No. 22-256

In the Supreme Court of the United States

CLETUS WOODROW BOHON, ET AL.,
Petitioners,

v.

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

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

BRIEF IN OPPOSITION OF MOUNTAIN VALLEY PIPELINE, LLC

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QUESTION PRESENTED

Under the Natural Gas Act, a party aggrieved by a final order of the Federal Energy Regulatory Commission ("FERC") may petition for review in an appropriate U.S. Court of Appeals, and the "jurisdiction" of that court to "affirm, modify, or set aside such order" "shall be exclusive" upon the filing of the administrative record. 15 U.S.C. § 717r(b). This Court has long held that the Federal Power Act's materially indistinguishable judicial-review provision "prescrib[es] the specific, complete and exclusive mode for judicial review of the Commission's orders." *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958).

The question presented is:

Whether, notwithstanding 15 U.S.C. § 717r(b), federal district courts have jurisdiction over claims seeking to "void" a final order issued by FERC under the Natural Gas Act.

CORPORATE DISCLOSURE STATEMENT

Respondent Mountain Valley Pipeline, LLC ("Mountain Valley") is a Delaware limited liability company to be engaged in the interstate transportation of natural gas. Mountain Valley has no parent companies. The following entities have an ownership stake of 10% or greater in Mountain Valley:

(1) MVP Holdco, LLC has a 10% or greater ownership stake in Mountain Valley. MVP Holdco, LLC is an indirect, wholly owned subsidiary of Equitrans Midstream Corporation (NYSE: ETRN), a publicly held corporation.

(2) US Marcellus Gas Infrastructure, LLC has a 10% or greater ownership stake in Mountain Valley. US Marcellus Gas Infrastructure, LLC is an indirect, wholly owned subsidiary of NextEra Energy, Inc. (NYSE: NEE), a publicly held corporation.

(3) WGL Sustainable Energy LLC has a 10% or greater ownership stake in Mountain Valley. WGL Sustainable Energy LLC is an indirect, wholly owned subsidiary of AltaGas Ltd. (TSX: ALA), a publicly held corporation.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Bohon v. *FERC*, No. 1:20-cv-6 (May 6, 2020)

United States Court of Appeals (D.C. Cir.):

Bohon v. *FERC*, No. 20-5203 (June 21, 2022)

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BRIEF IN OPPOSITION

The D.C. Circuit's unanimous decision involved a narrow application of the plain text of the judicial-review provision in the Natural Gas Act ("NGA"), which this Court has long held provides the "complete and exclusive" pathway for challenging final orders of the Federal Energy Regulatory Commission ("FERC"). The decision below is correct and consistent with every court ever to consider the question presented. As Judge Boasberg explained, "the heavy weight of precedential authority" confirms that plaintiffs may not bypass the NGA's judicial-review scheme by attempting to challenge a final FERC order in district court rather than the court of appeals. Pet. App. 19. "Not one [court] has held to the contrary." *Ibid.*

Tellingly, the Petition all but ignores the text of the NGA's judicial-review provision, 15 U.S.C. § 717r(b). Instead, Petitioners advocate for a sweeping exception to that scheme for "facial" or "structural" constitutional claims—even where such claims (as here) attack a final FERC order. That theory finds no support in the text of the NGA or this Court's cases interpreting the same.

The single most important feature of this case is that the Complaint explicitly and repeatedly asked the District Court to "void" a final order that FERC issued to Respondent Mountain Valley Pipeline, LLC ("Mountain Valley"), authorizing construction and operation of the Mountain Valley Pipeline. See Pet. App. 50-51, 53, 54 (Compl. ¶¶ 47, 53, 64). The NGA creates a clear pathway for parties, like Petitioners here, who seek to have a final FERC order set aside: They can seek rehearing before the agency, and then file a petition for review in an appropriate court of appeals. Many

stakeholders displeased with the order FERC issued to Mountain Valley in 2017 did follow that procedure; they took their claims to FERC (including non-delegation claims that are virtually identical to those the Petitioners press here) and to the D.C. Circuit. Petitioners chose not to use that statutory review pathway, despite having filed numerous comments at FERC opposing the certificate. Instead, they waited until years after the fact to file this collateral attack on a final FERC order—long after the D.C. Circuit had reviewed and upheld that very same order pursuant to its "exclusive" jurisdiction under 15 U.S.C. § 717r(b). See *Appalachian Voices* v. *FERC,* No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (per curiam).

Seeking to evade the statutory text and an unbroken line of precedent precluding district-court jurisdiction over collateral attacks on final FERC orders, Petitioners flatly mischaracterize their own Complaint. Petitioners suggest that they are not attacking a FERC order, but that position is not credible, given that their Complaint repeatedly and explicitly seeks to "void" Mountain Valley's final FERC certificate order. Pet. App. 50, 51, 53, 54. Petitioners also ignore the exhaustive procedural history of their dispute with Mountain Valley, which demonstrates that, in addition to bypassing the statutory pathway for seeking judicial review of the FERC order itself, Petitioners have had multiple other bites at the apple, none of which has been successful. Petitioners' newest lawsuit—aptly described by the District Court as the "latest trickle in a veritable flood of litigation relating to" the Mountain Valley certificate, Pet. App. 10—should likewise fail. The Petition should be denied.

STATEMENT

1. Section 7(c) of the Natural Gas Act provides that no natural gas company "shall engage in the transportation" of natural gas or "undertake the construction * * * of any facilities therefor" unless that company has first obtained a certificate of public convenience and necessity from FERC. 15 U.S.C. § 717f(c)(1)(A). Under Section 7(h) of the NGA, the holder of such a certificate may acquire lands and rights-of-way that are necessary to construct the pipeline by exercising "the right of eminent domain" in an appropriate state or federal court. *Id.* § 717f(h).

The NGA "sets forth a highly reticulated procedure" for challenging FERC's decision to grant a certificate. *Am. Energy Corp.* v. *Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010). Any person "aggrieved by an order issued" by FERC may file an application for administrative rehearing. 15 U.S.C. § 717r(a). No person may seek judicial review of a FERC order "unless such person shall have made application to [FERC] for a rehearing thereon." *Ibid.*

If FERC denies rehearing, any aggrieved party may then "obtain a review of [FERC's] order" by filing a petition for review in the D.C. Circuit or in the court of appeals "wherein the natural-gas company to which the order relates is located or has its principal place of business." 15 U.S.C. § 717r(b). "Upon the filing of such petition," the court of appeals where the petition was filed "shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part." *Ibid.* "No objection to the order of the Commission shall be considered by the court unless such objection shall have

been urged before the Commission in the application for rehearing," absent "reasonable ground for failure so to do." *Ibid.* "The judgment and decree of th[at] court, affirming, modifying, or setting aside * * * any such order of the Commission, shall be final, subject to review by [this Court] * * * upon certiorari." *Ibid.* As a practical matter, given the number of parties potentially affected by construction of a pipeline of any significant length, this statutory review scheme serves to centralize challenges to a FERC order and to avoid "piecemeal litigation." Cf. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 339 (1958).

2. On October 23, 2015, Mountain Valley filed an application for authorization to construct and operate the Mountain Valley Pipeline Project (the "Project"). *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, P 1 (2017) ("Certificate Order"). The Project is a 42-inch interstate pipeline that will carry natural gas approximately 300 miles from West Virginia to Virginia. See *id.* P 7.

"After two years of review, including reflection on hundreds of comments from interested parties," FERC issued a certificate to Mountain Valley in October 2017. Pet. App. 14; see Certificate Order P 64. Numerous individuals and entities sought rehearing at FERC. See *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, P 2 (2018) ("Rehearing Order"). In June 2018, FERC issued an order denying or dismissing all of the rehearing requests. See *id.* P 5. That order addressed, among many other things, arguments that eminent-domain authority had been "improperly subdelegated * * * to Mountain Valley." See *id.* PP 63, 73-75.

Several of the parties that had unsuccessfully sought rehearing then petitioned for review in the D.C. Circuit. In February 2019, the D.C. Circuit issued a unanimous decision dismissing or denying all of the petitions for review. *Appalachian Voices,* 2019 WL 847199, at *1. The D.C. Circuit's "decision (and the parties' decision not to seek certiorari) ended the statutorily prescribed review process." Pet. App. 4.

3. After FERC issued its Certificate Order, Mountain Valley filed a lawsuit in the U.S. District Court for the Western District of Virginia in which it sought to condemn portions of various properties for use as pipeline easements. Mountain Valley had been unable to obtain those easements through voluntary negotiation. Among these properties were tracts owned by Cletus Woodrow and Beverly Ann Bohon (the "Bohons"), Wendell Wray and Mary McNeil Flora (the "Floras"), and Robert Matthew and Aimee Chase Hamm (the "Hamms")—the Petitioners here.

In January 2018, the District Court granted Mountain Valley's motion for summary judgment on the right to condemn against those landowners and others. The District Court also granted Mountain Valley immediate possession of the easements. See *Mountain Valley Pipeline, LLC* v. *Easements*, No. 17-cv-492, 2018 WL 648376 (W.D. Va. Jan. 31, 2018). The Fourth Circuit affirmed, and this Court denied certiorari. *Mountain Valley Pipeline, LLC* v. *6.56 Acres*, 915 F.3d 197 (4th Cir. 2019), *cert. denied sub. nom. Givens* v. *Mountain Valley Pipeline, LLC*, 140 S. Ct. 300 (2019).

4. The U.S. District Court for the Western District of Virginia then opened separate dockets to determine the amount of just compensation owed.

With respect to the Hamms, the District Court entered summary judgment on the amount of just compensation, and that order was affirmed by the Fourth Circuit in 2020. *Mountain Valley Pipeline, LLC* v. *0.15 Acres (Hamm)*, No. 19-cv-181, 2020 WL 365506 (W.D. Va. Jan. 22, 2020), *aff'd*, 827 F. App'x 346 (4th Cir. 2020) (per curiam). The District Court's order vesting Mountain Valley with title to those easements has proceeded to final judgment. Aimee Hamm subsequently inherited an interest in another tract crossed by the pipeline, but she settled her dispute with Mountain Valley over compensation owed for that easement, and she and Robert Hamm agreed to release all their remaining claims against Mountain Valley, including by dismissing the claims in this lawsuit with prejudice.

With respect to the Bohons, the District Court granted summary judgment on just compensation and entered final orders vesting Mountain Valley with title in October 2022. See *Mountain Valley Pipeline, LLC* v. *0.19 Acres of Land (Bohon)*, No. 19-cv-146, Dkt. Nos. 65, 66, 67 (W.D. Va. Sept. 27 and Oct. 14, 2022) (post-judgment motion and notice of appeal filed); *Mountain Valley Pipeline, LLC* v. *Easements*, No. 17-cv-492, Dkt. Nos. 1598, 1599 (W.D. Va. Oct. 14, 2022).

With respect to the Floras, a trial to determine the just compensation is scheduled for 2023. See *Mountain Valley Pipeline, LLC* v. *5.88 Acres (Flora)*, No. 19-cv-225, Dkt. No. 82 (W.D. Va. Sept. 6, 2022).

5. In September 2017, before the FERC certificate had issued, the Floras and several other landowners along the Project route filed a lawsuit in the U.S. District Court for the District of Columbia in which they

sought to enjoin FERC from issuing certificates for the Mountain Valley Project and one other project (the Atlantic Coast Pipeline). The plaintiffs alleged violations of the non-delegation doctrine and numerous other constitutional and statutory infirmities. In September 2018, the District Court dismissed that lawsuit for lack of jurisdiction, reasoning that "Congress has elected by statute to confer sole jurisdiction on our Courts of Appeals for [claims] of this nature." *Bold Alliance* v. *FERC*, No. 17-cv-1822, 2018 WL 4681004, at *5 (D.D.C. Sept. 29, 2018), *appeal docketed*, No. 18-5322 (D.C. Cir. Oct. 31, 2018). The plaintiffs' appeal of that dismissal is currently being held in abeyance.

6. In January 2020, the Bohons, the Floras, and the Hamms filed the instant lawsuit against FERC and Mountain Valley, again in the U.S. District Court for the District of Columbia. Their Complaint again alleges that Congress's delegation of authority to FERC violated the non-delegation doctrine because the NGA does not adequately specify standards to govern issuance of pipeline certificates. See Pet. App. 49-50. Petitioners also allege that FERC's supposed "sub-delegation" of eminent-domain authority to private parties, or Congress's delegation of eminent-domain power to private parties, violates the non-delegation doctrine. Pet. App. 51-53. Petitioners requested, among other things, a judgment declaring that the certificate FERC issued for Mountain Valley Pipeline was "void." Pet. App. 50-51, 53, 54 (Compl. ¶¶ 47, 53, 64).

FERC and Mountain Valley moved to dismiss the Complaint for want of jurisdiction. Mountain Valley also argued that Petitioners' claims were barred by *res judicata* and issue preclusion because those claims

either were resolved or could have been resolved in the prior proceedings challenging the FERC certificate and the subsequent D.C. Circuit appeal. C.A. App. 96-102.

On May 6, 2020, the District Court granted the motions to dismiss. Pet. App. 10-32. Judge Boasberg held that the NGA "channels review of FERC decisions relating to pipelines—including constitutional claims inhering in those controversies—to the agency, not to a district court." Pet. App. 11. Judge Boasberg also noted that "[b]ifurcation and duplicative litigation are on display here in spades" because the Petitioners had brought "a suit nearly identical to one already dismissed by a sister court" (in *Bold Alliance*) and had sought "to enjoin a FERC certificate already approved by the Court of Appeals" (in *Appalachian Voices*). Pet. App. 23. Judge Boasberg noted that Defendants had "offer[ed] strong arguments that this litigation is precluded by either *res judicata* or issue preclusion," but found it unnecessary to reach those arguments in light of the jurisdictional holding. Pet. App. 24.

The D.C. Circuit affirmed. Pet. App. 1-9. Judge Walker's opinion, joined in full by Judges Pillard and Wilkins, concluded that the NGA "creates an exclusive review scheme for challenges to pipeline certificates, one that doesn't allow for the Bohons' district-court filing." Pet. App. 2. The panel emphasized that Petitioners "seek to 'set aside' existing pipeline certificates," and that their claims are therefore "very much anchored in pipeline proceedings." Pet. App. 7-8 (quoting 15 U.S.C. § 717r(b)). The panel also acknowledged and distinguished *PennEast Pipeline Co.* v. *New Jersey*, 141 S. Ct. 2244 (2021), as having involved a

claim—unlike those here—that "would not have required the district court to 'modify' or 'set aside' FERC's order." Pet. App. 8 (internal quotation marks omitted).

REASONS TO DENY THE PETITION

I. The D.C. Circuit Correctly Applied the Text of the NGA and this Court's Cases.

The NGA vests "exclusive" jurisdiction in specified courts of appeals to "affirm, modify, or set aside" any FERC order issued under that statute. 15 U.S.C. § 717r(b). Here, FERC issued the Certificate Order to Mountain Valley in 2017, FERC filed the administrative record with the D.C. Circuit in 2018, and the D.C. Circuit adjudicated all of the challenges to that order in 2019—all long before the Petitioners in this case filed their Complaint. Because in these circumstances the NGA vests the D.C. Circuit with "exclusive" jurisdiction with respect to all claims pertaining to the Mountain Valley certificate, the District Court correctly concluded that it lacked jurisdiction to entertain Petitioners' collateral attack on that certificate.

Petitioners' Complaint explicitly and repeatedly seeks to "void" the final Certificate Order that FERC issued to Mountain Valley. See Pet. App. 50, 51, 53, 54. Perhaps recognizing that this aspect of their Complaint is fatal to their invocation of district court jurisdiction, the Petition accuses the D.C. Circuit of having "falsely suggest[ed] that * * * Petitioners are seeking to 'set aside' FERC's certificate order." Pet. 9. Nonsense. Petitioners' Complaint repeatedly asks the district court to "void" the FERC order for Mountain Valley Pipeline, which is plainly an attempt to

"modify, or set aside" that order within the meaning of 15 U.S.C. § 717r(b). Compare *Set Aside*, Black's Law Dictionary 1648 (11th ed. 2019) ("set aside" means "to annul or vacate"), with *Void*, *id.* at 1885 ("void" also means "to annul" or "vacate").

Because their Complaint seeks to "modify" or "set aside" Mountain Valley's certificate, Petitioners were required to litigate their constitutional arguments concerning the purported illegality of the Certificate Order, if at all, through the process outlined in the NGA. They should have presented their arguments to FERC, sought administrative rehearing, and then filed a petition for review. Had they done so, their claims would have been adjudicated in *Appalachian Voices*, which was decided almost four years ago—and nearly a year before Petitioners here filed their Complaint.

Although Petitioners filed numerous comments opposing the Project, they chose not to formally intervene in the FERC proceeding, did not seek administrative rehearing, and did not file a petition for review with any court of appeals. Instead of following the statutory path, Petitioners waited until years after the fact and brought a collateral attack. Their Complaint was filed long after FERC had issued a final order, after other parties raised their claims at FERC on rehearing and then at the court of appeals, and after the court of appeals exercised its "exclusive" jurisdiction and denied the petitions for review in their entirety. See Rehearing Order PP 63, 73-75 (addressing non-delegation arguments); but cf. Pet. i, 4, 18 (suggesting incorrectly that FERC did not address non-delegation claims).

In these circumstances, the District Court plainly lacked jurisdiction over Petitioners' Complaint. FERC had issued a final order reviewable under 15 U.S.C. § 717r(b), other parties followed that appellate channel, FERC had filed the record in the D.C. Circuit, and that Court exercised its "exclusive" jurisdiction to "affirm, modify, or set aside" such order, in a decision that Congress specified "shall be final," subject only to certiorari review in this Court, 15 U.S.C. § 717r(b). As the D.C. Circuit panel explained, when "Congress creates an exclusive review scheme, it precludes any other court's jurisdiction over challenges that fit within that scheme"—including the Petitioners' challenge here to a final FERC order. Pet. App. 6; accord *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 378-379 (2012). Here, allowing district court jurisdiction over claims seeking to "void" Mountain Valley's FERC Certificate Order would also contradict the finality of the D.C. Circuit's decision upholding that order, which became "final" when the challengers in that case chose not to seek certiorari. 15 U.S.C. § 717r(b).

The panel faithfully applied *City of Tacoma,* in which this Court held that the materially identical judicial-review provision of the Federal Power Act ("FPA") created the "specific, complete and exclusive mode for judicial review" of final FERC orders. 357 U.S. at 336; see Pet. App. 6.[1] As this Court explained,

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[1] Petitioners suggest that *City of Tacoma* is "easily distinguished" from this case, but their proffered distinctions are immaterial and they misapprehend this Court's opinion. See Pet. 8-9 & n.2. The issue in *City of Tacoma* was whether a license for a hydroelectric project issued under the FPA gave the City of Tacoma the power to take a fish hatchery owned by the State of

in "prescrib[ing] the procedures and conditions under which * * * judicial review of [FERC] orders may be had," Congress necessarily foreclosed "other modes of judicial review" as to "all issues inhering in the controversy" regarding such orders. 357 U.S. at 336; see also *Adorers of the Blood of Christ U.S. Province* v. *Transcon. Gas Pipe Line Co*, No. 21-2898, 2022 WL

Washington. 357 U.S. at 333. Washington challenged the authority of the Federal Power Commission ("FPC") to issue the license, lost at the agency, filed a petition for review at the Ninth Circuit, and lost again. In subsequent state-court litigation concerning the project, Washington filed a cross-complaint "reasserting substantially the same objections that * * * the State had made before the [FPC]." *Id.* at 329. This Court held that the cross-complaint was an "impermissible collateral attack[]" on the Ninth Circuit's denial of the petition for review because Washington's arguments either were raised or "could and should have been" raised in the Ninth Circuit proceedings, given that "Congress had given" the Ninth Circuit "exclusive jurisdiction" over the FPC's order. *Id.* at 339-341 (internal quotation marks omitted).

Petitioners contend that *City of Tacoma* is irrelevant because they are not "tr[ying] to evade federal law by raising [a] challenge in state court." Pet. 8-9. But the prohibition on raising a collateral attack (i.e., an attack in a court other than the one specified by statute) applies equally to claims raised in federal district court and in state courts. Petitioners also suggest that *City of Tacoma* is off-point because it is, in their telling, a "preemption" or "preclusion" case. Pet. 8 & n.2. That misstates the rationale of *City of Tacoma*, which was that any challenge to an order issued under the FPA "must be made in the Court of Appeals" or else "not at all." 357 U.S. at 336. The same is true of a FERC order issued under the NGA, because the FPA and the NGA contain "substantially identical" judicial-review provisions and decisions interpreting those provisions are "cit[ed] interchangeably." *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981) (citation omitted).

16754137, at *5 (3d Cir. Nov. 8, 2022) ("*Adorers II*") ("The rule that any claim raising issues 'inhering in' the certification of a new interstate gas pipeline must first be presented to FERC—or else forfeited—also applies to claims that 'could and should have been' raised during the certification process." (quoting *City of Tacoma*, 357 U.S. at 339)); *Maine Council of Atl. Salmon Fed'n* v. *Nat'l Marine Fisheries Serv.*, 858 F.3d 690, 693 (1st Cir. 2017) (Souter, J.) (*City of Tacoma* "made it clear that the jurisdiction" of the court of appeals is "exclusive," meaning that parties "have nowhere else to go but to the courts of appeals, where they are afforded the opportunity to litigate just what they claimed in their attempt to proceed in the district court").

Carefully applying this Court's decisions, the D.C. Circuit panel declined to exempt certain claims from the NGA's statutory-review scheme based on their "facial" or "structural" nature. Pet. App. 7-8. The panel explained that, regardless of how Petitioners chose to characterize their claims, the point remained that their request "to 'set aside' existing pipeline certificates" fell "squarely within the Natural Gas Act's review scheme." *Ibid.* Because Petitioners' claims here "directly imperil[] a specific certificate that FERC granted Mountain Valley," the panel determined that this case was unlike *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477 (2010) ("*Free Enterprise*"), where the plaintiff's "structural" claim was "not rooted in any particular Board action." Pet. App. 8.

The panel's decision also carefully aligns with *PennEast*. The "crucial difference" between *PennEast*

and this case is that, in *PennEast*, "New Jersey's sovereign-immunity defense," even if successful, "would not have required the district court to 'modify' or 'set aside' FERC's order." Pet. App. 8 (internal quotation marks omitted). Here, by contrast, Petitioners are pressing a "collateral attack on the FERC order"—one that would require the district court to set aside FERC's prior determination. Pet. App. 9.

II. Nothing in the Decision Below Conflicts With *PennEast*

The Petition's lead argument is that the D.C. Circuit's decision somehow conflicts with this Court's ruling in *PennEast*. See Pet. 7-10. That is incorrect. *PennEast* involved a very different factual and procedural posture, and as the panel here ultimately concluded, Pet. App. 8, the jurisdictional analysis in *PennEast* ultimately supports the D.C. Circuit's decision here.

In *PennEast*, a FERC certificate holder brought district-court condemnation actions under 15 U.S.C. § 717f(h) to obtain the necessary right-of-way to build a FERC-approved pipeline. 141 S. Ct. at 2253. Some of those actions sought to condemn properties in which the State of New Jersey claimed an interest, but the State claimed immunity from suit. See *ibid.*

Before holding that the State was not immune, this Court held that the district court properly exercised jurisdiction. As noted above, the crux of this Court's jurisdictional holding in *PennEast* was that the State was not seeking to modify or set aside the FERC certificate. See *PennEast*, 141 S. Ct. at 2254 (noting that "New Jersey [did] not seek to modify FERC's order"

and that the federal court considering New Jersey's immunity defense did not need to "'modify' or 'set aside' FERC's order" to adjudicate that defense).

This Court's jurisdictional analysis turned on the precise nature of the claim advanced by the State in that case. New Jersey conceded that, under FERC's order, the pipeline had statutory eminent-domain power. See *PennEast*, 141 S. Ct. at 2257. The State asserted only that "sovereign immunity bars condemnation actions against nonconsenting states" that seek to effectuate that eminent-domain authority. *Ibid.*

Framed in that manner, this Court held that the State's claim was "not a collateral attack on the FERC order" itself. *PennEast*, 141 S. Ct. at 2254. *PennEast* then distinguished *City of Tacoma* on that basis. See *ibid.* And this Court reiterated the general rule that any attack on a FERC certificate must be brought under 15 U.S.C. § 717r(b). See *ibid* (noting that "15 U.S.C. § 717r(b) * * * gives the court of appeals reviewing FERC's certificate order * * * 'exclusive' jurisdiction to 'affirm, modify, or set aside such order'").

Here, by contrast, the landowners expressly and repeatedly asked the District Court to "void" the final Certificate Order that FERC issued to Mountain Valley. As the D.C. Circuit panel here correctly recognized, this "crucial" fact aligns this case with *City of Tacoma* and distinguishes it from *PennEast*. Pet. App. 8. Indeed, the Third Circuit recently cited with favor the panel decision here, in rejecting the argument that *PennEast* allowed opponents of another pipeline to collaterally attack that pipeline's final FERC order in district court, rather than through the

NGA's statutory review scheme. See *Adorers II*, 2022 WL 16754137, at *6-8.

Apart from its misguided attempt to show a conflict with *PennEast*, the bulk of the Petition is devoted to arguing that the NGA's statutory-review provision should be interpreted as only applying to issues that the "agency can fix" by applying its expertise. See Pet. 12. In other words, Petitioners assert that courts should imply a broad, atextual, and judge-made exception to the NGA's statutory review scheme for so-called "facial" or "structural" challenges—even where (as here) those challenges relate to and seek relief from a final FERC order. See Pet. § I.B.

But the Petition does not even attempt to show a conflict of authority among the lower courts on this issue—i.e., the criteria traditionally most important to certworthiness. Instead, Section I.B of the Petition spends many pages distinguishing this case from those involving claims that Petitioners believe are properly channeled to the agency, such as claims that a certificate holder is violating the terms of a statute, that a pipeline does not serve a public use, or that the pipeline's route is improper. See Pet. 11-20. There being no conflict of authority even under Petitioners' account of the case law, this discussion is irrelevant from the perspective of certworthiness.

Petitioners' proposed "facial challenge" exemption to the NGA's judicial-review provision is not only entirely divorced from the statutory text and caselaw interpreting the Natural Gas Act and Federal Power Act, but is also foreclosed by this Court's precedents. In *Elgin* v. *Department of Treasury* and other cases, this Court held that, where Congress has channeled

judicial review of certain agency actions to the courts of appeals, those challenging such actions may not bring "facial constitutional challenges to statutes" in district court. 567 U.S. 1, 15 (2012). Rather, such claims involving covered orders must be presented to the agency and appealed to a court of appeals.

Petitioners also rely heavily on *Free Enterprise*. See Pet. 18-19. But as the panel here rightly explained, the constitutional claim there "was not rooted in any particular [agency] action." Pet. App. 8. Central to this Court's reasoning in *Free Enterprise* was the fact that the plaintiff would have had to incur a sanction to obtain a final order. See *Free Enterprise*, 561 U.S. at 490 (noting that this Court has not required "plaintiffs to bet the farm" or "incur a sanction" before "testing the validity of the law" in question (internal quotation marks and emphasis omitted)).

This case is the inverse of *Free Enterprise*: Here, FERC had already issued a final order long before the Bohons sought relief in court. Indeed, the Bohons did not (and could not) suffer any injury prior to FERC issuing the Certificate Order. That is so because, as even Petitioners admit (Pet. 5), the statutory right of eminent domain only attaches once FERC issues a certificate. See 15 U.S.C. § 717f(h); see also *Certification of New Interstate Nat. Gas Facilities*, 174 FERC ¶ 61,125, P 10 (2021) ("Only after the Commission authorizes a project can the project sponsor assert the right of eminent domain for outstanding lands for which it could not negotiate an easement." (emphasis added)). Put differently, Petitioners' injury—unlike the injury at issue in *Free Enterprise*, arising from being subjected to an allegedly unconstitutional

administrative process—could not have occurred prior to issuance of the Certificate Order. See 15 U.S.C. § 717f(h). Critically, that Order had already been appealed—and indeed the appellate process had already ended—by the time the Petitioners filed their Complaint in this case.

III. The Panel Decision Does Not Conflict With *Jarkesy II* or *Cirko*.

The Petition briefly suggests that a purported "circuit split exists between the D.C. Circuit and the Third and Fifth Circuits." Pet. 23; see *id.* at 21-22. On Petitioners' telling, one side of the split consists of the D.C. Circuit's decisions in this case and *Jarkesy* v. *SEC*, 803 F.3d 9 (2015) ("*Jarkesy I*"). The other side of the supposed split consists of the Fifth Circuit's decision in *Jarkesy* v. *SEC*, 34 F.4th 446 (2022) ("*Jarkesy II*"), and the Third Circuit's decision in *Cirko* v. *Commissioner of Social Security*, 948 F.3d 148 (2020). But in truth there is no conflict between those cases. Petitioners' contrary argument rests on a mischaracterization of the decisions in question.

In *Jarkesy I*, the plaintiff had raised due-process, non-delegation, and equal-protection challenges to an SEC enforcement proceeding. The D.C. Circuit held that, even assuming the plaintiff had properly preserved a facial constitutional challenge to the governing statute (the Dodd-Frank Act), the district court would lack jurisdiction to hear that claim; instead, that claim had to be presented to the agency and then routed to the court of appeals. See 803 F.3d at 18-19.

That plaintiff proceeded to present his claims to the SEC, and appealed the SEC's final order to the Fifth Circuit under the Exchange Act's judicial-review provision, 15 U.S.C. § 78y(a). In *Jarkesy II*, the Fifth Circuit adjudicated Mr. Jarkesy's claims on the merits—and indeed sustained several of them, including a facial constitutional challenge to the Exchange Act.

In reviewing the SEC's final order in *Jarkesy II*, the Fifth Circuit had no occasion to—and did not—address whether those claims could have been raised first in district court, because the petitioner in *Jarkesy II* was by that point seeking review of the agency's final order directly in the court of appeals, pursuant to the Exchange Act's judicial-review scheme. *Jarkesy II* thus says nothing about the jurisdictional questions identified by Petitioners in this case.

The Fifth Circuit held in *Jarkesy II* that the Seventh Amendment required the agency to bring its enforcement action in district court rather than in an administrative proceeding. *Jarkesy II*, 34 F.4th at 450-463. But that holding has no relevance here. The FERC proceeding involving Mountain Valley is not an enforcement action of any kind. The Petitioners have not raised any Seventh Amendment claim, and the discussion of the Seventh Amendment in *Jarkesy II* does not address the Exchange Act's judicial-review provision or the circumstances in which a district court might retain jurisdiction to hear such claims in the first instance. Indeed, Mr. Jarkesy "expressly disclaimed" any Seventh Amendment argument during the *Jarkesy I* litigation. *Jarkesy I*, 803 F.3d at 18. For all of these reasons, the Petition is simply wrong to suggest that "the Fifth Circuit [in *Jarkesy II*] reached

the exact opposite conclusion on the issue of jurisdiction the D.C. Circuit had reached in [*Jarkesy I*]." Pet. 22.[2]

Similarly, there is no conflict between the panel decision here and the Third Circuit's decision in *Cirko*—a Social Security Act case which addresses the requirement of exhaustion of administrative remedies. *Cirko* says nothing about operation of any statutory review provision, never mind the Natural Gas Act.

The *Cirko* plaintiffs had their Social Security benefits denied and then appealed to district court. See *Cirko*, 948 F.3d at 152. Under the statutory scheme governing the Social Security system, disability appeals are routed first to district courts. See 42 U.S.C. § 405(g). While their claims were pending in district court, this Court decided in *Lucia* v. *SEC* that administrative law judges ("ALJs") used by the SEC were "officers" for purposes of the Appointments Clause. 138 S. Ct. 2044, 2053-2055 (2018). The *Cirko* plaintiffs argued that they should get a new hearing on their entitlement to Social Security benefits because the ALJ

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[2] The Petition characterizes *Jarkesy II* as having "held that the agency was not the proper forum for Jarkesy's challenges and that his claims belonged in district court." Pet. 22. Not so. The rationale of *Jarkesy II* was that the agency was an improper forum for the SEC's own administrative enforcement action because the Seventh Amendment entitled Mr. Jarkesy to a jury-eligible proceeding in federal court. *Jarkesy II* did not hold that district courts are a proper forum for a collateral attack on an agency order. As explained above, Petitioners err in conflating the Seventh Amendment issue in *Jarkesy II* with the subject-matter jurisdictional issue in this case.

that originally decided the case was unconstitutionally appointed. *Cirko*, 948 F.3d at 152.

In response, the agency argued that plaintiffs had not exhausted their administrative remedies because they failed to present an Appointments Clause challenge to the agency. See *Cirko*, 948 F.3d at 152. The District Court declined to require exhaustion, and the Third Circuit affirmed that ruling. See *id.* at 153, 159.

Cirko bears no resemblance to this case, because (a) it involved a completely different statutory review scheme that authorizes review in district court; (b) the plaintiffs there followed the statutory scheme by appealing the agency's final order to the district court; and (c) the sole issue on appeal was whether to require exhaustion of administrative remedies—not whether plaintiffs had brought suit in the wrong court. The Third Circuit did say that agencies have no competence to adjudicate constitutional claims, 948 F.3d at 158, but that discussion was in the context of explaining why the agency had a limited interest in remand proceedings, which in turn was a factor cutting against requiring exhaustion.

IV. Other Procedural and Substantive Problems Make this Case Unworthy of Further Review.

Although the courts below correctly dismissed the Petitioners' lawsuit for want of jurisdiction, it bears noting that Petitioners' underlying merits claims are glaringly weak. This Court's decision in *PennEast* recently reaffirmed that Congress can delegate eminent-domain authority to a private party, thus resolving in a manner adverse to Petitioners a substantive claim

they now concede is "identical" (Pet. 7) to their own. See *PennEast*, 141 S. Ct. at 2255-2257. And this Court has repeatedly rejected broader non-delegation challenges to statutes with standards similar to "public convenience and necessity," which is the criteria Congress has required FERC to use when evaluating requests for certificates.[3]

Moreover, Petitioners have already had multiple bites at the litigation apple. They have raised essentially identical claims in a variety of other forums, as explained above. See *supra* at 4-7. Indeed, this Court recently denied certiorari on the issues presented here, in a case involving other landowners along the Mountain Valley pipeline route who were represented by some of the same attorneys who represent the Petitioners here. See *Berkley* v. *FERC*, 139 S. Ct. 941 (2019).

Although the courts below did not need to address the question, there are several layers of preclusion barriers to reaching the merits of Petitioners' current theories. Petitioners' claims are barred by *res judicata*

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[3] See, *e.g.*, *FPC* v. *Hope Nat. Gas Co.*, 320 U.S. 591, 600-603 (1944) (upholding delegation to the Federal Power Commission (now FERC) to determine "just and reasonable" rates); *Nat'l Broad. Co.* v. *United States,* 319 U.S. 190, 216, 225-226 (1943) (upholding delegation to regulate broadcast licensing as a "public interest, convenience, or necessity"); *N.Y. Cent. Sec. Corp.* v. *United States,* 287 U.S. 12, 21, 24-25 (1932) (upholding delegation to the Interstate Commerce Commission to approve railroad consolidations "in the public interest"); *Am. Power & Light Co.* v. *SEC*, 329 U.S. 90, 104-105 (1946) (upholding delegation to SEC to modify structure of holding company system to not "unfairly or inequitably" distribute voting power among security holders); see also C.A. App. 104-110.

because those claims either were resolved or could have been resolved in the D.C. Circuit's *Appalachian Voices* decision. And their claims are barred by issue preclusion because the District Court previously determined in *Bold Alliance*—a case filed before this one, by some of the same plaintiffs—that it lacked jurisdiction over the types of claims the Petitioners are now pressing in this proceeding. Judge Boasberg noted that Mountain Valley had offered "strong arguments" on the preclusion issue, but declined to reach those issues due to the jurisdictional holding. Pet. App. 24; see *ibid.* (noting that the very fact that "strong arguments" on preclusion existed "sp[oke] to the duplicative nature of collateral constitutional attacks on FERC's pipeline process brought outside of the administrative-review scheme").

V. There Is No Need to Hold this Case for *Axon* or *Cochran*

Petitioners do not cite, ask this Court to hold their case for, or otherwise rely on *Axon Enterprises* v. *FTC* (No. 21-86) or *SEC* v. *Cochran* (No. 21-1239), in which this Court granted certiorari and heard argument on November 7, 2022. This Petition can and should be promptly denied because its disposition does not depend on how this Court resolves the questions presented in *Axon* or *Cochran*.

The central issue in *Axon* and *Cochran* is whether a party challenging an ongoing SEC or Federal Trade Commission enforcement proceeding (i.e., one that has not yet produced a final order) can assert a structural challenge to the agency's constitutionality in federal district court. In both *Axon* and *Cochran*, the plaintiffs' claimed injury is being subjected to an ongoing

administrative process before an allegedly unconstitutional agency decisionmaker. In each case there is not yet (and might never be) any final agency order that could be challenged via the applicable statutory review scheme. Thus, the plaintiffs' claims in those cases did not seek relief from a final agency order.

This case is distinguishable from *Axon* and *Cochran* in every material respect. The landowners here are not (and have never been) the subject of any FERC enforcement proceeding related to the Mountain Valley Pipeline, never mind an ongoing one. Unlike the target of an ongoing enforcement action, who claims aggrievement from the ongoing process, the Petitioners' claimed injury is that their real property was subject to eminent-domain proceedings initiated by Mountain Valley following issuance of the Certificate Order. That injury could have arisen only after FERC issued the Certificate Order, because the NGA only confers eminent-domain authority on the holder of a FERC certificate. 15 U.S.C. § 717f(h); see *supra* at 17. But these plaintiffs waited to file their Complaint until after FERC had issued the Certificate Order and its order denying administrative rehearing, and after other project opponents had filed, and the D.C. Circuit had resolved in *Appalachian Voices*, all challenges to that certificate. Their case therefore does not present any question that is even remotely comparable to *Axon* or *Cochran*, where the plaintiffs sought relief from an ongoing administrative process.

Indeed, Axon has explained that the jurisdictional issue in its case would have been much different if it had "sought district-court review of a final agency order for which [a path to] appellate review was

specified" by statute. Reply Br. for Pet'r at 5 (No. 21-86); accord *id.* at 7 (Axon's injuries are "independent from any final agency order"). Phrased differently, even the Petitioner in *Axon* agrees that district courts would not have jurisdiction if a plaintiff aggrieved by a final agency order sought review of that order in district court, instead of the court of appeals.[4] That is exactly what the Petitioners here have done. Thus, no matter what result obtains in *Axon*, the Petitioners' jurisdictional argument in this case would still be meritless.

As to *Cochran*, the Fifth Circuit could not have been clearer that its holding was "limited to the specific removal power claim at issue [there]." *Cochran* v. *SEC*, 20 F.4th 194, 201 n.7 (5th Cir. 2021) (en banc). The Fifth Circuit emphasized that, because *Cochran* was "not a 'mine-run' securities law case," the court did "not consider the question of whether the text of the Exchange Act evinces an intent to strip district courts of jurisdiction over claims that actually relate to a final SEC order." *Ibid.* Thus, in reviewing the Fifth Circuit's judgment, this Court should have no reason to reach that question, either. Indeed, Cochran herself characterizes the issues in her case as "fundamentally different" from cases like *City of Tacoma*, in which the judicial-review statute "expressly covered the agency actions at issue" (here, a final agency order). Reply Br. for Resp't at 8-9 & n.2 (No. 21-1239).

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[4] See *Axon* Oral Arg. Tr. 24:6-14 (Axon's counsel explaining that, "if [Axon] waited until the very end of th[e] process and challenged the [agency's final] order," then Axon would "have to bring it[s challenge] in the court of appeals" and "couldn't at that late stage challenge the * * * order itself in district court").

The key point is that Petitioners here—unlike the plaintiffs in *Axon* and *Cochran*—challenge a specific, final agency order that falls squarely within the statutory review scheme. They asked the District Court to declare Mountain Valley's certificate "void"—precisely the relief that the Natural Gas Act authorizes the Court of Appeals to afford in exercising its "exclusive" jurisdiction under 15 U.S.C. § 717r(b). And, far from needing a district court forum to have meaningful access to judicial review, the Petitioners here could have invoked a readily available statutory pathway for challenging FERC's final order, but instead opted not to do so. Other parties did invoke that pathway in raising a variety of claims, which the D.C. Circuit rejected in upholding the FERC order. See *supra* at 4-5.

Neither the Petitioners in this case nor their *amicus* even mentions *Axon* or *Cochran*, and Petitioners' own framing of the questions presented has eliminated any potential for overlap—and thus avoided any need to hold this case for those.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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