No. 18-561

In the Supreme Court of the United States

ORUS ASHBY BERKLEY, *et al.*,
Petitioners,
v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Petitioner-Landowners file this Joint Reply in response to the Briefs in Opposition filed by Respondents Federal Energy Regulatory Commission ("FERC") and Mountain Valley Pipeline ("MVP") on December 19, 2018.

ARGUMENT

1. Circuit Split.

First, in response to Respondents' arguments that there "is no such circuit split," no inconsistencies in the lower courts, and not a single case recognizing District Court jurisdiction under 28 U.S.C. § 1331 for constitutional challenges unanchored[1] in agency proceedings, Petitioners need only point this Court to ***Del. Riverkeeper Network v. FERC*, 895 F.3d 102 (D.C. Cir. 2018),** a recent case decided by the D.C. Circuit just this year—in July 2018—and ***No Gas Pipeline v. FERC*, 756 F.3d 764 (D.C. Cir. 2014),** two cases that directly contradict the Fourth Circuit's decision on the jurisdictional question at issue here.

Both cases from the D.C. Circuit held that constitutional challenges unanchored in agency proceedings fall outside the Natural Gas Act's 15 U.S.C. § 717r(b) statutory review scheme and should therefore properly be raised ***first*** in the District Court under 28 U.S.C. § 1331. Although those constitutional

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[1] *No Gas Pipeline v. FERC*, 756 F.3d 764, 769 (D.C. Cir. 2014)("The NGA gives us jurisdiction to review orders in proceedings under that Act, not claims unanchored in pipeline proceedings but arising under the Budget Act.")(emphasis added).

challenges were not rooted in the non-delegation doctrine or related *Chevron* issues at play here, the jurisdictional principle (which is the only question before this Court) was the same.

In *Delaware Riverkeeper*, the Circuit Court reasoned that it was already well-established that:

> **[T]he judicial-review provision in the Natural Gas Act does not apply to the kind of structural-bias claim** at issue here. We reasoned that such a claim "does not target any aspect of FERC's actual decision" in any individual proceeding under the Natural Gas Act, but instead "centers *wholly* on" the Budget Act. *Id.* at 769. Therefore, we concluded, **such a claim may be brought only in district court**. *See id.*

Id. at 107 (quoting *No Gas Pipeline*, 756 F3d at 769)(emphasis added). Distinguishing challenges to "a specific FERC decision" (i.e., an administrative challenge) from challenges to the agency's structure, the Circuit Court concluded that:

> Riverkeeper [the Plaintiff] **properly filed this case in the district court**. Its principal claim targets the Budget Act's funding mechanism rather than any individual decision to award a certificate of public necessity. **Therefore, the Natural Gas Act does not channel judicial review directly to the courts of appeals, and so the district court retained its federal-question jurisdiction under 28 U.S.C. § 1331.**

Id. at 107 (emphasis added). Here, similarly, Petitioners' claims are also properly filed only in the District Court. Just as the plaintiffs' claims in *Delaware Riverkeeper* did not target a FERC decision or FERC order (but rather the entire funding mechanism), neither do Petitioners' constitutional challenges here target a FERC decision or FERC order but, rather, an Act of Congress (i.e., the initial delegation of power by Congress to the agency and to MVP in the first place).

Petitioner-Landowners' non-delegation challenge to a Congressional Act arises under the Constitution's Vesting Clauses—not under the NGA. As the D.C. Circuit stated:

> "[B]ecause district courts have general federal question jurisdiction under 28 U.S.C. § 1331, t**he 'normal default rule' is that 'persons seeking review of agency action go first to district court rather than to a court of appeals**.'" *Id.* at 505 (quoting *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1481, 305 U.S. App. D.C. 125 (D.C. Cir. 1994)). There is no statute that takes this petition outside that normal rule. **The NGA gives us jurisdiction to review <u>orders</u> in proceedings <u>under that Act, not claims unanchored in pipeline proceedings</u> but arising under the Budget Act.**

No Gas Pipeline, 756 F.3d at 769(emphasis added). Just as the "direct-review" provision of 15 U.S.C. § 717r(b) did not apply to challenges to FERC's funding mechanism—a mechanism that clearly does not constitute a "FERC Order"—so too does the same

direct-review provision also not apply to the Petitioners' delegation challenge here—a challenge to Congress's action in delegating eminent domain power in the first place, not a challenge to FERC or a "FERC Order."

Despite Respondents' best efforts to paint this unique constitutional challenge as just another challenge to a "FERC Order" or "FERC action,"[2] it is not a challenge to a FERC order or FERC action, but to a ***Congressional act*** of ***delegation*** under the Vesting Clauses of Articles I, II, and III. The Fourth Circuit therefore erred in holding that the District Court had no jurisdiction. As the D.C. Circuit explained, the District Court is the only court with jurisdiction to hear such challenges. Even the plain language of the NGA's review provision points to this conclusion. Pet. 29-31 (explaining the review scheme applies only to review of "FERC orders" not Congressional acts that enabled the agency in the first place. The former deals with administrative proceedings under the NGA; the latter with ***delegation*** and ***deference*** problems under the Vesting Clauses.).

If a challenge to FERC's funding mechanism under the Budget Act is outside the NGA's review scheme, then surely a challenge to Congress's delegation of power that created the NGA and enabled FERC to

[2] Respondents' Questions Presented and subsequent Briefs discuss the "exclusive jurisdiction" of the court of appeals to "review **orders of the Federal Energy Regulatory Commission.**" Petitioners agree: the NGA does provide a review scheme, but only for review **of FERC orders**, not for review **of Congressional action** that enabled FERC in the first place.

exercise its regulatory power in the first place is all the more outside the NGA's review scheme.

It is, therefore, odd that Respondent FERC argues that there is no circuit split and "no conflict warranting review"[3] but fails to disclose to this Court controlling contrary precedent on the jurisdictional issue in the D.C. Circuit, in both *Delaware Riverkeeper Network v. FERC* (decided just this year) and in *No Gas Pipeline v. FERC* (decided in 2014). Not only was FERC a defendant in both cases, but the agency even cited the D.C. Circuit's 2018 decision from *Delaware Riverkeeper* at least ***twice*** in agency proceedings after the Opinion was issued, once on July 25, 2018 in *NEXUS Gas Transmission, LLC*, 164 F.E.R.C. P61054, 2018 FERC LEXIS 1088 and then again on August 10, 2018 in *Atl. Coast Pipeline, LLC*, 164 F.E.R.C. P61100, 2018 FERC LEXIS 1171, thus demonstrating both FERC's familiarity with the D.C. Circuit's decision and knowledge of the circuit split.

2. Injury-in-Fact Required To Establish Standing To Raise Non-Delegation Challenge.

Second, in response to claims that Petitioners' constitutional challenge should be channeled to the agency for review because:

(1) the FERC Order affecting these particular Landowners—if Petitioners ultimately succeed on the merits—would eventually be affected, which means

[3] *See* FERC's Brief in Opposition at 14.

(2) the Landowners' own property would be affected by a decision in this case,

Petitioners again note the absurdity of this claim: A plaintiff ***must*** show a concrete injury-in-fact in order to establish standing. Landowners ***must*** show that they personally will suffer an injury-in-fact, fairly traceable to the actions of the defendant, and redressable by a favorable decision in litigation.[4] Had Petitioners not shown an injury-in-fact (i.e., a FERC Order affecting their own land) as a result of this statute's delegation of power, they would not have had standing to challenge the delegation in the first place.

What Respondents argue—and what the District Court oddly adopted—flips constitutional law upside down: the only reason Landowners are even able to raise this constitutional attack to the enabling statute is precisely because they have standing, that is, because they have an injury-in-fact to their own land that is fairly traceable and—yes—redressable by a favorable decision in this litigation.

If Petitioners ultimately win their non-delegation challenge, it is not just ***this*** FERC order that would be affected but ***all*** FERC orders everywhere. Why? Because the constitutional challenge is a challenge to the Congressional Act of delegation that enabled the agency in the first place, not a challenge to any specific FERC order. Petitioners consistently explained this basic principle of constitutional law and yet the Respondents continue to muddy the waters in an

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[4] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *see also No Gas Pipeline v. FERC*, 756 F.3d 764, 767 (D.C. Cir. 2014).

attempt to steer the non-delegation challenge to the agency's review scheme while construction proceeds full-steam ahead.

3. Football Analogy Misplaced.

Third, in response to Respondent MVP's football reference, which dubbed the Petitioners' constitutional challenge an "end-run"[5] on the exclusive review procedure of the NGA, Petitioners reply as follows:

Whilst this mischaracterizes the nature of Petitioners' Complaint, in keeping with the football analogy, the exclusive review scheme Congress established in the NGA is similar to that employed by the NFL for instant replay. Assume that the NFL is Congress. The referee is FERC, and the coach is the Landowner.

The NFL hires rules experts (often lawyers) and empowers them with authority to regulate the conduct of players and coaches during a game. If a coach disagrees with a referee's decision, he can challenge it, subject to certain limitations. The officials, who made the call and have expertise in this area, then review the original call with the aid of instant replay. Only the referees can reverse their original decision. This is the method available for coaches to challenge decisions **made by the referees**.

Similarly, Congress created FERC and hired experts in the energy industry to regulate energy companies. If a party disagrees with a decision **made by the agency**, the party must bring that challenge to

[5] MVP's Brief in Opposition at 3.

the agency to review its own decision, just as a coach challenging a referee's decision must bring that challenge to the referee. The agency employees are experts in their field and should be most-able to determine if the original decision was correct. Only after exhausting the review process within the agency can the party appeal the agency's decision to the Circuit Court.

However, the Landowners here are **not** challenging an **agency decision**. They are challenging **Congress's decision** to create the agency and impermissibly delegate its eminent domain authority to the agency and to private entities, such as MVP.

Requiring the Landowners to ask the agency if Congress violated the Constitution by creating it [the agency] would make no more sense than requiring the coach to ask a referee if the NFL violated its charter by hiring him. It makes no more sense for the coach to ask the referee to review the NFL's decision to hire him than it does to ask FERC to review Congress' decision to create them.

4. Separation Of Powers And Non-Delegation Doctrine.

Fourth, in response to Respondents' claims that the "separation of powers" argument was raised for the first time before this Court, Petitioners reply that Respondents change their arguments as it suits them. At the District Court level, Respondent MVP fervently argued that the Petitioners' delegation challenge was based on an incorrect premise, that is, that Congress never delegated the power of eminent domain to the agency at all, but rather ***delegated it directly to***

MVP, a private entity. *See* App. 216 (MVP stating: "Congress has not delegated the power of eminent domain to FERC. Rather, the NGA delegated the power of eminent domain to natural gas companies."); *see also* Pet. 3, n.1. However, when confronted with controlling Supreme Court precedent stating that there is "not even a fig leaf of constitutional justification" for delegations to private entities (Pet. 3, n.1), Respondent MVP quickly dropped that position, realizing perhaps that it is not only unconstitutional but also proves the Landowners' point. Similarly, Respondent FERC also shifts positions, noting in one instance that it has no expertise or jurisdiction to adjudicate constitutional issues, but in another that this challenge could anyways be channeled through the agency's review scheme. Worse still, FERC argues there is no circuit split on the jurisdictional issue despite knowing that the D.C. Circuit, as recently as this year, recognized District Court jurisdiction for challenges unanchored in agency proceedings. Consistent with this pattern of shifting argumentation, Respondents now argue that Petitioners never before raised the separation of powers arguments.

First, the Questions Presented ask whether or not the District Court has subject matter jurisdiction. That is the same issue presented to the Court of Appeals. The non-delegation doctrine and separation of powers (which are virtually identical sister theories drawn from the Vesting Clauses) are merely the underlying substance of Petitioners' constitutional claims, the merits of which are not before this Court. ***Second***, the "separation of powers principle ***is*** the basis for the delegation argument, which ***is*** and ***has*** always been the focal point of Petitioners' challenge. All of FERC's

unchecked powers under the NGA *are a result* of that overly broad delegation of power by Congress. And whilst some powers can be delegated, others cannot. Why? Because some delegations violate the separation of powers. ***In any event***, regardless of the merits of those issues, the only question before this Court is District Court ***jurisdiction***, not the underlying substance of the non-delegation or separation of powers arguments.

5. Rutherford Amicus Brief *Is* Relevant.

Fifth, in response to Respondents' attacks on the Rutherford Institute's amicus brief, Petitioners respond that *Amicus* is precisely on-point with the lack of "meaningful judicial review." Petitioners argued that very point multiple times, at the District Court and the Fourth Circuit. *Amicus* pointed this Court to *Califano v. Sanders*, 430 U.S. 99, 109 (1977)("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures . . ..") and *Rankin v. Heckler*, 761 F.2d 936, 940-41 (3d Cir. 1986)(finding that exhaustion is waived when the federal court is more qualified to address constitutional questions than the agency). Amicus 3-4.

Amicus also correctly notes that "[t]he current practice, therefore, substitutes 'meaningful' judicial review for ***any*** judicial review." *Id*. at 9. This is related to Petitioners' arguments that Congress could not have intended to send this challenge through the NGA's review scheme because it would effectively deprive Landowners of meaningful review. By the time the issue reached the Court of Appeals, the pipe would already be in the ground and the Landowners would have a constitutional decision from an unaccountable,

unchecked, and ill-equipped agency that has already ***twice*** admitted it has neither the expertise nor jurisdiction to adjudicate constitutional challenges to Congressional action.

6. Chevron and Auer Deference: Unfit For Challenges To Delegation.

Sixth, in response to Respondents' claims that the Court of Appeals would eventually adjudicate the issue even if FERC was unqualified to do so, Petitioners point this Court to Ronald A. Cass's recent publication by The Federalist Society entitled: "*Deference To Agency Rule Interpretations: Problems of Expanding Constitutionally Questionable Authority in the Administrative State*." Vol. 19 (Oct. 11, 2018).

As Cass notes, "[t]he loss of a serious, direct judicial brake on legislative grants of power to administrators has permitted the enormous expansion of government regulation[.]" *Id*. at Part V. "Original Chevron," as described by Cass, allotted agency discretion only when reasonable and "not outside the scope of the law's grant of discretion." *Id*. at Part I. That discretion, however, hinged on the ***ambiguity*** of the statute. If the statute was not silent or ambiguous, the agency did not possess discretion. *See id*. Similarly, as lax as Auer deference is, even *Auer* seems to require deference only when there is ambiguity.

Here, however, there is no ambiguity in the NGA's review scheme. ***First***, the plain language states the review scheme applies only to a "review of an order" or "action of a Federal agency." 15 U.S.C. § 717r(b); Pet. 30. Petitioners are not seeking review **of an agency action** but of **Congressional action**. There is no

ambiguity and thus no jurisdiction allotted to the agency **<u>or</u>** the Court of Appeals for such determinations. ***Second***, even if there were an ambiguity in the review scheme (which there is not), ambiguity "cannot plausibly be evidence of a congressional commitment of authority to the agency." *Id*. at Part II. "[A]dministrative officials cannot confer additional discretionary authority on themselves. If judicial deference follows from legal delegation of discretionary authority to administrators—as in original Chevron—that delegation must be found in statutory or constitutional provisions[.]" *Id*. at Part II.

In any event, as explained by the D.C. Circuit in *Delaware Riverkeeper Network* and *No Gas Pipeline* cited above, absent a direct-review provision, **<u>neither</u>** the agency **<u>nor</u>** the Court of Appeals can self-delegate additional jurisdiction to address constitutional challenges that are properly brought before the District Court. In such cases, the default rule, as explained by the D.C. Circuit, is District Court jurisdiction under 28 U.S.C. § 1331.

7. The Law Does Not Require That Which Is Futile.

Seventh, again in response to Respondents' claims that futile agency review is cured because the Court of Appeals would eventually review the issue, Petitioners invoke the centuries-old maxim: the law does not require the doing of that which is futile. ("Lex neminem cogit ad vana seu inutilia peragenda.") To require Landowners to ask the agency what the agency thinks of a Congressional Act would be requiring that which is futile. The law neither requires such an act, nor would Congress have intended it.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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