Nos. 18-1584 & 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 FOR *AMICI CURIAE* NATURAL RESOURCES DEFENSE COUNCIL, THE WILDERNESS SOCIETY, AND DEFENDERS OF WILDLIFE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Natural Resources Defense Council (NRDC) is a national non-profit environmental advocacy organization that has worked for five decades to protect our Nation's public lands and the various values they support.

The Wilderness Society is a non-profit land conservation organization that is dedicated to protecting natural areas and federal public lands in the United States, including national forests and national parks.

Defenders of Wildlife is a non-profit conservation organization dedicated to the protection and restoration of all native animals and plants in their natural communities and the preservation of the habitat on which they depend.

SUMMARY OF ARGUMENT

I. This is a straightforward case of statutory interpretation. The Mineral Leasing Act expressly provides that no federal agency may grant a right-of-way for a natural gas pipeline through "lands owned by the United States" that are "in the National Park System." 30 U.S.C. § 185(a), (b). The National Park Service Organic Act defines lands in the National Park System to include all lands administered by the Director of the

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[1] In accordance with Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and that no party or counsel other than the *amici curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for petitioners in No. 18-1587 and for respondents in both cases have filed with this Court notices of blanket consent to the filing of *amicus* briefs. Counsel for petitioner in No. 18-1584 has consented to the filing of this brief.

National Park Service for recreational purposes. 54 U.S.C. §§ 100102, 100501. And the National Trails System Act defines the Appalachian Trail (AT) as lands administered by the Secretary of the Interior (through the Director of the National Park Service) for recreational purposes. 16 U.S.C. § 1244(a)(1). The only possible conclusion from the applicable statutes is that no federal agency may grant a natural gas pipeline right-of-way through federally owned segments of the AT, at least not unless or until Congress takes additional action to expressly authorize such a right-of-way.

Petitioners' arguments to the contrary are wrong. First, petitioners contend that no part of the AT is in the National Park System because the trail is not land per se, but is instead some sort of intangible route across lands. That argument is refuted by the relevant statutory texts and by this Court's explanations that a right-of-way for public purposes refers to the tract of land itself, not to the right to cross the land. Second, petitioners expend enormous energy insisting that the National Trails System Act did not "divest" the United States Forest Service of its jurisdiction over portions of the AT in the George Washington National Forest. But nobody disputes *that*. The question is not whether those portions of the AT were *removed* from the George Washington National Forest; the question is whether they were *added* to the National Park System. They were.

Because Congress plainly intended AT lands in the George Washington National Forest to be *both* lands in the National Park System *and* lands in a national forest, overlapping statutory schemes govern the ad-

ministration and management of those lands. And because the lands are part of the National Park System, the more protective measures of the Organic Act inevitably preclude the Forest Service from engaging in some activity on AT lands that the agency could engage in elsewhere in the Forest. That much is confirmed by the Forest Service's own documents governing its management of the George Washington National Forest. In light of Congress's direction in the Organic Act that National Park System lands must receive the highest level of protection and preservation, it is no surprise that Congress also declined to authorize pipelines through lands in the National Park System.

II. Petitioners' sky-is-falling predictions about the consequences of the Fourth Circuit's decision are without merit. First, the AT will *not* serve as a 2,000-mile barrier to natural gas pipelines because the exemption in the Mineral Leasing Act applies only to "lands owned by the United States," 30 U.S.C. § 185(b)(1)—and petitioners acknowledge that large swaths of the AT are owned by non-federal entities. Second, nothing in the decision below will interfere with agencies' ability to grant other types of rights-of-way across lands in the National Park System—because those rights-of-way are authorized by separate statutory provisions. Finally, petitioners are wrong that the decision below would allow pipelines to cross Yosemite National Park. Because Yosemite is in the National Park System, it is subject to the exemption in the Mineral Leasing Act.

III. If petitioners' view prevails, however, a small but important segment of National Park System lands will be imperiled. The AT is not the only unit of the

National Park System that is found within a national forest. Other units such as the Timpanogos Cave National Monument and the Gila Cliff Dwellings National Monument are within national forests. Those special places, like the AT, cannot be separated from the land in and on which they exist. But if the Forest Service could authorize a pipeline through those areas, the essence of those monuments would be destroyed. That is plainly not what Congress intended.

ARGUMENT

THE MINERAL LEASING ACT PROHIBITS ANY FEDERAL AGENCY FROM AUTHORIZING A PIPELINE ACROSS THE FEDERALLY OWNED PORTIONS OF THE APPALACHIAN TRAIL

This case presents a straightforward question of statutory interpretation: whether the portions of the Appalachian Trail (AT or Trail) that cross national forests qualify as "lands in the National Park System," 30 U.S.C. § 185(b), for purposes of the Mineral Leasing Act (MLA), 30 U.S.C. § 181 *et seq*. As the Fourth Circuit correctly held, the answer is unambiguously yes—and petitioner United States Forest Service (Forest Service or USFS) therefore lacked authority to issue a permit to petitioner Atlantic Coast Pipeline, LLC (ACP) to build a natural gas pipeline through a segment of the AT on federally owned lands.

I. The Federally Owned Portions of the Appalachian Trail Qualify as "Lands in the National Park System" Under the Mineral Leasing Act.

The MLA authorizes "the Secretary of the Interior or appropriate agency head" to grant a right-of-way

"through any Federal lands" "for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom" to a qualified applicant. 30 U.S.C. § 185(a). The Act defines the term "Federal lands"—"[f]or the purposes of" Section 185 only—to "mean[] all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf." *Id.* § 185(b). The ultimate question in this case is whether AT lands located within a national forest are "lands in the National Park System" for purposes of the MLA and therefore exempt from the definition of "Federal lands" through or under which a natural gas pipeline may pass. They are.

A. The Plain Language of the Mineral Leasing Act Excludes Appalachian Trail Lands from Pipeline Authorization.

The MLA does not define "lands in the National Park System"—but the National Park Service Organic Act (Organic Act), 54 U.S.C. § 100101 *et seq.*, and the National Trails System Act (Trails Act), 16 U.S.C. § 1241 *et seq.*, together make clear that the AT comprises lands in the National Park System.

First, the Organic Act defines the term "National Park System" to "mean[] the areas of land and water described in" 54 U.S.C. § 100501. *Id.* § 100102. Section 100501, in turn, provides that "[t]he System shall include any area of land and water administered by the Secretary [of the Interior], acting through the Director [of the National Park Service], for park, monument, historic, parkway, recreational, or other pur-

poses." *Id.* § 100501.[2] Under the plain text of that definition, the AT is part of the National Park System because it is administered by the Secretary of the Interior through the Director of the National Park Service for recreational purposes. The Organic Act expresses a broad view of what lands or waters qualify as the National Park System, first by declaring the Act's purpose of "includ[ing]" all areas administered by the National Park Service "in the System," *ibid.*, and then by emphasizing that the "areas" administered by the National Park Service, "though distinct in character, are united through their interrelated purposes and resources into one National Park System as cumulative expressions of a single national heritage," *id.* § 100101(b)(1)(B). In keeping with that congressional intent, the Court should reject petitioners' cramped view of the statutory definition of the National Park System.[3]

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[2] *Amici* Members of the House of Representatives argue (at 6) that the definition in Section 100501 cannot be relevant in construing the MLA because Section 100501 was not enacted until 2014. Before 2014, however, a materially identical definition of "National Park System" was codified at 16 U.S.C. § 1c(a) (1970) ("The 'national park system' shall include any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational, or other purposes.").

[3] Other parts of the Organic Act confirm that the AT is part of the National Park System. For example, the Act requires that the Director of the Park Service "prepare[] and revise[]" "[g]eneral management plans for the preservation and use of each System unit," 54 U.S.C. § 100502, and the Park Service has done just that for the AT, Nat'l Park Serv., *Appalachian National Scenic Trail Resource Management Plan* (Sept. 2008), https://www.nps.gov/

Second, the Trails Act makes clear that the AT satisfies the definition of "National Park System" in the Organic Act. The Trails Act specifies that "[n]ational scenic trails" are intended "to provide for maximum outdoor recreation potential," 16 U.S.C. § 1242(a)(2), designates the AT as a national scenic trail, and directs that the AT "shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture," *id.* § 1244(a)(1). The Secretary of the Interior has delegated authority to "administer[]" the AT to the Director of the National Park Service. Office of the Assistant Sec'y for Fish & Wildlife & Parks, U.S. Dep't of the Interior, *Departmental Manual* pt. 710, at 1.4(C)(1) (Aug. 16, 1977).[4] The AT is therefore an "area of land . . . administered by the Secretary, acting through the Director, for . . . recreational purposes," 54 U.S.C. § 100501—which makes it part of the "National Park System," as that term is defined in 54 U.S.C. § 100102. Consistent with that plain-text understanding, the National Park Service has promulgated a regulation governing activity on the AT, 36 C.F.R. § 7.100, and included that regulation under the umbrella of "Special Regulations, Areas of the National Park System," 36 C.F.R. ch. 1, pt. 7. The National Park Service also includes the AT in its published maps of the National Park System. *E.g.*, Nat'l Park Serv., *National Park System Wall Map* (Jan. 2020).[5] And the National Park Service's operative

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appa/learn/management/upload/Appalachian_Trail_Resource_Management_Plan.pdf.

[4] https://go.usa.gov/xpKnw.

[5] https://www.nps.gov/carto/hfc/carto/media/NPSWallMap.jpg.

Management Policies handbook specifies that "[s]everal components of the National Trails System which are administered by the Service, have been designated as units of the national park system" and "are therefore managed as national park areas." Nat'l Park Serv., *Management Policies 2006*, § 9.2.2.7, at 134 (Aug. 31, 2006).[6]

Because the AT comprises "lands in the National Park System," the segments of the AT on "lands owned by the United States" do not qualify as "Federal lands" under the MLA. 30 U.S.C. § 185(b). The MLA therefore does not authorize either the Secretary of the Interior or the Secretary of Agriculture to grant a right-of-way through AT segments on federally owned land for natural gas pipelines.

B. The Appalachian Trail Is Land, Not a Metaphysical Route.

Petitioners' first response (USFS Br. 19; ACP Br. 18) to that straightforward reading of the relevant statutory texts is that the AT is not "land" at all but is instead merely "a trail" or "a footpath" that metaphysically crosses land. That argument is too clever by half.

The Trails Act defines the AT as a "right-of-way" that traces a specified route. 16 U.S.C. § 1244(a)(1); *accord id.* § 1246(b) (authorizing relocation of "segments of a national scenic or national historic trail right-of-way" in some circumstances); *id.* § 1246(d)-(f) (provisions governing "trail right-of-way"). Petitioners would have this Court hold that a "right-of-way" is in

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[6] https://www.nps.gov/policy/mp/policies.html.

all circumstances only a right of passage—an intangible route that hovers above the land it traverses. But this Court long ago rejected that cramped understanding of the term, holding that "[t]he phrase 'right of way,' . . . does not necessarily mean the right of passage merely" or "'the mere intangible right to cross.'" *New Mexico v. U.S. Tr. Co.*, 172 U.S. 171, 181-182 (1898) (quoting *Keener v. Union Pac. Ry.*, 31 F. 126, 128 (D. Colo. 1887) (Brewer, J.)). Rather, when a right-of-way is for a "public purpose[]"—such as here, to build a public, federally recognized trail—the term "'is often used to otherwise indicate that strip which the [right-of-way holder] appropriates for its use, and upon which it builds its'" public use. *Id.* at 182 (quoting *Keener*, 31 F. at 128); *see Joy v. St. Louis*, 138 U.S. 1, 44 (1891) (same); *accord Black's Law Dictionary* 1522 (10th ed. 2014) (defining "right-of-way," as, *inter alia*, "[t]he *strip of land* subject to a nonowner's right to pass through") (emphasis added).

The Trails Act can only be understood as treating the designated "trails" as the strip of land on which they exist. The Act, for example, specifies the types of "trail uses allowed on designated components of the national trails system," including "bicycling, cross-country skiing, day hiking, [and] equestrian activities," and the types of "[v]ehicles which may be permitted on certain trails," including "motorcycles" and "four-wheel drive or all-terrain off-road vehicles." 16 U.S.C. § 1246(j). Each of those activities and vehicle types uses the *land* that makes up a trail, not only the route a trail takes. The Act also appropriates funds "for the acquisition of lands or interests in lands . . . for the Appalachian National Scenic Trail," *id.*

§ 1249(a)(1), reflecting the view that the AT and the land are not severable.

C. Appalachian Trail Lands in the George Washington National Forest Are Subject to Overlapping Statutory Schemes Applicable to National Forests and to Lands in the National Park System.

Petitioners' second response—and the primary theme of their briefs—is that the AT cannot be part of the National Park System because the Forest Service, not the National Park Service, owns and has exclusive jurisdiction over the land in the George Washington National Forest that makes up the relevant segment of the AT. *See* ACP Br. 6-8, 20-23; USFS Br. 24-35. That argument is both wrong and beside the point. It is true that the Forest Service has management authority over the surface of that land—but that does not mean that the land is not *also* in the National Park System. In determining whether the federally owned segments of the AT are in the National Park System, the relevant question is not which federal agency owns or has management authority over the tracts of land; the relevant question is whether the National Park Service "administer[s]" those tracts of land for "recreational, or other purposes." 54 U.S.C. § 100501. As discussed at pp. 5-8, *supra*, it does—and the land is therefore excluded from the MLA's definition of "Federal land."

1. Initially, ACP errs in suggesting (at 6-8, 20-23) that the Forest Service owns the land in the George Washington National Forest. As ACP eventually (and reluctantly) admits (at 22 n.2) and as the Forest Service explains (at 21 n.6) it is the *United States* that owns the land, not any particular federal agency.

That concept is embodied in the MLA itself, which applies to "lands owned by the United States except," *inter alia*, "lands in the National Park System." 30 U.S.C. § 185(b).

2. Petitioners' broader argument goes like this: (1) the Weeks Act, 16 U.S.C. § 521, authorized the Secretary of Agriculture to acquire lands to be held and administered as national forest lands; (2) pursuant to that authority, the Secretary acquired lands that Congress eventually deemed to be the George Washington National Forest, 40 Stat. 1779 (1918); Exec. Order No. 5,867 (1932); and (3) no other statute "divests" or "ousts" the Forest Service of its authority over those forest lands, "transfers" ownership of that land among federal agencies, "impliedly repeal[s]" the Weeks Act, or "converts" the national forest land into non-national-forest land within the National Park System. *E.g.*, ACP Br. 18, 20-29, 34; USFS Br. 25-40. Petitioners are right about all of that—but they are wrong that the Forest Service's continued management of the George Washington National Forest prevents the segments of the AT in that forest from being lands in the National Park System.

In determining whether the lands that make up the federally owned segments of the AT are lands in the National Park System, the relevant question is *not* which federal agency owns those lands or which agency has primary management responsibility for the surface of the surrounding lands. Congress could have defined the lands subject to the MLA in those terms; but it did not. Instead, the MLA exempts "lands owned by the United States" that are "*in* the National Park System," 30 U.S.C. § 185(b) (emphasis

added)—and the Organic Act defines lands in the National Park System to include lands "administered" by the National Park Service for recreational purposes, 54 U.S.C. § 100501. This Court has recognized that the "broad authority under the National Park Service Organic Act . . . to administer both lands and waters within all system units" "make[s] no distinctions based on the ownership of either lands or waters (or lands beneath waters)." *Sturgeon v. Frost*, 139 S. Ct. 1066, 1076 (2019). Lands can be *simultaneously* managed by the Forest Service *and* in the National Park System because they are administered for recreational purposes by the Director of the National Park Service. The segments of the AT in the George Washington National Forest are such lands.

The Trails Act expressly contemplates that two federal agencies may have overlapping authority over lands in the National Park System. It must have because by the time Congress created the AT as a National Scenic Trail and specified its route, the lands relevant here were already part of the George Washington National Forest. Congress nevertheless assigned to the National Park Service the responsibility for administering the Trail lands for recreational purposes, 16 U.S.C. § 1244(a)(1), thereby making those lands part of the National Park System, 54 U.S.C. § 100501. At the same time, Congress expressly preserved existing management responsibilities of federal agencies over Trail land by directing that nothing 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). Petitioners argue

(ACP Br. 7; *see* USFS Br. 40) that the Trails Act "preserves, rather than overrides, the land management responsibilities that preceded it." That is true—but the Act *also* creates overlapping authority over Trail lands where, as here, the AT *both* crosses land managed by the Forest Service *and* is administered for recreational purposes by the National Park Service.

Although petitioners would elide the distinction between the "administration" of Trail lands and the "management" of those lands, the Trails Act and Organic Act do not. As discussed, the Organic Act defines "National Park System" as "any area of land and water *administered* by" the National Park Service for, *inter alia*, recreational purposes. 54 U.S.C. § 100501 (emphasis added); *id.* § 100102(2). And the Trails Act grants to the National Park Service the authority to "administer[]" the AT for recreational purposes. 16 U.S.C. § 1244(a)(1). At the same time, the Trails Act preserves the existing "*management*" responsibilities of federal land-owning agencies, not the full extent of their existing administrative responsibilities. *Id.* § 1246(a)(1)(A) (emphasis added). The statute thus makes "a distinction between trail *administration* and trail *management*: While there is usually only one administering agency, multiple federal agencies, state and local governments, private groups, and individuals may own and manage lands along a national scenic or historic trail." Cong. Research Serv., R43868, *The National Trails System: A Brief Overview* 6 (2019).[7] And nothing in any statute suggests that the Forest Service's continued land-management responsibilities in the George Washington National Forest "impliedly

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[7] https://fas.org/sgp/crs/misc/R43868.pdf.

repeals" (to borrow from ACP's framing) either the Trails Act's express delegation to the National Park Service of responsibility for administering AT lands or the Organic Act's incorporation of all lands administered by the National Park Service for recreational purposes into the National Park System.

3. Notwithstanding the Forest Service's position in this litigation, its actual management of the George Washington National Forest demonstrates that the Forest Service and the National Park Service have long considered the AT lands within a national forest to be subject to the overlapping authority of both agencies. The agency's land-management plan for the George Washington National Forest explains, for example, that "[t]he Appalachian National Scenic Trail is administered by the Secretary of the Interior in consultation with the Secretary of Agriculture, and is managed as a *partnership* between the Forest Service, the National Park Service[,]" and various AT-focused organizations "utilizing [a] *cooperative* management system." USFS, U.S. Dep't of Agric., *Revised Land and Resource Management Plan*, § 4A, at 4-42 (Nov. 2014)[8] (GWNF Plan) (emphases added).

The National Park Service's AT Resource Management Plan similarly provides that the National Park Service and the Forest Service are partners in a cooperative management of Trail lands within the boundaries of national forests. Nat'l Park Serv., *Ap-*

[8] https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd525098.pdf.

palachian National Scenic Trail Resource Management Plan, at I-8, I-18, I-22 to I-23 (Sept. 2008).[9] And the comprehensive AT management plan created by the Forest Service and the National Park Service in 1981 reflects that both agencies (along with other stakeholders) cooperatively manage AT lands. Nat'l Park Serv., *Comprehensive Plan for the Protection, Management, Development and Use of the Appalachian National Scenic Trail* 14-15, 17 (Sept. 1981) (*Comprehensive AT Plan*).[10]

4. Petitioners focus almost exclusively on which agency owns or has primary management responsibility over the surface of the lands surrounding the relevant Trail lands—but the more relevant question is which statutory scheme (or schemes) govern that land. As discussed in the following section, when, as here, multiple agencies have overlapping authority (administrative or management) over federally owned land, multiple statutory schemes will apply. The Trails Act expressly contemplates that multiple land-management regimes may apply to national scenic trails, specifying that "[d]evelopment and management of each segment of the National Trails System"—necessarily including those administered by the National Park Service for recreational purposes—"shall be designed to harmonize with and complement any established multiple-use plans for that specific area." 16 U.S.C. § 1246(a)(2).

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[9] https://www.nps.gov/appa/learn/management/upload/Appalachian_Trail_Resource_Management_Plan.pdf.

[10] https://www.nps.gov/appa/learn/management/upload/CompPlan_web.pdf.

D. Overlapping Statutory Schemes Govern Land Uses on Segments of the Appalachian Trail in National Forests.

Because the segments of the AT in the George Washington National Forest are subject to the overlapping authority of the National Park Service and the Forest Service, the statutory land-management regimes applicable to national parks and to national forests both apply. And where they conflict, the more protective rules applicable to national parks must prevail.

1. The National Forest Management Act of 1976, 16 U.S.C. § 1600 *et seq.*, requires the Forest Service to develop land-management forest plans that consider both economic and environmental considerations. *See* 16 U.S.C. § 1604(a), (e), (g); 36 C.F.R. § 219.1(c). In doing so, the Forest Service must provide for multiple uses and sustained yield of forest resources, including "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." 16 U.S.C. § 1604(e)(1). In other words, Congress has commanded that national forests shall be used not only for recreational and environmental purposes, but also for extractive activities like timber harvesting.

In contrast, lands in the National Park System are subject to a higher level of protection—and correspondingly greater restrictions on their use—than are non-System lands within national forests. The Organic Act provides that "the fundamental purpose of [National Park] System units . . . is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of" those aspects of the System "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a).

The Organic Act accordingly directs that "the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established." *Id.* § 100101(b)(2).

Where lands are *both* part of a national forest *and* in the National Park System, the more protective provisions of the Organic Act must apply, meaning that the Forest Service's discretion to implement its multiple-use approach to land management will be curtailed on those lands. The same is true in related contexts, such as when the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*, would prohibit otherwise permissible land uses in a national forest if the activity would destroy a listed species or its critical habitat, 16 U.S.C. § 1536(a)(2), or where the Wilderness Act, 16 U.S.C. § 1131 *et seq.*, would prohibit roads, vehicles, and any commercial enterprise in a statutorily designated wilderness area within a national forest, 16 U.S.C. § 1133(c). Agency planning documents reflect exactly that, establishing that AT lands in the George Washington National Forest are subject to restrictions not applicable to other areas in the forest—including a ban on "timber production," minerals mining, and vendor or peddler permits. GWNF Plan §§ 4A-004, 4A-019, 4A-023, at 4-44 to 4-45. The *Comprehensive AT Plan* similarly confirms that, where the AT crosses national forest land, the Forest Service is subject to additional restrictions on its authority to disturb the natural state of the land. *Comprehensive AT Plan* 24 (designating AT lands in a

national forest as having "a maximum sensitivity rating" for purposes of the Forest Service's visual-management system).

2. In light of Congress's direction in the Organic Act that National Park System lands receive the highest level of protection and preservation, it is no surprise that Congress chose to exempt those lands from fuel pipeline rights-of-way in the MLA. The Forest Service has authority to approve a pipeline on national forest land—just like it has the right to approve a timber-cutting operation on national forest land—*unless* that land is also "in the National Park System." 30 U.S.C. § 185(a), (b).

Significantly, Congress has the power to authorize rights-of-way across the AT or any other Park System lands—and it has exercised that power. The Organic Act authorizes the Secretary of the Interior to "grant a right of way through a System unit" for, *inter alia*, power lines, telephone lines, television lines, and irrigation ditches. 54 U.S.C. § 100902. Pursuant to that authority, the National Park Service has established procedures for obtaining such right-of-way permits, explaining that such permits are required for "electrical transmission lines, telephone lines, canals, and sewer lines," as well as "[b]roadband equipment, such as telecommunication sites, microwave, and fiber optic."[11]

Petitioners contend (ACP Br. 31-32; USFS Br. 37-38) that Congress has expressly authorized rights-of-way across the Blue Ridge Parkway, a scenic road in

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[11] Nat'l Park Serv., *Right-of-Way Permit*, https://www.nps.gov/aboutus/right-of-way-permit.htm (last updated Nov. 2, 2018).

the National Park System that parallels a portion of the AT. 16 U.S.C. §§ 460a-3, 460a-8. Petitioners fail to mention that those provisions authorize rights-of-way only to owners or lessees of adjacent lands. *See id.* §§ 460a-3, 460a-8. And they permit rights-of-way only to the extent the proposed use would "be consistent with the use of such lands for parkway purposes." *Id.* § 460a-8; *see id.* § 460a-3. Petitioners complain (ACP Br. 30-33; USFS Br. 37-39) that Congress must have intended to implicitly allow pipelines across the AT as well because it explicitly allowed rights-of-way across the parallel Blue Ridge Parkway. But even if Petitioners' capacious view of the grants of authority in those provisions were correct (which is doubtful), their argument ignores the fundamentally different characters of the AT and the Parkway—*viz.*, the former is a footpath in nature and the latter is a highway. And even with respect to the Parkway, Congress authorized a right-of-way only to the extent it would be consistent with the Parkway's purposes.[12]

More to the point, even if petitioners were correct about Congress's treatment of the Blue Ridge Parkway, that would only demonstrate that Congress knows how to authorize a pipeline right-of-way across National Park System lands when it wants to—and that it *has not done so* with respect to the AT. If petitioners are displeased by that policy choice, they can

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[12] In its initial comments to the Federal Energy Regulatory Commission on the proposed pipeline at issue here, the National Park Service explained that, although in its view pipelines are statutorily permitted across the Blue Ridge Parkway, that authorization does not apply where the Parkway and AT merge. At those points, the Service explained, "the prohibitions of 30 U.S.C. 185 still hold." J.A. 134.

appeal to Congress and Congress can amend the MLA if it sees fit. Congress did precisely that in 1973, amending the MLA in response to what it viewed as an overly restrictive judicial interpretation in *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir. 1973) (en banc). *See* H.R. Rep. No. 93-414, at 9 (1973) (explaining that the "need for an amendment of the law is urgent" because the D.C. Circuit "recognized that the existing law is inadequate, but concluded that it was the responsibility of Congress to change the law, and not the responsibility of the court to stretch the law beyond its reasonable meaning").

II. The Fourth Circuit's Holding Will Not Lead to the Catastrophic Consequences Petitioners Forecast.

Petitioners predict dire consequences if the Court affirms the Fourth Circuit's decision. But none of those predicted consequences is rooted in reality.

First, ACP insists (at 40)—and the Forest Service contemplates (at 41)—that the decision below has the effect of erecting a 2,000-mile barrier to natural gas pipelines because it prohibits *all* natural gas rights-of-way across *any* portion of the AT. That argument borders on specious. The MLA's prohibition on pipeline rights-of-way applies *only* to "lands *owned by the United States* . . . in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf." 30 U.S.C. § 185(b)(1) (emphasis added). As petitioners recognize (ACP Br. 1, USFS Br. 7), large portions of the AT are owned by non-federal entities, including state and local governments as well as private entities. The MLA has nothing to say about pipeline rights-of-way across those

portions of the AT. If ACP can reach a mutually agreeable arrangement with a private owner of an AT segment, it can locate its pipeline there.[13] In fact, the Federal Energy Regulatory Commission has approved multiple pipelines across the AT on non-federal lands. BIO 16-17. And, as noted above, Congress can approve ACP's preferred pipeline location if it wishes.

Second, ACP's speculation (at 49) that the Fourth Circuit's decision will interfere with federal agencies' authority to grant other types of rights-of-way is baseless. As noted above, separate statutory authority permits the National Park Service to grant rights-of-way for other infrastructure across National Park Service lands such as the AT, in conjunction with the Forest Service where appropriate. 16 U.S.C. § 1248(a); 54 U.S.C. § 100902. Nothing in the Fourth Circuit's decision disturbs those non-MLA sources of authority to grant non-pipeline rights-of-way.[14]

Third, ACP errs in contending (at 42-43) that the Fourth Circuit's decision has the effect of authorizing pipeline rights-of-way through Yosemite and Sequoia National Parks—because the Trails Act authorizes the Forest Service to administer the Pacific Crest Trail,

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[13] The Fourth Circuit concluded that the Forest Service did not even consider alternative pipeline routes on lands outside the George Washington National Forest. Pet. App. 38a-42a.

[14] Contrary to *amicus* National Association of Manufacturers' suggestion (at 20-23), the decision below merely confirms the status quo, under which numerous utility rights-of-way have been granted across federally owned portions of the AT. *See* U.S. Dep't of Energy, *Electricity, Transmission, Pipelines, and National Trails: An Analysis of Current and Potential Intersections on Federal Lands in the Eastern United States, Alaska, and Hawaii* (Mar. 25, 2014).

which passes through those two parks. That sky-is-falling assertion is premised on ACP's erroneous contention that recognizing the National Park Service's jurisdiction over AT lands in a national forest necessarily transfers ownership of those lands from the Forest Service to the National Park Service. If that is so, ACP argues, then recognizing the Forest Service's authority over segments of the Pacific Crest Trail that cross Yosemite and Sequoia will transfer ownership of those trail lands to the Forest Service, making that land eligible for a pipeline right-of-way under the MLA. As discussed at length, the agencies' overlapping authority over trail lands does not transfer ownership of the lands from one agency to another; rather, it means that the lands are *both* in the National Park System *and* in the National Forest System. As such, the segments of the Pacific Crest Trail in Yosemite remain exempt from the MLA's definition of "Federal land."[15]

III. If Petitioners' View Prevails, the Fundamental Purpose of the Appalachian Trail and Other National Park System Units Would Be Threatened.

As explained, Congress has mandated that lands in the National Park System are entitled to the highest level of protection, with the intent that such lands

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[15] *Amicus* National Association of Manufacturers similarly err in arguing (at 20) that the decision below makes Trail lands National Park Service lands for all purposes because it has the effect of "convey[ing]" the land to the Park Service. It does no such thing. The decision below merely construed the statutory definition of "Federal lands" in the MLA, which by its own terms governs only "[f]or the purposes of" 30 U.S.C. § 185.

remain "unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a). The National Park System is a "cumulative expression[] of a single national heritage," *id.* § 100101(b)(1)(B), infused with "superb environmental quality" that must be "preserved and managed for the benefit and inspiration of all the people of the United States," *id.* § 100101(b)(1)(C). Congress used strong words in commanding that National Park System units shall be not be managed "in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress." *Id.* § 100101(b)(2). With respect to natural gas pipelines—and consistent with Congress's approach to managing National Park System lands—Congress has "specifically provided," *ibid.*, that they shall *not* cross lands in the National Park System. If petitioners prevail in their view that that prohibition does not apply when Park System lands are located in a national forest, important National Park System resources will be at risk.

Throughout the United States, there are a small but meaningful number of units in the National Park System that are also part of national forests. The decision below would protect those special areas from pipeline development (as Congress intended) without creating a huge obstacle to pipeline development in the Nation more generally. In contrast, if petitioners' view prevails, those lands could be stripped of the heightened protections afforded to Park System lands and the integrity of the parks and of the system as a whole would be threatened. A couple of examples will illustrate what is at stake.

Timpanogos Cave National Monument is a unit of the National Park System that includes a spectacular display of underground rock and mineral formations, including an unusually high abundance of helictites (a form of stalactite that resembles a twig) in a vast array of colors. Nat'l Park Serv., *Timpanogos Cave: Nature and Science*.[16] The cave has been a National Monument since 1922 and has been part of the National Park System since 1934. *See* USFS, U.S. Dep't of Agric., *History of the Uinta National Forest: A Century of Stewardship* 41 (1997).[17] The Timpanogos Cave National Monument is located within the Uinta-Wasatch-Cache National Forest in Utah.[18] *Id.* at 39-41. And, although the monument was placed under the jurisdiction of the National Park Service by executive order in 1933, *id.* at 41, jurisdiction over the forest land above and around the cave was not thereby transferred. Under petitioners' view, the cave would not be considered lands in the National Park System through or under which a pipeline could not cross under the MLA—even though it is fantasy to think of the cave as severable from the land on and in which it lies.

Gila Cliff Dwellings National Monument provides another compelling example. The cliff dwellings are a unit of the National Park System located within the Gila National Forest in New Mexico. Here, too, the

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[16] https://www.nps.gov/tica/learn/nature/index.htm (last updated Jan. 8, 2020).

[17] https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_042096.pdf.

[18] USFS, U.S. Dep't of Agric., *Uinta-Wasatch-Cache National Forest: Recreation*, https://www.fs.usda.gov/recmain/uwcnf/recreation (last visited Jan. 21, 2020).

creation of the National Monument and its designation as part of the National Park System did not transfer any land from the Forest Service to the National Park Service. Rather, the agencies exercise overlapping authority over the lands into which the dwellings are built. Nat'l Park Serv., *Foundation Document: Gila Cliff Dwellings National Monument* 3 (June 2016) (explaining that "both agencies have managed the monument throughout its history").[19] Because the dwellings are built in natural cliffs, they are undoubtedly part of the land—but if petitioners' view prevails, the Forest Service could ignore their status as protected National Park Service units by authorizing a pipeline through them. That is not what Congress intended.

[19] https://www.nps.gov/gicl/learn/management/upload/GICL-Foundation-Doc.pdf.

CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit should be affirmed.

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