No. _____

In the
Supreme Court of the United States

CLETUS WOODROW BOHON, BEVERLY ANN BOHON, WENDELL WRAY FLORA, MARY MCNEIL FLORA, ROBERT MATTHEW HAMM AND AIMEE CHASE HAMM,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION AND MOUNTAIN VALLEY PIPELINE, LLC,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a facial challenge to Congress's delegation of eminent domain power to private parties is properly filed in district court, as this Court held in *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021), or with FERC, which has admitted it has no jurisdiction to adjudicate the constitutionality of this delegation.

Whether a facial challenge to Congress's overly broad delegation of legislative power to FERC is properly filed in district court or with FERC, which has admitted it has no jurisdiction to adjudicate the constitutionality of this delegation.

Whether a facial challenge to Congress's delegation of eminent domain power to FERC is properly filed in district court or with FERC, which has admitted it has no jurisdiction to adjudicate the constitutionality of this delegation.

LIST OF PARTIES

Petitioners are private landowners, Cletus Woodrow Bohon and Beverly Ann Bohon ("the Bohons"), Wendell Wray Flora and Mary McNeil Flora ("the Floras"), and Robert Matthew Hamm and Aimee Chase Hamm ("the Hamms") (hereinafter collectively "Petitioners" or "Landowners") and were the appellants in the court below. Respondents are the Federal Energy Regulatory Commission ("FERC") and Mountain Valley Pipeline, LLC ("MVP") and were the appellees in the court below.

CORPORATE DISCLOSURE

This Petition is not filed on behalf of a corporation.

STATEMENT OF RELATED PROCEEDINGS

Petitioners are not aware of any cases directly related to, or arising from, the same trial court case as the case in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit (hereinafter the "D.C. Circuit") in this case.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 37 F.4th 663, and is reproduced in the appendix hereto ("App.") at 1. The opinion of the United States District Court for the District of Columbia is reported at 2020 U.S. Dist. LEXIS 79639, and is reproduced in the appendix at 10.

JURISDICTION

The judgment of the D.C. Circuit was entered on June 21, 2022. App. 1. The D.C. Circuit had jurisdiction under 28 U.S.C. § 1291 and the district court had original jurisdiction under 28 U.S.C. § 1331. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Vesting Clauses:

Article I, Section 1 of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."

Article II, Section 1, Clause 1 provides that "[t]he executive Power shall be vested in a President of the United States of America."

Article III, Section 1 provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Pertinent provisions of the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq*. are referenced below and reproduced in the appendix.

28 U.S.C. § 1331 provides that, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

INTRODUCTION

The D.C. Circuit's decision is in direct conflict with this Court's decision on the exact same jurisdictional question decided in *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021). The D.C. Circuit erroneously differentiates Petitioners' challenge from New Jersey's challenge in *PennEast* by ignoring explicit language from this Court stating that the delegation at issue in *PennEast* was not delegation of the power to abrogate Eleventh Amendment immunity but, rather, "whether the United States can delegate its eminent domain power to private parties."[1] This is the exact question Petitioners raise in Count III of their Complaint. Accordingly, this Writ should be granted for two reasons: 1) the D.C. Circuit's decision directly conflicts with recent controlling Supreme Court precedent; and 2) the D.C. Circuit's decision directly conflicts with the Fifth Circuit's recent decision in *Jarkesy v. SEC,* 34 F.4th 446 (5th Cir. 2022) and the Third Circuit's decision in *Cirko on behalf of Cirko v. Commissioner of Social Security,* 948 F.3d 148, 153 (3d Cir. 2020).

When determining original jurisdiction of cases involving FERC, there are two types of challenges: (1) those which are filed with the agency; and (2) those which can only be raised in district court. The vast majority of pipeline challenges can only begin with the agency via the administrative review scheme. Cases that question the agency's judgment

[1] *PennEast*, 141 S. Ct. at 2262.

and call on the agency's scientific or technical expertise are routed to the agency because there *is* an opportunity for "error correction," i.e., the agency can apply its special expertise to fix the problem. For example, the agency can police noncompliance with the terms of the certificate, or change the pipeline route, or impose higher standards to protect the fish, the bats, the streams, and the wetlands. The agency can revoke permits, re-do environmental assessments and biological studies, prevent ecological harm, or impose penalties for environmental damage. Congress routed these types of challenges to the agency so its experts can employ their unique expertise in these areas. But, as *PennEast* and prior Supreme Court precedent demonstrate, there is a narrow second category of cases that do not require the agency's scientific expertise and must be initiated in district court. Cases that question Congress's judgment are not filed with FERC because FERC admits it cannot answer those questions. This case, like *PennEast*, falls within that narrow second category.

STATEMENT OF THE CASE

Articles I, II, and III of the Constitution of the United States vest power in three branches of government: legislative, executive, and judicial. The "separation of powers" doctrine is derived from these Articles, i.e., the vesting clauses. This doctrine forbids any branch from delegating its vested powers to another branch. That prohibition is known as the "non-delegation doctrine."

In 1938, Congress passed the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq*. In 1947, Congress amended the NGA to enable the Federal Power Commission—the predecessor to today's Federal Energy Regulatory Commission ("FERC")—to issue a "certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas." 15 U.S.C. § 717f. Under the NGA, the recipient of such a certificate acquires the power of eminent domain to condemn and take private property. FERC is an agency within the executive branch led by commissioners appointed by the President.

By enacting the NGA, Congress delegated expansive legislative authority to FERC to determine when eminent domain power should be conveyed to a private party without drafting any definite standards to guide FERC in carrying out Congress's will. Instead, Congress allowed FERC to unilaterally create and impose its own rules to determine when a private, *for-profit* entity can exercise the government's power of eminent domain to take private property from landowners unwilling to sell.

Petitioners own private property along a pipeline route. When Petitioners refused to sell their property to the pipeline company ("MVP"), MVP filed condemnation actions seeking to exercise its unlawfully delegated eminent domain power to take Petitioners' property against their will.

On January 2, 2020, Petitioners filed a facial constitutional challenge in the United States District

Court for the District of Columbia. Petitioners alleged three facial counts arising under Articles I, II, and III of the U.S. Constitution. On May 6, 2020, the district court erroneously held it lacked jurisdiction to decide Petitioners' nondelegation challenge and dismissed the case.

On July 6, 2020, Petitioners filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit. Before this case was argued, Respondent FERC moved the D.C. Circuit to hold this case in abeyance pending this Court's decision on an almost identical jurisdiction issue in *PennEast*.

On June 29, 2021, this Court held in *PennEast* that New Jersey's nondelegation challenge to Congress's decision to delegate eminent domain power to a private party—one of the same questions presented here—had properly been filed in district court.

On June 21, 2022, the D.C. Circuit ignored this Court's jurisdictional holding and explicit language in *PennEast* regarding the type of delegation at issue there and erroneously affirmed dismissal of Petitioners' nondelegation challenge.

REASONS FOR ALLOWANCE OF THE WRIT

I. Review Is Warranted Under Supreme Court Rule 10(c) Because The D.C. Circuit's Decision Is In Direct Conflict With Controlling Supreme Court Precedent Upholding District Court Jurisdiction In *PennEast Pipeline Co. v. New Jersey*.

A. The Supreme Court has expressly held—in a case involving an identical non-delegation challenge to the NGA—that constitutional challenges to FERC's enabling legislation are properly raised in district court.

The D.C. Circuit decision ignores controlling Supreme Court precedent by erroneously differentiating this delegation issue from the delegation issue in *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021). The D.C. Circuit held that *PennEast* involved the delegation of "sovereign immunity" abrogation. However, the delegation issue in *PennEast* is identical to the delegation issue raised in Count III of Petitioners' Complaint: whether Congress can delegate its eminent domain power to a private party. In fact, this Court expressly rejected Respondents' false distinction by noting that the *PennEast* delegation issue is not about the Eleventh Amendment at all:

> But they have again misconstrued the issue in this case as whether the United States can delegate its ability to sue

> States. The issue is instead whether the United States can delegate its eminent domain power to private parties.

PennEast Pipeline Co., 141 S. Ct. at 2262 (Roberts, C.J.) (emphasis added). That is the exact same issue—almost word-for-word—that Petitioners raised in Count III of their Complaint. App. 52. As this Court held, such a challenge is properly raised initially in district court.

The D.C. Circuit misconstrues the issues and mistakenly likens Petitioners' non-delegation challenge to *Tacoma v. Taxpayers of Tacoma,* 357 U. S. 320, 78 S. Ct. 1209, 2 L. Ed. 2d 1345 (1958) – a case that is easily distinguished. *Taxpayers of Tacoma* was about the tension between municipal and state authority and did not even involve the NGA.[2] It was a preclusion case in which this Court reversed the Supreme Court of Washington because the state had already litigated the same issues before the Ninth Circuit, lost, and then tried to re-litigate those same issues again in state court. By contrast, neither New Jersey in *PennEast* nor Petitioners here

[2] *Taxpayers of Tacoma* involved a city using federal eminent domain power to "take" a state fish hatchery. The state argued the project would violate state law but lost its challenge before the agency and with the Ninth Circuit. The state then sued again in state court to block the taking on the basis of state law and won. But this Court reversed the Supreme Court of Washington, holding that (1) federal law preempts state law in this area, and (2) the state was precluded from re-litigating the same issue again in state court. By contrast, here, as in *PennEast*, neither preemption nor preclusion are issues. Accordingly, the D.C. Circuit errs in its analogy.

tried to evade federal law by raising their challenge in state court. That analogy is incongruous.

The D.C. Circuit also focuses on the words "set aside" to falsely suggest that, unlike New Jersey, Petitioners are seeking to "set aside" FERC's certificate order. Not so. Nowhere in their Prayer for Relief do Petitioners ask the district court to "set aside" or "modify" the specific order FERC issued to MVP in October 2017. Petitioners asked for a declaratory judgment that the enabling legislation—the NGA—is facially unconstitutional. This relief, if granted, would have practical consequences, like other declaratory judgments. Here, it would affect certificates issued by FERC. But that is the same relief New Jersey would have obtained if its challenge had been successful. Only the judicial branch can grant such relief. The executive branch cannot decide whether the legislative branch violated the Constitution when it enacted the NGA in 1938. FERC could not answer New Jersey's question in *PennEast* and it cannot answer Petitioners' identical question here. Nor can it answer whether the delegation from Congress to FERC was overly broad and in violation of this Court's "intelligible principle" test. Both questions must be raised in district court.

The best and only place to challenge an unconstitutional Act of Congress is district court, not an executive agency. The jurisdictional holding in *PennEast* was not an "exception" to the rule, but a reflection of a well-established principle. In *PennEast*, this Court requested additional briefing on the issue of jurisdiction, analyzed the issue, and held

that New Jersey's non-delegation challenge to the constitutionality of the NGA was properly raised in district court. Although New Jersey was indeed (1) harmed by a FERC order (a harm necessary to confer standing); and (2) had already raised and lost other as-applied challenges via the administrative review scheme, New Jersey's challenge in *PennEast* was not a "collateral attack" to the FERC order affecting New Jersey. Rather, it was a structural attack to the enabling legislation. So, too, is Petitioners' challenge here. Accordingly, under *PennEast*, district court is the only forum in which Petitioners could file their challenge.

Nonetheless, the D.C. Circuit adopts Respondents' erroneous distinctions that: (1) *PennEast* involved state-owned land, and (2) New Jersey's challenge was raised *defensively* in district court whereas Petitioners' challenge was raised *offensively*. But neither of those factors has ever conferred district court jurisdiction where it was otherwise lacking. The test for jurisdiction is not *Is the landowner a state or private party?* or *Was the challenge raised defensively or offensively?* The test is simple: whose judgment are you challenging (the agency's judgment or Congress's) and can the agency fix the error you allege was made? The case law provides a clear line of demarcation: if the agency can correct the problem, the challenge must be brought initially to the agency. However, if there is no opportunity for error correction by the agency—if the agency cannot fix the constitutional defect—the challenge must be initiated in district court.

It is the nature of the claim, not the procedural posture or identity of the property owner, that determines the district court's original jurisdiction.

B. The D.C. Circuit ignores the overwhelming body of case law which illustrates that the exclusive review scheme is only exclusive for the *types* of challenges Congress intended to channel to the agency.

Challenges affecting FERC are initially either routed to the agency or filed in district court. The vast majority of pipeline challenges, however raised, must be filed with the agency via the administrative review scheme. 15 U.S.C. § 717r. But, as *PennEast* and other cases illustrate, cases such as this, which do not require the agency's industry-specific expertise, must be initiated in district court.

i. Category 1: Cases that question the agency's independent judgment and call on the agency's expertise to adjudicate the issue go to the agency first because that provides the agency an opportunity to correct the alleged error.

Almost all challenges affecting pipelines raise issues that fall within the agency's scientific or technical expertise. As a result, Congress established an exclusive review scheme to channel these cases back to the agency to give its experts an opportunity to re-evaluate the issue and fix it, if needed.

But in each such case, the district court lacks jurisdiction because the issue involves something the agency can fix, whether raised *defensively* in response to a condemnation action or *offensively* in a separate suit. There is an opportunity for "error correction." The agency has extensive power to modify or enforce certificates to provide the relief requested. Even in as-applied constitutional cases that question "public use," the agency can re-evaluate whether public need exists and reverse its own decision or reroute the pipeline to an area where there is public need. If FERC can correct the error alleged, that challenge must be raised initially with the agency.

1. Challenges alleging "noncompliance" with a certificate's terms begin with FERC because FERC can enforce compliance and correct the error

Most pipeline-related challenges allege a certificate is invalid due to "noncompliance" with, or "violation" of, the terms and conditions of the certificate order. Such challenges are "collateral attacks" because it is FERC's job—not the court's—to police violations and enforce compliance with the terms of a certificate. *See*, *e.g.*, *Portland Natural Gas Transmission Sys. v. 4.83 Acres of Land,* 26 F.Supp.2d 332, 339 (D.N.H. 1998) ("the power to police compliance [falls] squarely upon FERC"). A collateral attack occurs when a party asks a court to perform FERC's job, i.e., enforcing compliance with the certificate, policing violations of environmental conditions, enforcing safety standards, etc. In the

vast majority of such cases, the court involved is a federal district court, but parties have also sought relief from state courts.[3] In each case, parties are not arguing the certificate could *never* be valid under *any* circumstance; only that the particular certificate at issue is invalid so long as the company remains in violation of its terms. But once FERC enforces compliance with the terms of the certificate, the issue is cured. Because there is an opportunity for "error correction," these challenges must be brought to FERC so the agency can use its expertise to evaluate and fix the problem.

All of the following cases—some raised defensively and others offensively—are cases in which the district court rightly lacked jurisdiction because the affected landowner alleged a violation of the certificate's terms. In each instance, the issue was squarely within FERC's expertise and a matter FERC could fix. *See, e.g., Columbia Gas Transmission, LLC v. Temp. Easements for the Abandonment of a Natural Gas Transmission Pipeline,* 2017 U.S. Dist. LEXIS 51716 (W.D. Pa. Apr. 5, 2017) (no jurisdiction where landowner, in defense to a condemnation action, alleged the certificate was invalid because the company was in violation of certain environmental conditions set forth in the certificate); *Millennium Pipeline Co. v. Certain Permanent & Temp. Easements in (No*

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[3] *Taxpayers of Tacoma* and *Williams Natural Gas Co. v. Okla. City*, 890 F.2d 255 (10th Cir. 1989) are two examples where parties sought relief from state court using state law – obvious collateral attacks.

Number) Thayer Road, 777 F. Supp. 2d 475, 481 (W.D.N.Y. Apr. 12, 2011) (no jurisdiction where landowner alleged the certificate was invalid because the company was in violation of the pipeline route set forth in the certificate) ("when a landowner contends that the certificate holder is not in compliance with the [FERC] certificate, 'that challenge must be made to FERC, not the court'" (citation omitted)); *Portland Natural Gas Transmission Sys. v. 4.83 Acres of Land,* 26 F.Supp.2d 332, 339 (D.N.H. 1998) (no jurisdiction where landowner alleged the company was in violation of environmental conditions set forth in the certificate to prevent contamination of an aquifer); *Am. Energy Corp. v. Rockies Express Pipeline LLC,* 622 F.3d 602, 605 (6th Cir. 2010) (no jurisdiction where coal company alleged "that FERC did not adequately consider the safety risks and business interruptions" from the pipeline because FERC is the expert on mine safety issues and already set forth safety standards in its order); *Me. Council of the Atl. Salmon Fed'n v. Nat'l Marine Fisheries Serv.* (NOAA Fisheries), 858 F.3d 690 (1st Cir. 2017) (no jurisdiction where environmental organizations complained about the impacts of hydroelectric dams on endangered salmon because the agencies are the scientific experts on endangered species and FERC already considered and incorporated the biological opinions in its orders).

Each of these cases was a "collateral attack" because the landowner was asking the district court to perform FERC's role; the district court does not police violations or enforce compliance with the terms of a FERC certificate. That is why these challenges

cannot be raised in district court; the issues fall squarely in FERC's wheelhouse. Most importantly, FERC can fix the alleged issues by enforcing compliance, where appropriate. It can "issue stop work orders," "modify the conditions," or "impose additional measures, as necessary 'to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation.'" *Portland Natural Gas Transmission Sys.,* 26 F.Supp.2d at 339. Congress requires all such challenges to be filed with FERC.

2. As-applied constitutional challenges questioning "public use" begin with FERC because FERC can change the location of the pipeline and correct the error

Most of the remaining pipeline-related challenges question "public use" for a project or seek to change the pipeline route. These *as-applied* constitutional challenges are also properly channeled to the agency because FERC can re-evaluate public need and change the location of the pipeline to an area where such need exists. Because FERC can fix the problem (assuming one exists), the district court lacks jurisdiction over these types of challenges, as well. *See*, *e.g.*, *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187 (3d Cir. 2018) (no jurisdiction where landowners attacked FERC's judgment to route the pipeline over property owned by a religious order because landowners could have obtained the same

relief from the agency by asking the agency to reconsider the route and move the pipeline to a different location). In *Adorers of the Blood of Christ,* the nuns alleged the certificate issued was invalid because it crossed the nuns' parcel of land and therefore violated the Religious Freedom Restoration Act. The Third Circuit held the district court lacked jurisdiction because, once again, FERC could fix the purported invalidity by simply moving the pipeline to a different location. The nuns were not arguing the certificate could *never* be valid under *any* circumstance; only that the certificate was not valid so long as it crossed their land. Moving the pipeline to a different location would fix that problem, and FERC had the power to do that. The same is true in: *Alliance Pipeline L.P. v. 3.304 Acres of Land*, 911 F. Supp. 2d 826 (D.N.D. Nov. 21, 2012) (no jurisdiction where landowner defending against a condemnation action did not attack the validity of the certificate "on its face" but merely lodged various as-applied challenges attacking FERC's judgment to issue a certificate for that particular project); and *USG Pipeline Co. v. 1.74 Acres in Marion Cnty., Tenn.,* 1 F. Supp. 2d 816 (E.D. Tenn. Mar. 13, 1998) (no jurisdiction where landowner defending against a condemnation action attacked FERC's judgment as to whether there was any "public benefit" to extending the pipeline to a private factory in Alabama).

In each of these cases, FERC could grant the relief the landowner is seeking. Thus, there is an opportunity for "error correction" because the agency can fix the *as-applied* constitutional defect by moving the location of the pipeline. By contrast, moving the

location of the pipeline in Petitioners' case will not fix the constitutional problem. Petitioners allege the enabling legislation—the NGA—is facially invalid, meaning the legislation is unconstitutional at *all* times, under *all* facts, irrespective of where FERC routes a pipeline. Other than conferring standing, the location of the pipeline is irrelevant to Petitioners' constitutional query. Hence, Petitioners' challenge, like New Jersey's, was properly raised initially in district court.[4] On this point, *PennEast* is consistent with prior decisions of this Court.

3. Review is only meaningful if the agency can apply its expertise to fix the problem

Where the question is a matter of statutory construction, i.e., where the issue arises "under the statute," preclusion is appropriate—and agency review is meaningful—because the agency has the special technical knowledge or fact-finding ability needed to adjudicate the issue. In *United States v.*

[4] Just as moving the pipeline in Petitioners' case would not obviate the constitutional defect, neither would moving the pipeline off New Jersey's land in *PennEast* because, once again, the delegation issue in *PennEast*—as noted by the majority—was not whether the United States could delegate its ability to sue states but, rather, whether the United States could delegate the power of eminent domain to a private party. Because the issue did not hinge on *who* owned the land—the state or a private party— moving the pipeline off state land would not have fixed that alleged facial defect. Hence, New Jersey's delegation challenge could only be raised in district court because FERC could not answer that question just as it cannot answer the questions here.

Ruzicka, 329 U.S. 287 (1946), agency review was meaningful because the question presented required "fact-bound inquiries" that called for the agency's specialized knowledge of the milk industry. *See Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 (2010). Because district courts lack technical or factual expertise in the milk industry, they would be at a disadvantage in answering that question. Likewise, the district court would be at a disadvantage answering scientific questions related to environmental damage, mudslides, water contamination, endangered species, optimal pipeline locations, etc. Preclusion in these cases is appropriate because the agency is the most qualified to answer the question and can, in fact, apply its expertise to fix the problem. This was true in both *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200 (1994) (where the agency could apply its special expertise in walk-around rights to answer the statutory question concerning mine rights) and in *Elgin v. Dept. of Treasury,* 567 U.S. 1 (2012), (where the agency could use its fact-finding ability to grant "precisely" the same type of relief it routinely granted in those types of employment disputes, i.e., reinstatement, compensation, backpay). In both instances, the agency's ability to apply its scientific, factual, or technical expertise to answer the question and effectively fix the problem made agency review meaningful.

But where—as here—the agency cannot cure the constitutional defect and instead expressly disclaims jurisdiction because the question lies outside of the agency's knowledge and expertise, courts have

consistently held that the district court retains jurisdiction.

ii. Category 2: Cases that question Congress's judgment cannot be answered by the agency and must be raised in district court.

Agencies have neither expertise nor authority to adjudicate facial constitutional challenges to the laws they administer. It is well-settled that **"[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."** *Johnson v. Robison*, 415 U.S. 361, 367-68 (1974) (holding that "[t]he questions of law presented in these proceedings **arise under the Constitution, not under the statute whose validity is challenged.")** (emphasis added); *Public Utilities Commission of State of Cal. v. U.S.*, 355 U.S. 534, 539 (1958) ("[W]here the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and **judicial relief sought as the only effective way of protecting the asserted constitutional right**.") (emphasis added); *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 (2010) (concluding that **"constitutional claims are also outside the Commission's competence and expertise");** *Cirko on behalf of Cirko v. Commissioner of Social Security,* 948 F.3d 148, 153 (3d Cir. 2020) ("[E]xhaustion is generally inappropriate where a claim serves to vindicate

structural constitutional claims like Appointments Clause challenges, which implicate both **individual constitutional rights and the structural imperative of separation of powers**.") (emphasis added).

FERC's admission that it will not—and cannot—answer Petitioners' constitutional questions further bolsters this position. Like the agency in *Johnson v. Robison*, which "expressly disclaimed authority to decide constitutional questions," 415 U.S. at 367-68, FERC has likewise expressly disclaimed authority to answer the questions presented. 161 FERC ¶ 61,043 (2017) (Certificate Order to MVP) **("[S]uch a question is beyond our jurisdiction: only the Courts can determine whether Congress' action in passing section 7(h) of the NGA conflicts with the Constitution.")** (emphasis added).

FERC could not answer New Jersey's delegation question in *PennEast* and admits it cannot answer Petitioners' delegation questions here—one of which is identical to the question raised by New Jersey. For that reason, agency review here is futile, meaningless, and could not have been intended by Congress.

II. Review Is Warranted Under Supreme Court Rule 10(a) Because the D.C. Circuit's Decision Directly Conflicts With The Fifth Circuit's Decision In *Jarkesy v. SEC,* 34 F.4th 446 (5th Cir. 2022) And The Third Circuit's Decision In *Cirko on behalf of Cirko v. Commissioner of Social Security,* 948 F.3d 148 (3d Cir. 2020).

The D.C. Circuit's decision directly conflicts with the Fifth Circuit's recent decision in *Jarkesy v. SEC,* 34 F.4th 446 (5th Cir. 2022). The D.C. Circuit relies on dicta in *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015) concluding that the district court would not have had jurisdiction over plaintiff's nondelegation challenge to the SEC's authority *if* he had properly raised such a challenge.[5] But, in 2022, the Fifth Circuit held that the D.C. Circuit erroneously routed Jarkesy to agency proceedings and denied him his right to a jury trial in district court (holding that "the [agency] proceedings suffered from three independent constitutional defects: (1) Petitioners were deprived of their constitutional right to a jury trial; (2) Congress unconstitutionally delegated legislative

[5] The plaintiff in *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015) did not properly raise his facial nondelegation challenge and only mentioned it later, in passing. Thus the D.C. Circuit's comments in 2015 on whether the district court *would have had* jurisdiction *assuming* the plaintiff had properly raised the nondelegation issue was dicta. However, the D.C. Circuit in the case at bar relies on this dicta from its *Jarkesy* decision in 2015 to erroneously hold that the district court here has no jurisdiction over facial nondelegation challenges – a decision that now directly conflicts with the Fifth Circuit's recent holding.

power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power; and (3) statutory removal restrictions on SEC ALJs violate Article II."). *Jarkesy*, 34 F.4th at 455 (emphasis added). Citing William Blackstone, the Fifth Circuit reasoned that securities fraud actions are "traditional common law" claims which are not best suited for agency adjudication. *Jarkesy*, 34 F.4th at 451. The Fifth Circuit held that the agency was not the proper forum for Jarkesy's challenges and that his claims belonged in district court, not with the SEC. In so doing, the Fifth Circuit reached the exact opposite conclusion on the issue of jurisdiction the D.C. Circuit had reached in the same, predecessor case seven years prior.

The D.C. Circuit's decision is also in direct conflict with the Third Circuit's decision in *Cirko on behalf of Cirko v. Commissioner of Social Security,* 948 F.3d 148 (3d Cir. 2020). In *Cirko*, the Third Circuit held that deference to agency expertise in constitutional challenges was "rendered irrelevant" on account of the "well-worn maxim" that constitutional questions, such as Appointments Clause challenges, are "outside the [agency's] competence and expertise." *Cirko*, 948 F.3d at 158 (internal citation omitted). Because the challenge in *Cirko* arose under the Appointments Clause, there was "no legitimate basis" for the Commissioner to argue that agency expertise was required to answer the legal question. *Id*. Nor could the agency in *Cirko* correct the constitutional error because the administrative judges could not "cure the constitutionality of their own

appointments." *Id.* at 158. There, as here, the agency's legitimacy was being challenged under the Constitution. And since agencies cannot determine—or cure—the unconstitutionality of their own power, administrative exhaustion was inappropriate and could not have been impliedly intended.

CONCLUSION

This Court should grant this petition for certiorari because: 1) the D.C. Circuit's decision contradicts controlling precedent and explicit language from this Court regarding the type of delegation at issue in *PennEas*t when analyzing one of the same jurisdictional questions presented here; and 2) a circuit split exists between the D.C. Circuit and the Third and Fifth Circuits on this issue.

Respectfully submitted,

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