No. 18-548

In the Supreme Court of the United States

ADORERS OF THE BLOOD OF CHRIST, UNITED STATES PROVINCE, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether provisions of the Natural Gas Act, 15 U.S.C. 717-717w, conferring "exclusive" jurisdiction on courts of appeals to review orders of the Federal Energy Regulatory Commission, 15 U.S.C. 717r(a)-(b), precluded the district court from exercising jurisdiction over petitioners' claim that the siting of an interstate natural-gas pipeline violated the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Statutes and regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 897 F.3d 187. The opinion of the district court (Pet. App. 24-34) is reported at 283 F. Supp. 3d 342.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2018. The petition for a writ of certiorari was filed on October 19, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are a religious order that opposes, on religious grounds, the siting of a natural-gas pipeline running through their property. Pet. App. 4, 24. The Federal Energy Regulatory Commission (FERC or Commission) approved the pipeline pursuant to the

Natural Gas Act (NGA or Act), 15 U.S.C. 717-717w. See Pet. App. 4. Petitioners, who did not participate in the FERC proceeding, filed a complaint in federal district court alleging that FERC had violated their rights under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* Pet. App. 4. The court dismissed the complaint for lack of jurisdiction. *Id.* at 24-34. The court of appeals affirmed. *Id.* at 1-23.

1. Under the NGA, FERC has exclusive authority to regulate sales and transportation of natural gas in interstate commerce. 15 U.S.C. 717f. As part of that authority, FERC determines whether to approve a proposed interstate natural-gas pipeline. 15 U.S.C. 717f(c). To construct or expand such a pipeline, a company must first obtain from FERC a "certificate of public convenience and necessity." *Ibid.*; see *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 302-303 (1988).

Upon the filing of an application for a certificate, FERC provides notice to the public and commences an administrative review and public-comment process. 15 U.S.C. 717f(c)(1)(B); 18 C.F.R. 157.1-157.11. The applicants for a certificate must also provide notice and specific information regarding the proposed project to affected landowners. 18 C.F.R. 157.6(d). As part of the administrative process, the Commission conducts an environmental review consistent with the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.* Any person may submit comments regarding a pending pipeline application, or move to intervene as a party in the FERC proceeding. 18 C.F.R. 157.10, 385.214.

FERC may issue a certificate only if it finds the proposed facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. 717f(e). The certificate may include conditions that the holder

must satisfy before it commences work on the project. *Ibid.* A certificate holder unable to reach agreement with property owners on necessary rights of way for pipeline construction may initiate eminent domain proceedings in "the district court of the United States for the district in which such property may be located, or in the State courts." 15 U.S.C. 717f(h).

FERC decisions relating to the issuance of certificates are subject to review under a framework set forth in 15 U.S.C. 717r. Upon FERC's issuance of a certificate, any party to the proceeding "aggrieved" may seek rehearing by the Commission. 15 U.S.C. 717r(a). If the Commission denies rehearing, the aggrieved party may petition for review in the D.C. Circuit or a designated regional court of appeals. 15 U.S.C. 717r(b). The court of appeals has "exclusive" jurisdiction to "affirm, modify, or set aside" the FERC order. *Ibid.* The court of appeals may not consider an "objection to the order of the Commission" unless that objection was raised in a petition for rehearing before the Commission or "there is reasonable ground for failure so to do." *Ibid.*

2. In March 2015, respondent Transcontinental Gas Pipe Line Company (Transco) filed an application for a certificate of public convenience and necessity for the Atlantic Sunrise Project (Project)—a proposed natural-gas pipeline running from Pennsylvania to South Carolina. See *Transcontinental Gas Pipe Line Co.*, 158 F.E.R.C. ¶ 61,125, at ¶ 1, stay denied, 160 F.E.R.C. ¶ 61,042 (2017) (Certificate Order). Transco's filing initiated a regulatory-review process before FERC, with opportunities for public comment and participation. See Pet. App. 6-10. The Commission published various notices regarding the Project in the *Federal Register* and mailed letters to potentially affected landowners,

including petitioners. *Id.* at 6-7. FERC received more than 600 written comments and heard from about 200 speakers at public meetings. *Id.* at 8-9.

In February 2017, FERC issued a certificate conditionally authorizing the Project, subject to Transco's compliance with environmental and operational conditions. Certificate Order ¶ 2. Multiple parties requested rehearing of the certificate order. *Transcontinental Gas Pipe Line Co.*, 161 F.E.R.C. ¶ 61,250, at ¶¶ 2-3 (2017). The Commission issued an order denying rehearing in December 2017. *Id.* ¶ 5. Subsequently, certain parties petitioned for review of the Commission's orders in the D.C. Circuit. *Allegheny Def. Project* v. *FERC*, No. 17-1098 (argued Dec. 7, 2018).

3. Petitioners are a vowed religious order of Catholic women who own a parcel of land in Pennsylvania along the path of the pipeline. Pet. App. 7, 26. Petitioners' religious practice includes, among other things, a commitment to "protecting and preserving creation, which they believe is a revelation of God." *Id.* at 7 (citation omitted). As part of their religious beliefs, petitioners oppose the siting of the Project on their property. *Id.* at 10-11. Although petitioners received notice about the FERC proceeding regarding approval of the proposed pipeline, they did not submit comments or otherwise participate in the proceeding. *Id.* at 6-10.

After FERC issued the certificate to Transco, the company sought to obtain land rights from petitioners. Pet. App. 9. Petitioners "refused to grant Transco an easement on the land to begin construction." *Ibid.* Transco then initiated condemnation proceedings against petitioners in federal district court, as authorized by 15 U.S.C. 717f(h). Pet. App. 9. Petitioners "failed to

answer the complaint or file any sort of responsive motion" for more than two months. *Ibid.*

In July 2017—more than two years after Transco filed its certificate application, five months after FERC granted the certificate and multiple parties sought rehearing, and three months after Transco initiated condemnation proceedings—petitioners filed a complaint against Transco and FERC in federal district court. Pet. App. 10-11. Petitioners alleged that the Project, as approved by the Commission, violated their rights under RFRA, which provides in relevant part that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates that the burden is "the least restrictive means" to further a "compelling governmental interest." 42 U.S.C. 2000bb-1(a)-(b); see Pet. App. 11.[1]

FERC and Transco filed motions to dismiss for lack of subject matter jurisdiction, citing the NGA provisions requiring that challenges to FERC orders be brought in the court of appeals after seeking rehearing by the Commission, 15 U.S.C. 717r(a)-(b). Pet. App. 11. The district court agreed and dismissed the complaint. *Id.* at 24-34. The court explained that "the law in this area is particularly well-settled," *id.* at 28, and that "[e]xclusive means exclusive" in the NGA's exclusive-review provisions, *ibid.* (quoting *American Energy Corp.* v. *Rockies Express Pipeline LLC*, 622 F.3d 602,

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[1] RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. 2000bb-3(a). "Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. 2000bb-3(b).

605 (6th Cir. 2010)) (emphasis omitted). Because petitioners "do not dispute that they not only failed to apply for a rehearing before FERC, but failed to present their RFRA claims in any manner to the FERC, and ultimately to the appropriate [c]ourt of [a]ppeals," the district court explained that petitioners were "barred by [15 U.S.C. 717r(a)-(b)] from pursuing what amounts to collateral review of the FERC Order." Pet. App. 29.

The district court rejected petitioners' contention that RFRA allowed their complaint to proceed notwithstanding the NGA's jurisdictional bar. Pet. App. 30-34. Specifically, petitioners contended that dismissing their complaint would conflict with RFRA's provision that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." *Id.* at 30 (quoting 42 U.S.C. 2000bb-1(c)). The court explained that petitioners' right under RFRA to assert a claim in a "judicial proceeding" did not allow them to "bypass the specific procedure established by Congress in the NGA" requiring them to bring such a claim in the court of appeals after first asserting it before FERC. *Id.* at 33. The district court observed that "unlike the NGA, RFRA does not contain an exclusive jurisdictional provision." *Id.* at 34. Given that petitioners had "failed to participate at all at FERC, or raise any objections at FERC, either initially or through a rehearing," the court concluded that petitioners could not "now argue that they have been deprived of the ability to assert their RFRA claims in a judicial proceeding." *Id.* at 33.

4. The court of appeals affirmed. Pet. App. 1-23. The court explained that the NGA's "highly reticulated" review scheme required petitioners to exhaust their

remedies before FERC prior to seeking review in a court of appeals, which would then have "'exclusive'" jurisdiction to "'affirm, modify, or set aside'" FERC certificate orders. *Id.* at 15-16 (quoting 15 U.S.C. 717r(b)); see *id.* at 14-16. "By failing to avail themselves" of this statutory review procedure, the court of appeals concluded, petitioners "foreclosed judicial review of their substantive RFRA claims." *Id.* at 15.

Alternatively, the court concluded that the NGA implicitly precluded review of petitioners' claims in the district court under the framework outlined in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994). Pet. App. 15-17. The court of appeals reasoned that Congress's intent to vest jurisdiction exclusively in the courts of appeals is "fairly discernible" in the NGA, and that petitioners' claims "are of the type Congress intended to be reviewed within this statutory structure." *Id.* at 16 (quoting *Thunder Basin*, 510 U.S. at 207, 212). The court of appeals noted that petitioners could have obtained "'meaningful judicial review'" in the court of appeals; that petitioners' RFRA claims were not "'wholly collateral'" to the FERC proceedings because "if [petitioners we]re successful in their administrative challenge, the FERC order [would have been] modified or set aside"; and that any lack of agency expertise was "tempered by the court of appeals'[] review, which regularly resolves" claims of the kind petitioners raise. *Id.* at 16-17 (quoting *Thunder Basin*, 510 U.S. at 212-213).

The court of appeals rejected petitioners' contention that RFRA's provision that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a

government," 42 U.S.C. 2000bb-1(c), necessarily created jurisdiction in the district court, Pet. App. 14-20. The court of appeals noted that RFRA's text does not "specifically confer jurisdiction to the federal district courts to hear RFRA claims" or otherwise "abrogate or provide an exception to [the] specific and exclusive jurisdictional provision prescribed by Congress" in the NGA for judicial review of FERC pipeline certificate decisions. *Id.* at 14, 22-23. To the contrary, the court explained, RFRA and the NGA exist without any conflict because the NGA's "procedural requirements, which permit parties to seek review in a court of appeals following an initial agency hearing, qualify as a 'judicial proceeding' under RFRA." *Id.* at 15 n.6. The court noted that its interpretation was consistent with that of other courts of appeals. *Id.* at 18-19 (citing cases).

In sum, the court of appeals explained, if petitioners "had participated in the administrative process, FERC may have denied or modified the conditions of Transco's certificate. Or, if FERC failed to do so, the reviewing court of appeals may have ruled in [petitioners'] favor." Pet. App. 22. But because petitioners "failed to engage with the NGA's procedural regime," the court was "without jurisdiction to hear [their] claims." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 16-35) that they were entitled to bring their RFRA claim in federal district court and that the courts below erred by requiring them to follow the exclusive review mechanism set forth in the NGA. Petitioners are mistaken. Applying the plain meaning of both the NGA and RFRA, the court of appeals correctly concluded that Congress required petitioners to bring their challenge to the siting of Transco's pipeline before FERC and then in the court of appeals,

a "judicial proceeding" in which they could "obtain appropriate relief against a government" as guaranteed by RFRA. 42 U.S.C. 2000bb-1(c). The court of appeals' decision appropriately gives effect to both statutes and does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The court of appeals correctly applied the "exclusive" review provision of the NGA, 15 U.S.C. 717r(b), and the framework set forth by this Court in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), to conclude that petitioners were required to bring their challenge to the siting of Transco's pipeline by raising it before FERC and then in the court of appeals, rather than directly in the district court. Pet. App. 14-20. As the court of appeals explained, 15 U.S.C. 717r(b) expressly requires challenges to FERC orders to proceed through the NGA's exclusive review mechanism, Pet. App. 14-15, and Congress's intent to vest jurisdiction exclusively in the courts of appeals is "fairly discernible" in the NGA, *id.* at 16 (quoting *Thunder Basin*, 510 U.S. at 207).

Petitioners' claims, moreover, are "are of the type Congress intended to be reviewed within this statutory structure." Pet. App. 16 (quoting *Thunder Basin*, 510 U.S. at 212). Indeed, petitioners' contention that "[t]here are alternative routes to divert the Pipeline around" their property, C.A. App. 39, falls squarely within FERC's expertise and within the scope of a certificate-application proceeding, see 15 U.S.C. 717f; *Millennium Pipeline Co.* v. *Seggos*, 860 F.3d 696, 698 (D.C. Cir. 2017) (stating that in matters pertaining to natural-gas pipeline construction, "all roads lead to FERC"). For example, the FERC order authorizing the Project addressed pipeline-

route alternatives in response to concerns raised by affected parties, and ordered Transco to make various route changes. Certificate Order ¶¶ 149-171.

Petitioners suggest (Pet. 30) that appellate review at the conclusion of agency proceedings would not be meaningful because courts of appeals are constrained by a deferential standard of review and cannot "hear testimony, take evidence, or award all appropriate relief." The court of appeals appropriately rejected that argument. See Pet. App. 17, 21-22 & n.10. Although a court of appeals reviews FERC's factual findings only to ensure that they are supported by "substantial evidence," 15 U.S.C. 717r(b), review of the Commission's legal conclusions is not similarly constrained. To the extent FERC interprets a statute that it does not administer, such as RFRA, the Commission's interpretation receives no deference. See, *e.g.*, *New York State Dep't of Envtl. Conservation* v. *FERC*, 884 F.3d 450, 455 (2d Cir. 2018) (exercising *de novo* review of FERC's interpretation of Clean Water Act, 33 U.S.C. 1251 *et seq.*); *California Trout, Inc.* v. *FERC*, 313 F.3d 1131, 1133-1134 (9th Cir. 2002) (same), cert. denied, 540 U.S. 818 (2003).

Petitioners also suggest (Pet. 20-21) that they could not have participated in the FERC proceeding because they would have lacked Article III standing to object before construction of the pipeline on their property was imminent. That is incorrect. Article III standing is not a prerequisite to participation in FERC proceedings. See 18 C.F.R. 157.10, 385.214; cf. *City of Orrville* v. *FERC*, 147 F.3d 979, 985-986 (D.C. Cir. 1998). As the court of appeals observed, if petitioners "had participated in the administrative process, FERC may have denied or modified the conditions of Transco's certificate. Or, if FERC [had] failed to do so, the reviewing

court of appeals may have ruled in [petitioners'] favor." Pet. App. 22. The court of appeals was accordingly correct to conclude that the NGA's framework provided petitioners with an opportunity for "meaningful judicial review." *Id.* at 16 (quoting *Thunder Basin*, 510 U.S. at 212-213).

The decision below, moreover, is consistent with the decisions of other courts of appeals addressing the NGA's exclusive-review scheme. See Pet. App. 18-20. Indeed, every other court of appeals that has considered a similar question has concluded that claims of the kind at issue here must be brought before the Commission and then asserted in the court of appeals, not commenced in the district court in the first instance. See, *e.g.*, *Berkley* v. *Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628-630 (4th Cir. 2018), petition for cert. pending, No. 18-561 (filed Oct. 23, 2018); *American Energy Corp.* v. *Rockies Express Pipeline LLC*, 622 F.3d 602, 605-606 (6th Cir. 2010); cf. *Maine Council of Atl. Salmon Fed'n* v. *National Marine Fisheries Serv. (NOAA Fisheries)*, 858 F.3d 690, 693 (1st Cir. 2017) (Souter, J.) (interpreting similar "exclusive" jurisdiction provision in the Federal Power Act, 16 U.S.C. 825*l*(b)).

2. Petitioners principally contend (Pet. 22-31) that RFRA conflicts with—and must supersede—the NGA's exclusive review procedures that required them to bring their challenges to the pipeline-siting decision before FERC and then in a court of appeals, rather than in a district court. Specifically, petitioners contend (Pet. 24-25) that the RFRA provision stating that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the government," 42 U.S.C. 2000bb-1(c),

necessarily creates jurisdiction for a district court to hear their claim.

The court of appeals correctly rejected that assertion. As the court observed, "[n]owhere does the text" of RFRA "specifically confer jurisdiction to the federal district courts to hear RFRA claims." Pet. App. 14. The relevant provision of RFRA requires that a "person whose religious exercise has been burdened" be able to "assert that violation as a claim or defense in a judicial proceeding." 42 U.S.C. 2000bb-1(c). Here, petitioners could have asserted the alleged RFRA violation as a claim or defense in a judicial proceeding before the court of appeals. There is accordingly no "conflict" between RFRA and the NGA. Pet. App. 12. As the court below rightly concluded, the NGA's "FERC + [c]ourt of [a]ppeals" framework qualifies as a "judicial proceeding" within the meaning of 42 U.S.C. 2000bb-1(c). Pet. App. 14-15 n.6.[2]

Consistent with the decision below, courts that have squarely addressed the scope of 42 U.S.C. 2000bb-1(c) likewise have held that a proceeding in a designated court of appeals qualifies as a "judicial proceeding" for purposes of RFRA. For example, the Seventh Circuit affirmed a district court's dismissal for lack of jurisdiction claims that the Federal Aviation Administration violated RFRA in approving an airport expansion plan, concluding that the RFRA claim fell within the exclusive jurisdiction of the courts of appeals under 49 U.S.C. 46110. *St. John's United Church of Christ* v. *City of Chicago*, 502 F.3d 616, 628-629 (2007). As the court ex-

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[2] The court of appeals reserved the question whether RFRA might require a different result if a litigant sought damages, which petitioners here did not. Pet. App. 22 n.11.

plained, RFRA "says nothing about exclusive jurisdiction of district courts to find facts in RFRA cases," and "[n]othing in RFRA purported to repeal the authority of federal administrative agencies to find facts, subject to review by the courts of appeals." *Id.* at 629. Moreover, "[r]eview of an agency action in the court of appeals surely qualifies as an Article III judicial proceeding." *Ibid.* Likewise, the Sixth Circuit concluded in an analogous case that RFRA "does not provide that the 'judicial proceeding' must be in the district court as opposed to a designated court of appeals." *La Voz Radio de la Comunidad* v. *FCC*, 223 F.3d 313, 319 (2000); see also, *e.g.*, *Francis* v. *Mineta*, 505 F.3d 266, 270 (3d Cir. 2007) ("[N]othing in RFRA alters the exclusive nature of Title VII with regard to employees' claims."); *Radio Luz* v. *FCC*, 88 F. Supp. 2d 372, 376 (E.D. Pa. 1999) (dismissing RFRA challenge to a Federal Communications Commission regulation because an exclusive-jurisdiction provision "cut[] off th[e district] court's jurisdiction over plaintiff's actions"), aff'd 213 F.3d 629 (3d Cir. 2000) (Tbl.).

None of the cases cited by petitioners conflicts with that interpretation. Petitioners cite several cases in which courts have "declined 'to read an exhaustion requirement into RFRA.'" Pet. 24 (quoting *Oklevueha Native Am. Church of Haw., Inc.* v. *Holder*, 676 F.3d 829, 838 (9th Cir. 2012)). But those cases did not involve a statutory exclusive-jurisdiction provision that divests district courts of jurisdiction, such as the NGA provision here. Other RFRA cases cited by petitioners likewise do not bear on this case; none of those decisions concerned the RFRA provision at issue here, 42 U.S.C. 2000bb-1(c), or a statutory exclusive-jurisdiction provision such as 15 U.S.C. 717r. See, *e.g.*, Pet. 17 (citing

Holt v. *Hobbs*, 135 S. Ct. 853 (2015); *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); and *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)).

In sum, the court of appeals correctly concluded that "a claim under RFRA, 42 U.S.C. § 2000bb-1(c)" brought in federal district court "does not abrogate or provide an exception to a specific and exclusive jurisdictional provision prescribed by Congress for judicial review of an agency's action," as the NGA provides here. Pet. App. 22-23. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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