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

SUPPLEMENTAL BRIEF FOR MOUNTAIN VALLEY PIPELINE, LLC

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This Court's April 14, 2023, decision in *Axon Enterprise, Inc.* v. *Federal Trade Commission*, 21-86, and *Securities and Exchange Commission* v. *Cochran*, 21-1239, has no bearing on this petition, because it addresses the legal framework for *implied* preclusion of district court jurisdiction, and this case involves *express* statutory preclusion. For that reason, among others, there is no reasonable probability that the D.C. Circuit would read *Axon* as "reject[ing] a legal premise on which it relied" or that *Axon* could "affect the outcome of [this] litigation." *Tyler* v. *Cain*, 533 U.S. 656, 666 n.6 (2001). The petition should be denied.

In *Axon*, this Court held that the judicial-review schemes in the Federal Trade Commission Act, 15 U.S.C. § 45(c), and Securities Exchange Act, *id.* § 78y(a), did not *implicitly* displace a district court's federal-question jurisdiction to entertain certain claims brought at the outset of a federal agency proceeding, challenging the structure or existence of those agencies. *Axon*, slip op. 7, 17-18. In so holding, this Court recognized that Congress may "explicitly" substitute an appellate-review scheme for district-court jurisdiction under 28 U.S.C. § 1331. *Id.* at 7. But because Congress had not done so in the circumstances of and with regard to the specific claims at issue in that case, the question in *Axon* was whether Congress had displaced district-court jurisdiction "implicitly." *Ibid.* To answer that question, this Court applied the framework from *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994). See *Axon*, slip op. 7-18.

By contrast, this case can be resolved on the ground of explicit statutory preclusion, without recourse to the *Thunder Basin* inquiry. The Natural Gas Act provides that a party may, after administrative rehearing, seek judicial review of an order issued by the Federal Energy Regulatory Commission in an appropriate court of appeals. 15 U.S.C. §§ 717r(a)-(b). The Act further states that the "jurisdiction" of the court of appeals "*shall be exclusive*" "upon the filing of the [administrative] record with [that court]." *Id.* § 717r(b) (emphasis added). And the statute provides that the "judgment and decree of the court [of appeals], affirming, modifying, or setting aside * * * any such order of the Commission, shall be final," subject only to certiorari review in this Court. *Ibid.*

It is undisputed that Petitioners here filed their lawsuit in district court years after the agency proceeding concluded with FERC issuing the final certificate order challenged here, and long after the administrative record had been filed in the D.C. Circuit, vesting that court with "exclusive" jurisdiction. 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). Indeed, the claims here were filed even after the D.C. Circuit had issued its decision upholding FERC's order, and after that court's decision had become "final" when no party sought certiorari. This case thus falls squarely within the class of cases and claims for which the Natural Gas Act's appellate review scheme is "exclusive."

The D.C. Circuit decided this case on that understanding. The court framed its analysis around the text of 15 U.S.C. § 717r(b). Pet. App. 5-6. The D.C.

Circuit held that the statute "makes clear" that once the record had been filed in that court during the challenge to FERC's certificate order, "our jurisdiction became 'exclusive.'" *Id.* at 6 (quoting 15 U.S.C. § 717r(b)). For that reason, the panel did not have occasion to analyze the three *Thunder Basin* factors governing implied preclusion. Instead, the court proceeded directly from its analysis of the statutory text to addressing and rejecting the arguments Petitioners had advanced below, about why the statutory review scheme should not apply. See, *e.g.*, *id.* at 7-8 (rejecting arguments based on "facial" nature of Petitioners' claims and *PennEast Pipeline Co., LLC* v. *New Jersey*, 141 S. Ct. 2244 (2021)).

Other aspects of the Natural Gas Act's statutory review scheme confirm why § 717r(b) should be read as expressly precluding district-court jurisdiction in these circumstances, and illustrate how far removed Petitioners' claims are from those in *Axon*. In *Axon*, this Court emphasized that the district-court Plaintiff in that case claimed a "here-and-now" constitutional injury from "being subjected to * * * an [allegedly] illegitimate [agency] proceeding." Slip op. 3, 13 (internal quotation marks omitted). Here, by contrast, Petitioners claim injury from their real property being subject to federal eminent-domain proceedings initiated by Mountain Valley Pipeline. That injury did not accrue, and could never have accrued, until *after* FERC issued a final certificate order to Mountain Valley Pipeline, because the Natural Gas Act only confers eminent-domain authority on the "holder of a [FERC] certificate." 15 U.S.C. § 717f(h).

* * * * *

FERC issued its order authorizing construction and operation of the Mountain Valley Project in 2017, the agency filed the record with the D.C. Circuit in mid-2018, and the D.C. Circuit upheld that certificate in all respects in early 2019. Petitioners filed their district-court lawsuit long after the D.C. Circuit's decision had become final, seeking to "void" the very agency action that the D.C. Circuit had already upheld. See Pet. App. 50-51, 53-54 (Compl. ¶¶ 47, 53, 64). Their invocation of district-court jurisdiction is barred by the express language of the Natural Gas Act. The time has long since come for this ill-considered collateral litigation to come to an end. There is no basis to remand the case for further proceedings in light of *Axon* and *Cochran*, particularly given that the petition did not seek that relief or even once mention those cases as potentially relevant to the questions presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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