No. 22-256

In the Supreme Court of the United States

CLETUS WOODROW BOHON, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Natural Gas Act's review provision—which grants courts of appeals "exclusive" jurisdiction to "affirm, modify, or set aside" the Federal Energy Regulatory Commission's orders, 15 U.S.C. 717r(b)—precludes a district court from setting aside an order of the Commission based on a facial constitutional challenge to the statute authorizing the order.

RELATED PROCEEDINGS

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

Bohon v. *FERC*, No. 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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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 37 F.4th 663. The memorandum opinion of the district court (Pet. App. 10-32) is unreported but is available at 2020 WL 2198050.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2022. The petition for a writ of certiorari was filed on September 15, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Natural Gas Act (Act), 15 U.S.C. 717 *et seq.*, empowers the Federal Energy Regulatory Commission (FERC or Commission) to regulate wholesale sales and transportation of natural gas. See 15 U.S.C. 717(b).

The Act provides that a company may build, operate, or expand an interstate pipeline facility only if it obtains a "certificate of public convenience and necessity" from the Commission. 15 U.S.C. 717f(c)(1)(A). A pipeline company that receives such a certificate may exercise the right of eminent domain in federal district court to acquire the right of way for the pipeline and related facilities. See 15 U.S.C. 717f(h).

Any party aggrieved by an order of the Commission may seek rehearing within 30 days after the issuance of the order. See 15 U.S.C. 717r(a). If the agency denies rehearing, the party may file a petition for review in a court of appeals. See 15 U.S.C. 717r(b). Once the agency files the record, the court of appeals' "jurisdiction * * * to affirm, modify, or set aside" the agency's order "shall be exclusive." *Ibid.* The court's decision "shall be final, subject to review by the Supreme Court." *Ibid.*

2. In October 2017, the Commission issued a certificate of public convenience and necessity to respondent Mountain Valley, LLC to build a pipeline running from West Virginia to Virginia. See Pet. App. 3-4, 14. In June 2018, the Commission denied rehearing. See *id.* at 14. Multiple parties filed petitions for review in the D.C. Circuit, but the court denied those petitions in February 2019. See *Appalachian Voices* v. *FERC*, No. 17-1271, 2019 WL 847199 (Feb. 19, 2019) (per curiam).

Petitioners are landowners who own property in the path of the Mountain Valley pipeline and who do not wish to sell it to the company. See Pet. App. 4. They neither filed an application for rehearing before the Commission nor participated in the review proceedings in the D.C. Circuit. See *ibid.* Instead, a year after those

proceedings concluded, they filed this suit in the U.S. District Court for the District of Columbia. See *id.* at 35. They alleged that the Act violates the Constitution on its face, both by delegating legislative power to the Commission and by delegating (or allowing the Commission to delegate) the eminent-domain power to private entities. See *id.* at 49-53. They asked the court to declare that all certificates ever issued by the Commission (including the Mountain Valley certificate) are "void," to enjoin all certificate-holders (including Mountain Valley) from exercising the eminent-domain power under those certificates, and to grant various other remedies. *Id.* at 54.

The district court dismissed the complaint. Pet. App. 10-32. The court explained that the Act channels review of the Commission's orders to the courts of appeals, thus precluding jurisdiction in the district courts. See *id.* at 20-21, 24-25. The court concluded that petitioners' claims fell within the scope of that channeling of review. See *id.* at 21-31.

The court of appeals affirmed. Pet. App. 1-9. The court explained that the Act, by its plain terms, granted the courts of appeals "exclusive" jurisdiction to review the certificate of public convenience and necessity that authorized Mountain Valley to acquire the necessary property by eminent domain. *Id.* at 6. The court then rejected petitioners' argument that facial constitutional challenges fell outside the scope of that exclusive review scheme. *Id.* at 7-8.

ARGUMENT

Petitioners contend (Pet. 7-23) that, because they challenge the Commission's certificate on the ground that the Act under which the certificate was issued is

facially unconstitutional, the district court had jurisdiction to review that challenge. The court of appeals correctly rejected that contention, and its decision does not conflict with the decision of any other court of appeals. No further review is warranted.

1. The Constitution grants Congress the power to define the jurisdiction of the lower federal courts. See *Bowles* v. *Russell*, 551 U.S. 205, 212 (2007). Exercising that authority, Congress has granted the courts of appeals "exclusive" jurisdiction "to affirm, modify, or set aside" the Commission's orders. 15 U.S.C. 717r(b). Congress has also made the courts of appeals' decisions "final," subject to review only in this Court. *Ibid.*

Those provisions resolve this case. Petitioners seek to invalidate an order issued by the Commission—namely, the Mountain Valley pipeline certificate. See Pet. App. 54 (seeking a declaration that certificates issued by the Commission are void and an injunction forbidding companies from exercising the right of eminent domain under those certificates). Under the plain text of the Act, however, the D.C. Circuit had "exclusive" jurisdiction to "affirm, modify, or set aside" the Mountain Valley certificate, 15 U.S.C. 717r(b)—precluding jurisdiction in the district court. Further, before petitioners filed this suit, the D.C. Circuit had already issued a judgment upholding the Mountain Valley certificate. See *Appalachian Voices* v. *FERC*, No. 17-1271, 2019 WL 847199 (Feb. 19, 2019) (per curiam). Because that decision is "final," 15 U.S.C. 717r(b), a district court may not revisit the lawfulness of the certificate.

It makes no difference that petitioners have brought (Pet. 5) a "facial" rather than an as-applied challenge to the Act. First, the Act categorically provides that the

courts of appeals have "exclusive" jurisdiction to "affirm, modify, or set aside" the Commission's orders. 15 U.S.C. 717r(b). The text contains no exception for challenges to a Commission certificate based on an argument that the provision of the Act under which it was issued is facially unconstitutional. Second, this Court has rejected efforts to "carve out an exception to * * * exclusivity for facial * * * constitutional challenges" when the statutory text "provide[s] no support for such an exception." *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 12 (2012). Third, an atextual carveout for facial challenges would be difficult to administer. "The line between facial and as-applied challenges can sometimes prove 'amorphous' * * * and 'not so well defined.'" *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1128 (2019) (citations omitted). The allocation of jurisdiction between the courts of appeals and the district courts should not depend on a "line [that] is hazy at best and incoherent at worst." *Elgin*, 567 U.S. at 15.

2. Petitioners' arguments lack merit. Contrary to petitioners' suggestion (Pet. 7-11), the court of appeals' decision does not conflict with *PennEast Pipeline Co.* v. *New Jersey*, 141 S. Ct. 2244 (2021). There, the Court held that the Act's exclusive-review provisions did not preclude a State from raising a sovereign-immunity defense in a condemnation proceeding brought by a pipeline company. See *id.* at 2254. The Court explained that recognizing a State's sovereign immunity in the eminent-domain proceeding would "not 'modify' or 'set aside' FERC's order." *Ibid.* In this case, by contrast, petitioners *do* seek to modify and set aside the Commission's orders: Their complaint asks the district court to declare the orders "void" and to enjoin pipeline

companies from exercising eminent domain under them. Pet. App. 54.

Petitioners argue (Pet. 11-20) that facial constitutional challenges to federal statutes fall outside administrative agencies' expertise and competence. But the issue in this case is not whether petitioners should have brought their claims before an agency rather than a court; it is whether they should have brought their claims in a court of appeals rather than a district court. And constitutional claims (whether facial or as-applied) undoubtedly fall within the expertise and competence of the courts of appeals. Indeed, the D.C. Circuit reviewed and rejected constitutional claims during its previous proceedings on petitions for review of the Commission's order granting the Mountain Valley certificate. See *Appalachian Voices*, 2019 WL 847199, at *1 (rejecting challenges under the Due Process Clause and Just Compensation Clause).

3. Petitioners err in suggesting (Pet. 21-23) that the decision below conflicts with *Jarkesy* v. *SEC*, 34 F.4th 446 (5th Cir. 2022), and *Cirko* v. *Commissioner of Social Security*, 948 F.3d 148 (3d Cir. 2020). In *Jarkesy*, the Fifth Circuit reviewed and set aside an order issued by the Securities and Exchange Commission on the ground that the authorizing legislation violated (among other things) the nondelegation doctrine. See 34 F.4th at 459-463. The Fifth Circuit did so, however, on a petition for review brought in the court of appeals. See *id.* at 450. The Fifth Circuit did not suggest that the challenger could have brought his nondelegation challenge in a district court.

In *Cirko*, the Third Circuit determined that parties were not required to exhaust Appointments Clause

challenges through the Social Security Administration before they could raise those challenges in court. See 948 F.3d at 152; see *Carr* v. *Saul*, 141 S. Ct. 1352 (2021). But this case concerns jurisdiction, not exhaustion. The court of appeals upheld the dismissal of petitioners' claims on the ground that Congress had precluded the district court from exercising jurisdiction over those claims—not on the ground that petitioners had failed to exhaust their claims in front of the Commission. See Pet. App. 9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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