachian Trail is indeed "land" in the National Park System. That land has been specially set aside "for the enjoyment of future generations," and its protected status is designed to leave the land "unim-

[3] The Wintergreen amici are currently challenging FERC's decision to accept Atlantic's proposal, and reject Wintergreen's, without adequately considering either proposal or other viable alternatives. See *Atlantic Coast Pipeline, LLC* v. *FERC*, Nos. 18-1224+ (D.C. Cir.).

paired." 54 U.S.C. 100101(a). If a pipeline wishes to override that statutory default, Congress required the pipeline to ask Congress itself for an exemption. See 30 U.S.C. 185(a), (b)(1).

While the Wintergreen amici fully agree with respondents' comprehensive submission, we offer this short brief to underscore two straightforward points.

First, there is every reason to read the Mineral Leasing Act to mean exactly what it says: Congress did indeed reserve to itself (by withdrawing from any agency) the authority to grant rights-of-way through national parks, including the Appalachian Trail. Congress had a heightened interest in direct supervision given the special nature of this land, and that interest is reflected in the express exceptions in the Act. And while it is often unrealistic to tell a litigant to "go back to Congress" if it wants to change the law, that is simply not the case here. Given the staggering magnitude (economic and otherwise) of most pipeline projects—a point Atlantic itself repeatedly reaffirms—there is every reason to believe Congress will consider pipeline proposals carefully, just as it has done in the past. It is up to the pipeline to identify a proposal that is politically palatable (which, by demanding a single, dangerous, inadequate path, it has yet to do here).

Energy producers are sophisticated entities. Any company seeking to construct a 600-mile pipeline crossing four States is already coordinating closely with multiple agencies, communities, economic stakeholders, and political bodies. It will know how to present a proposal to Congress that promises "thousands of jobs, substantial tax revenues, and hundreds of millions of dollars in annual [residential] savings." Atlantic Pet. Br. 1. And Congress is best situated to balance the potential benefits of any such project against the (often-irreversible) costs of disturbing land in the national parks—including by forcing

pipelines to consider any and all alternatives that might minimize environmental damage and, as here, avoid grave harm to surrounding communities.

Second, Atlantic's claim that the court of appeals' holding erects an impenetrable 2200-mile barrier to economic development is false. As the administrative record established, multiple route alternatives were available, including those that might sidestep any protected federal lands. See, *e.g.*, Pet. App. 31a, 40a & n.4. And it is telling that dozens of pipelines already cross this impenetrable barrier, without a single one looking to the Mineral Leasing Act for permission. See Resp. Br. 8. The fact is that Atlantic's true obstacle is its inflexible insistence on pursuing a single route through a sensitive area—notwithstanding viable alternatives that avoid protected land while eliminating the risk of catastrophic harm to communities like Wintergreen. Had Atlantic simply adopted any of those prudent alternatives, it could have avoided the legal quandary of asking an agency to grant a right-of-way that Congress saw fit to decide for itself.

ARGUMENT

A. Congress Reserved To Itself The Authority To Grant Any Pipeline Rights-Of-Way Through Protected National Park Lands

1. According to petitioners, the Mineral Leasing Act grants the Forest Service the authority to grant pipeline rights-of-way through the Appalachian Trail. But while Congress granted agencies broad authority over most "Federal lands," it specifically "except[ed]" three categories from the agencies' purview, including "lands in the National Park System." 30 U.S.C. 185(b)(1). This exception ensures that Congress alone has authority in this area; it did not delegate to an agency the decision whether to permit pipeline rights-of-way across national parks.

There is absolutely no reason to ignore that plain text and extend agency authority in one area where Congress expressly withdrew agency power.

Nor is Congress's careful reservation of authority at all surprising. The National Park System is a sacred part of our nation's identity. Congress has issued express directives to preserve those lands in their natural state for the benefit of all, "leav[ing] them unimpaired for the enjoyment of future generations." 54 U.S.C. 100101(a). These codified rules reflect Congress's heightened interest in protecting these special lands in an undisturbed state. If a pipeline wishes to upset that default and go straight through a national park—at obvious risk to its "scenery, natural and historic objects, and wild life," *ibid.*—Congress required the pipeline to ask Congress itself for permission.

2. a. In most instances, it is cold comfort—and somewhat unrealistic—to tell a regulated entity that its relief lies with Congress. But that is hardly the case here. This is not a matter of requesting a Public Law to approve a new crosswalk across some random town intersection. This is seeking legislative approval of a massive financial endeavor with significant public-policy implications. A 600-mile pipeline is a project of staggering proportions. It requires diligent planning and close interaction with various governments and government agencies.[4] The consequences for multiple communities (often in multiple States) are obvious, and there is every reason to believe that Congress will studiously entertain and review such

[4] See, *e.g.*, 18 C.F.R. Pt. 157, Subpt. A; see generally, *e.g.*, INGAA Foundation, Inc., *Building Interstate Natural Gas Transmission Pipelines: A Primer* (Jan. 2013) <https://tinyurl.com/ingaa-2013report>.

proposals with all necessary attention—including by balancing the potential benefits against the predictable costs to our National Park System.

It is also fair to ask pipelines to seek this legislative approval. Pipelines are sophisticated industry actors with deep financial resources. They are well-positioned to address all manner of legal and regulatory issues. If the pipeline wishes to traverse one of the country's limited protected areas, it can present its case to Congress, just as the Mineral Leasing Act effectively contemplates. And given the purported "billions of dollars of economic benefits" at stake (Atlantic Pet. Br. 19), Congress will obviously listen—even if its answer instructs the pipeline to adopt a more prudent course.

b. Notwithstanding this statutory design, certain amici worry that Congress does not grant such rights-of-way "routinely," noting that only a "handful of projects" have "received Congressional approval for rights-of-way across undisputed Park Service lands." Nat'l Ass'n of Mfgs. Amicus Br. 7-8. But this proves *our* point: It establishes that Congress can, and indeed *does*, consider such projects as appropriate. And the lack of "routine" legislation—approving entirely *non-routine* massive new industrial works—is unsurprising: It is not every day that a pipeline proposes extraordinary investments in significant new infrastructure, much less over routes that absolutely must cross treasured national parks.

As petitioners' own amici confirm, Congress is not insensitive to the needs of industry where viable alternatives are truly unavailable. See, *e.g.*, Rep. Jeff Duncan, et al., Amicus Br. 12 ("Congress has strongly supported domestic energy production, and pipelines are a crucial part of bringing that energy to consumers."). And industry has proven successful in obtaining permission when genuinely

necessary to bring critical new economic projects to fruition. The statutory scheme in place simply ensures that Congress itself gets the final say when it comes to endangering "lands in the National Park System." 30 U.S.C. 185(b)(1).

3. The Mineral Leasing Act, in short, withdraws agency power for a reason. Congress is best positioned to balance the competing equities implicated in this sensitive space. It can take a broader perspective in asking whether the benefits of a new pipeline (in a specific location) justify the potential costs to our national parks—or whether the pipeline ought to adjust its route to accommodate competing interests. This system has functioned effectively for over half a century without agencies granting a single pipeline a new right-of-way over the Appalachian Trail. There is no reason to upset this accepted practice now.

B. Enforcing The Mineral Leasing Act's Express Exceptions Will Not Frustrate Or Hamper Economic Development

According to Atlantic, the court of appeals' holding converts the Appalachian Trail into an impenetrable, 2200-mile barrier, forever blocking off the east coast from needed natural gas supplied from other parts of the country. Pet. Br. 2, 18, 19, 32, 40, 44, 48. Petitioner's "the-sky-is-falling" rhetoric vastly overstates its case.

It is simply untrue that Atlantic's preferred path is unquestionably the only option if Atlantic wants to bring natural gas to the eastern seaboard. The court of appeals already faulted Atlantic for refusing to adequately consider alternative routes. See, *e.g.*, Pet. App. 31a, 40a & n.4. Amici themselves have provided engineering studies to show alternatives were available, including ones that apparently avoid "Federal land," 30 U.S.C. 185(a)—and thus moot any issue under the Mineral Leasing Act. See Resp.

Br. 47-48.[5] And, of course, Atlantic always has the option of seeking congressional approval if it insists on crossing the Trail at this particular juncture—though it will predictably face problems in Congress given the shortcomings of its plan.

Atlantic has yet to adequately explain its refusal to consider these alternatives. In the past several decades, other pipelines have considered similar options and successfully traversed the Trail—they have done just fine without invoking the Mineral Leasing Act or distorting its terms. Resp. Br. 8 & n.9. Yet Atlantic refuses to embrace any other viable path, despite the prospects of minimizing harm to the Appalachian Trail and reducing significant dangers to communities like Wintergreen.[6]

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[5] Indeed, amici have already shown, with a thorough engineering study, that alternative paths are technically feasible. See, *e.g.*, *Comments of Friends of Wintergreen, Inc., on Draft Environmental Impact Statement*, Nos. CP15-554-000 & CP15-554-001, at 9-10, Attachments 1 (Ex. C) & 5 (FERC Mar. 24, 2017) <https://tinyurl.com/wintergreen-ferc-comments> (outlining the "Rockfish Gap" alternative, approximately 12 miles from Atlantic's preferred path). Atlantic raised various objections to this proposed route, but did not assert that it could not be constructed. The Rockfish Gap is already transited by two major highways and a CSX railroad tunnel. The Appalachian "Trail" at this location is a sidewalk along a road; it has an empty lot available for construction staging. Atlantic's pipeline could be accommodated with virtually no perceptible cost to any environmental (or other) interest in the area. Amici have attached a picture of this alternative location as an addendum to this brief.

[6] Atlantic is incorrect that it faces opposition solely from "environmental[ists]" who oppose any pipeline across any portion of the Trail. Pet. Br. 13. As the Wintergreen Property Owners Association has made clear, it has no objection to a *responsible* pipeline project; it merely opposes a plan to plot the pipeline in a location that risks unnecessary environmental harm and poses significant (and potentially catastrophic) danger to the entire Wintergreen community.

The true barrier Atlantic faces is not the Mineral Leasing Act, but its stubborn insistence on pursuing a single path despite its documented problems. With a project worth hundreds of millions (if not more), Atlantic has sufficient room to compromise if it so wishes—and a compromise would predictably secure a workable path for its 600-mile pipeline. But if Atlantic truly believes that only a single route will do, the Mineral Leasing Act unambiguously requires Atlantic to take it up with Congress.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2020

ADDENDUM

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This picture is a map of the "Rockfish Gap" alternative created through Google Maps using geographic coordinates for the route developed by Wintergreen's engineering team:

2: The 'Rockfish Gap' Detailed