

IN THE SUPREME COURT OF THE UNITED STATES

No. 22-256

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

RESPONSE OF THE FEDERAL ENERGY REGULATORY COMMISSION
TO PETITIONERS' MOTION TO LIFT THE HOLD, REVERSE AND REMAND

The Solicitor General, on behalf of respondent Federal Energy Regulatory Commission (FERC or Commission), respectfully submits this response to petitioners' "Motion to Lift the Hold, Reverse and Remand in Light of SEC v. Cochran and Axon Enterprises v. FTC" (filed Apr. 17, 2023). Contrary to the contentions in the motion, this Court should deny the petition for a writ of certiorari.

Acting under the Natural Gas Act, FERC 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. Multiple parties filed petitions for review

in the D.C. Circuit, but the court denied those petitions. See Appalachian Voices v. FERC, No. 17-1271, 2019 WL 847199 (Feb. 19, 2019) (per curiam). A year after those proceedings ended, petitioners -- landowners who own property in the path of the Mountain Valley pipeline -- filed this suit in federal district court, alleging that the eminent-domain provisions of the Natural Gas Act violate the nondelegation doctrine and asking the court to void all certificates ever issued by the Commission (including the Mountain Valley certificate). See Pet. App. 49-53. The district court dismissed the complaint, id. at 10-32, and the court of appeals affirmed, id. at 1-9. The court explained that the Natural Gas Act expressly granted courts of appeals "exclusive" jurisdiction to review challenges to certificates of public convenience and necessity. Id. at 8.

Petitioners now ask this Court (Mot. ¶ 16) to grant the petition for a writ of certiorari, "reverse" the court of appeals' judgment, and remand the case for further proceedings in light of Axon Enterprise, Inc. v. FTC, No. 21-86, slip op. (April 14, 2023). Although petitioners' motion uses (Mot. ¶ 16) the term "revers[al]," petitioners presumably mean to ask this Court to grant, vacate, and remand (GVR). But a GVR order based on intervening developments is appropriate only if the developments "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." Lawrence v. Chater, 516

U.S. 163, 167 (1996) (per curiam). No such probability exists here. Contrary to petitioners' motion, this Court's intervening decision in Axon has no bearing on the court of appeals' analysis.

In Axon, this Court considered whether Congress had "implicitly" divested district courts of subject-matter jurisdiction over certain challenges to certain agency proceedings by authorizing "review in a court of appeals following the agency's own review process." Slip op. 7. The Court answered that question by applying "three considerations" set forth in Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994): whether precluding district-court jurisdiction would "'foreclose all meaningful judicial review,'" whether the claim at issue is "'wholly collateral to the statute's review provisions,'" and whether the claim is "'outside the agency's expertise.'" Slip Op. 8 (brackets and citation omitted). Applying those factors, the Court held that Congress had not deprived district courts of jurisdiction over the separation-of-powers claims involved in that case. Id. at 18.

In this case, in contrast, the court of appeals did not hold that the Natural Gas Act "implicitly" divested district courts of jurisdiction. Slip op. 7. Nor did the court rely on the "Thunder Basin factors." Id. at 8. The court instead held that the Natural Gas Act explicitly "deprive[d] district courts of jurisdiction to invalidate pipeline certificates." Pet. App. 5. The court observed that the Natural Gas Act expressly provides that, "[u]pon the filing of [a] petition [for review] [the] court [of appeals]

shall have jurisdiction, which upon filing of the record with it shall be exclusive, to affirm, modify, or set aside [the certificate] in whole or in part.” Ibid. (quoting 15 U.S.C. 717r(b)) (emphasis omitted). “That provision makes clear,” the court of appeals explained, “that once the original parties who challenged the Mountain Valley certificate proceeding filed the record in [the court of appeals], [the court’s] jurisdiction became ‘exclusive.’” Ibid. Axon has no bearing on that textual analysis. And nothing in the statutory text suggests that Congress created an exception for “structural separation-of-powers challenges” to certificates issued by the Commission. Mot. ¶ 9.

To be sure, the district court in this case not only held that the Natural Gas Act expressly divested it of jurisdiction, see Pet. App. 20-24, but also applied the Thunder Basin factors to conclude that Congress had implicitly divested it of the power to hear the case, see id. at 24-31. But the court of appeals did not rely on the later rationale; rather, as explained above, it relied solely on express divestment of jurisdiction. Nothing in Axon justifies vacating that decision.

Even if the Thunder Basin factors were relevant to the disposition of this case, the case is readily distinguishable from Axon. The plaintiffs in Axon did not challenge final decisions of the relevant agencies; rather, they challenged the constitutional authority of the agencies to conduct proceedings. In contrast, in this case, petitioner challenged the certificate issued by the

Commission in its final decision after that decision had been affirmed by the court of appeals. Petitioner's challenge thus is not wholly collateral (see Axon slip op. 14-15) to agency decision-making. This Court should accordingly deny the petition for a writ of certiorari.

Respectfully submitted.

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APRIL 2023