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

RESPONDENT MOUNTAIN VALLEY PIPELINE, LLC'S OPPOSITION TO PETITIONERS' MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

JEREMY C. MARWELL
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6507
jmarwell@velaw.com

The Court should deny Petitioners' belated "emergency" motion to hold their Petition pending disposition of *Axon Enterprises* v. *FTC* (No. 21-86) and *SEC* v. *Cochran* (No. 21-1239).

The certiorari Petition in this case does not discuss or even cite *Axon* or *Cochran*, despite certiorari having been granted in those cases months before Petitioners here filed this Petition. Rather, the Petition's lead argument is that the D.C. Circuit's decision in their case purportedly conflicts with *PennEast Pipeline Co.* v. *New Jersey*, 141 S. Ct. 2244 (2021). The Petition also briefly asserts a split between the D.C. Circuit's decision here, on the one hand, and *Jarkesy* v. *SEC*, 34 F.4th 446 (5th Cir. 2022), and *Cirko* v. *Commissioner of Social Security*, 948 F.3d 148 (3d Cir. 2020), on the other. In its brief in opposition, Respondent Mountain Valley Pipeline, LLC ("Mountain Valley") explained that there is no conflict between the decision below and any of those three cases. Mountain Valley further observed that the "Petitioners' own framing of the[ir] questions presented has eliminated any potential for overlap" with *Axon* and *Cochran*. Br. in Opp. 26.

Petitioners have now filed a reply brief and emergency motion focused almost entirely on *Axon* and *Cochran*. Remarkably, those filings appear to abandon the arguments Petitioners advanced in their Petition; indeed, neither document even cites to *PennEast* or either of the court of appeals decisions that were alleged to be part of the Petition's posited "circuit split."

Petitioners also barely engage with Mountain Valley's arguments, grounded in the text of the Natural Gas Act, explaining why this case is fundamentally different

from *Axon* and *Cochran*, obviating any need for a hold. As Mountain Valley has explained, the outcome of this case does not depend on how *Axon* and *Cochran* are resolved. See Br. in Opp. 23-26. The Petitioners in *Axon* and *Cochran* claim injury from being subjected to an ongoing administrative process that has not yet matured into a final order. Petitioners, by contrast, filed a district-court collateral attack on agency orders that had become final years earlier, and that had already been upheld by the D.C. Circuit. Under the Natural Gas Act, the D.C. Circuit's jurisdiction over the final agency orders was "exclusive," and its decision upholding those orders "shall be final." 15 U.S.C. § 717r(b); see Br. in Opp. 9-14. Moreover, the Petitioners in *Axon* and *Cochran* claim injury arising from the very pendency of an ongoing agency enforcement process; here, by contrast, there is no similar ongoing agency proceeding, and the Petitioners' injury could only conceivably have arisen after the Federal Energy Regulatory Commission issued its final Certificate Order, because the Natural Gas Act only confers eminent-domain authority on the holder of a FERC certificate. See Br. in Opp. 17, 24. Axon itself has confirmed that, if it had sought review of a final agency order, it would be required to follow the path to appellate review specified by the statute in that case. See *id.* at 24-25 & n.4. That rationale exactly distinguishes *Axon* and *Cochran* from this case, and highlights that Petitioners here have refused to follow the available and express statutory pathway. Thus, no matter the result in *Axon* or *Cochran*, the D.C. Circuit's decision here should stand, and the Petition should be denied.

Petitioners' eleventh-hour motion does not seriously attempt to respond to these arguments about why there is no basis to hold this case. Instead, Petitioners reproduce out-of-context excerpts from the transcripts of oral argument in *Axon* and *Cochran* and suggest that certain questions or comments favor their arguments. Mot. ¶¶ 3-5. But that attempt to align themselves with *Axon* and *Cochran* collapses under scrutiny. Notably, Petitioners suggest that the relief they are seeking is "the same as the relief sought in *Cochran* and *Axon*" because they are "not seeking to 'set aside' or 'modify'" any final "agency decision." Reply Br. 7 (emphasis omitted); accord Mot. ¶ 7. But that argument is contradicted by the record, as the D.C. Circuit here recognized. Petitioners' Complaint—unlike those in *Axon* and *Cochran*—repeatedly and expressly sought to "void" a final agency order. See Br. in Opp. 9-10; see also Pet. App. 50, 51, 53, 54 (Complaint). This Court should not entertain a belated effort by Petitioners to reimagine their case in a motion and reply brief, and to align themselves with *Axon* and *Cochran*, particularly when that effort rests on an obvious mischaracterization of Petitioners' own pleadings.

The Motion should be denied.

Respectfully submitted,

JEREMY C. MARWELL
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW
Suite 500 West
Washington, D.C. 20037
(202) 639-6507
jmarwell@velaw.com

December 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Mountain Valley Pipeline, LLC certifies that the Corporate Disclosure Statement contained in its November 18, 2022 Brief in Opposition remains accurate.