No. 23A35

IN THE

Supreme Court of the United States

MOUNTAIN VALLEY PIPELINE, LLC,
Applicant,

v.

THE WILDERNESS SOCIETY, et al.,
Respondents.

MOUNTAIN VALLEY PIPELINE, LLC,
Applicant,

v.

APPALACHIAN VOICES, et al.,
Respondents.

On Emergency Application to Vacate the Stays of the U.S. Court of Appeals for the Fourth Circuit (Nos. 23-1592, 23-1594, & 23-1384)

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO CHIEF JUSTICE JOHN G. ROBERTS, JR. TO VACATE THE STAYS OF AGENCY AUTHORIZATIONS PENDING ADJUDICATION OF THE PETITIONS FOR REVIEW

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INTRODUCTION

For years, statutory legal challenges have created significant delays in the construction of the Mountain Valley Pipeline. Last month, Congress made a judgment that finishing the Pipeline was "required in the national interest." Act § 324(b). To ensure the Pipeline's "timely completion," *ibid.*, Congress amended existing law to "ratify" all "necessary" permits and authorizations for construction, preclude further litigation over those permits and authorizations, and channel any remaining legal challenges to the constitutionality or applicability of the statute to the D.C. Circuit. Congress did so to maximize the likelihood that the Pipeline, which is mostly finished, will be completed and serving customers before this winter, reducing the risk of another season of the shortages and price spikes that have plagued the region that the Pipeline will serve. Nonetheless, in orders that defy Congress's "timely completion" objective, *ibid.*, the Fourth Circuit stayed all remaining construction, based on the unstated but necessary conclusion that Section 324 is likely unconstitutional. In one case, it reached that conclusion without even waiting for MVP or the United States to file their responses to the stay requests.

The Wilderness Society and Appalachian Voices (petitioners) do not come close to justifying the Fourth Circuit's extraordinary actions. Petitioners do not—and could not—contend that Congress lacked the constitutional authority to give the D.C. Circuit exclusive jurisdiction to resolve all challenges to the constitutionality of Section 324. Petitioners instead argue that this part of the statute merely seeks to create an additional supplementary venue for constitutional challenges to Section 324. But accepting that argument would render the jurisdictional grant meaningless—and would undermine Congress's objective of prompt completion of the Pipeline.

In all events, Section 324 is constitutional. Section 324 changed the substantive law applicable to all pending and future cases challenging the authorizations and permits covered by the statute, and that substantive change eliminates any Article III separation-of-powers problem.

The only relevant limit that Article III imposes is that Congress cannot exercise the judicial power itself by dictating the result in a particular case without changing the law. But Congress ratified all permits and authorizations necessary to complete the Pipeline, without regard to the federal statutory requirements that had been applicable to those permits and authorizations. Before Section 324, the permits and authorizations at issue before the Fourth Circuit would be valid and enforceable only if they met the requirements of the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and the like. Now they are lawful irrespective of whether they meet those requirements. That ratification is a substantive change in law. See *United States* v. *Heinszen*, 206 U.S. 370 (1907). And Section 324(f)'s declaration that the statute's ratification of the permits and authorizations supersedes all previously applicable legal requirements confirms that the statute was an appropriate exercise of Congress's Article I legislative power to change the applicable law, not an inappropriate effort to invade the Article III judicial power by directing the result in a pending case without any change in existing law. Petitioners have no answer to this dispositive objection to their position.

For similar reasons, Section 324's jurisdiction-stripping provision, Section 324(e)(1), raises no substantial separation-of-powers concern. Once again, the only conceivable limit on the authority of Congress to determine the jurisdiction of the lower federal courts is that Congress cannot manipulate jurisdiction to dictate the result in a particular pending case without changing the substantive law applicable to that case. Because Congress did change the substantive law in Section 324, the jurisdiction-stripping provisions of the statute cannot be characterized as an attempt to invade the Article III judicial power by dictating the result of a pending case without changing the law applicable to that case. Moreover, Section 324 applies to all pending and future cases seeking to challenge the permits and authorizations covered by the provision, not just to one

particular case or even a closed set of pending cases. Nor does Section 324 direct any court to dismiss a pending matter. It is up to the judiciary to determine whether the statutory ratification and jurisdiction-stripping provisions apply to the permits and authorizations challenged in any case. Thus, Petitioners are wrong that Section 324 impermissibly invades the judicial power.

The Fourth Circuit's stay orders also inflict significant and irreparable harms to Mountain Valley Pipeline, LLC (MVP), the government, and the public. This is not a hard case for determining how to apply the policy-focused stay factors: Congress (the coordinate branch charged with making such determinations) has unambiguously determined what the public interest requires—and it is expeditious completion of the Pipeline, not months or years more of delay and litigation. The Fourth Circuit's stay orders should be vacated, and this Court should exercise its mandamus authority to direct the Fourth Circuit to stand down.

ARGUMENT

I. VACATUR OF THE STAYS IS WARRANTED UNDER ANY STANDARD.

Relying on old in-chambers opinions, Petitioners contend that MVP must demonstrate that the Court is likely to grant review of a final decision in this case and that the Fourth Circuit was "demonstrably wrong." Wilderness Society (WS) Resp. 11-12; Appalachian Voices (AV) Resp. 5-6. That contention ignores this Court's more recent, consistent application of the traditional four-factor test for issuing a preliminary injunction when considering applications to grant or vacate stays pending further proceedings in the court of appeals. See *Alabama Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2487 (2021); *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 66 (2020); see also *Nat'l Fed'n of Indep. Bus.* v. *Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 664 (2022). That approach makes sense; in the context of reviewing a stay *pending appeal*, the question is whether the party will likely prevail in the court of appeals—not whether it will ultimately obtain this Court's review and

prevail here. See *Nken* v. *Holder*, 556 U.S. 418 (2009). In any event, MVP satisfies petitioners' preferred standard. As the United States explains, this Court routinely grants review when the lower courts have invalidated or defied an act of Congress on constitutional grounds. U.S. Resp. 12-14. Were the Fourth Circuit to side with petitioners, this Court would very likely grant certiorari. And, given that petitioners could not meet any of the four stay factors—and that the Fourth Circuit lacked jurisdiction to enter the stays—the Fourth Circuit's orders were "demonstrably wrong." See App. 12-27; U.S. Resp. 14-32.

II. MOUNTAIN VALLEY PIPELINE IS LIKELY TO PREVAIL ON THE MERITS

A. The Fourth Circuit Lacked Jurisdiction to Enter the Stays.

Nobody disputes that petitioners are challenging actions granting "approval[s] necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline"—*i.e.*, that petitioners' suits fall within Section 324(e)(1).[1] Nor does anyone dispute that Section 324(e)(1) on its face deprives the Fourth Circuit of jurisdiction to enter stay orders (or to take any other action) in petitioners' suits. See App. 13-14; see also App. 14 (Section 324(c)'s ratification renders suits moot). As petitioners concede, therefore, the Fourth Circuit had jurisdiction to enter the stay orders only if Section 324 is unconstitutional—and in entering the stays, the Fourth Circuit necessarily concluded that Petitioners would likely succeed in establishing that the provision is unconstitutional. The court had no authority to make that determination, however, because Section 324(e)(2) provides that the D.C. Circuit, not the Fourth, "shall have original *and exclusive* jurisdiction over *any* claim alleging the invalidity of this section." Act § 324(e)(2) (emphasis added); see App. 14-17; U.S. Resp. 15-17.

[1] The Fourth Circuit's duty to decide whether Section 324(e)(1) applies disproves Appalachian Voices' unsupported (but repeated) assertion that MVP and the United States offer a "construction [that] would entirely forbid the Fourth Circuit from * * * even considering its own jurisdiction." AV Resp. 11; see also *id.* at 8, 9.

Petitioners attempt to resist that conclusion by arguing that "claim" in Section 324(e)(2) is a term of art that means "cause of action," but their arguments find no support in the statute's text and "would also make a hash" of the rest of the Act, *Becerra* v. *Empire Health Found., for Valley Hosp. Med. Ctr.*, 142 S. Ct. 2354, 2364 (2022). The term "claim" is a broad one whose most common definition is argument "yet to be proved." App. 16. "With 'several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation, without being confused or getting confusing,' the word 'claim' eschews the presumption of uniform usage." *United States ex rel. Int'l Bhd. of Elec. Workers Loc. Union No. 98* v. *Farfield Co*., 5 F.4th 315, 331 (3d Cir. 2021). Statutory context is therefore critical to determine the meaning of "claim"—and that context forecloses the narrow meaning petitioners urge. Section 324 expressly applies to pending petitions for review of agency actions related to the Pipeline, see Act § 324(e)(1), and Congress therefore necessarily anticipated that constitutional challenges to Section 324 would most naturally arise in those pending cases. App. 15-17; U.S. Resp. 16-17. Particularly given Congress's express concern with "expediting completion of the Mountain Valley Pipeline," Act § 324, it would make no sense for Congress to vest "exclusive" jurisdiction over constitutional challenges in the D.C. Circuit, while also allowing the Fourth Circuit to hear constitutional challenges in pending suits. Put differently, petitioners' theory requires accepting that Congress enacted an exclusive jurisdiction provision that does not apply in the very cases to which the Act is designed to apply and that requires parallel adjudication of constitutional challenges in a statute expressly designed to ensure the "timely completion" of the Pipeline. Act § 324(b). Petitioners have no answer. See, *e.g.*, WS Resp. 18 (dismissing Section 324's obvious import without analysis).

Indeed, Petitioners' own arguments underscore the importance of context in construing

"claim." Petitioners identify a number of instances where courts have used "claim" to mean "cause of action." AV Resp. 9-10; WS Resp. 15. But those very examples do not use "claim" alone, but contain additional context making the particular meaning clear, see WS Resp. 15 (claim *arising under*; claim *for relief*). Petitioners' cited decisions are to the same effect. See, e.g., *Sanders* v. *Allison Engine Co*., 703 F.3d 930, 938 (6th Cir. 2012) (discussing importance of context in construing "claim"); AV Resp. 10. Moreover, this Court has regularly used "claim" to mean "argument," see, *e.g.*, U.S. Resp. 16 n.3—a usage that would unquestionably make Section 324(e)(2) apply here.[2] Similarly unavailing is Wilderness Society's contention that Congress's use of the future "shall have" in Section 324(e)(2) means the section does not apply to cases "predating the Act." WS Resp. 15-16. Section 324(e)(1) also uses "shall have," and that section removes jurisdiction over "lawsuit[s] pending in a court as of the date of enactment of this section." Act § 324(e)(1). Congress plainly did not use that language to limit that statute's reach only to suits filed after its passage. Petitioners' textual arguments show only that Congress could use "claim" to mean "cause of action"—not that Congress so limited that language here.

Finally, even accepting petitioners' (faulty) construction of "claim," the Fourth Circuit would *still* lack jurisdiction, because petitioners' causes of action necessarily "alleg[e] the invalidity of" Section 324. Act § 324(e)(2). As in all cases, an essential and ongoing element of petitioners' causes of action is that the court where they brought suit (here, the Fourth Circuit) has subject matter jurisdiction. See *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to 'satisfy itself * * * of its own jurisdiction" (citation omitted)); *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006) (explaining that "parties * * * asserting federal jurisdiction" must "carry the burden of

[2] Tellingly, throughout Appalachian Voices' response, it uses "claim" to mean "argument." See AV Resp. 29-33.

establishing their standing under Article III"); *Decker* v. *Nw. Env't Def. Ctr.*, 568 U.S. 597, 609 (2013) ("It is a basic principle of Article III that a justiciable case or controversy must remain extant at all stages of review, not merely at the time the complaint is filed." (citation omitted)). Because petitioners must establish Section 324's invalidity for a court to have jurisdiction over their claims, that allegation of unconstitutionality is necessarily bound up in their causes of action. The Fourth Circuit therefore lacked jurisdiction to consider Section 324's constitutionality.

B. The Act Is Constitutional.

The Fourth Circuit's stay orders are particularly unjustified because Section 324 is clearly constitutional. Petitioners do not dispute that Congress may "change[] the law by establishing new substantive standards" and that it may apply those standards to pending cases. WS Resp. 20 (quoting *Bank Markazi* v. *Peterson*, 578 U.S. 212, 231 (2016)); AV Resp. 12. What Congress may not do is direct the result in a pending case under existing law. *Bank Markazi*, 578 U.S. at 226 n.17. Section 324 does not do that; instead, it changes the law in two different ways.

First, Section 324(c)(1) "ratifies and approves all authorizations * * * necessary for the construction and initial operation * * * of the Mountain Valley Pipeline." And, Section 324(f) is express that "[t]his section supersedes any other provision of law." As *Heinszen* recognized, a "ratification" supplies *new* legal authority for an action *regardless* of whether the action was lawful at the time it was taken. 206 U.S. at 382 (Executive action that was unconstitutional because it was taken without congressional authorization was subsequently ratified by statute); see also *ibid.* (where agent takes unauthorized action, "the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity."). Against that backdrop, Wilderness Society is forced to argue (at 21) that ratification is a conclusion that the previous action complied with old law. *Heinszen* forecloses that argument. There, Congress would have had no authority to assert that the Executive's unauthorized tariffs were in fact constitutional when imposed; instead, it provided

new authority for the action. Section 324's ratification provision thus provides *new* law that is, by definition, *different from* the old law under which the action was allegedly unlawful. Before Section 324, courts reviewed such permits for compliance with the APA, NEPA, the ESA, and any number of other federal statutes. Now, courts must instead consider whether the permit is "necessary for the construction and initial operation * * * of the Mountain Valley Pipeline." Act § 324(c)(1). Section 324(f) leaves no doubt that this is a quintessential change in the law, because it expressly supersedes all inconsistent existing law. Congress would have had no need to do that had it declared the relevant agency actions to be in compliance with existing law.

Petitioners suggest that "Congress cannot employ ratification in a way that fails to supply any new standard apart from the result that a favored party in a pending case must win." WS Resp. 24; see also AV Resp. 20. But *Heinszen* expressly upheld a congressional ratification that determined the result of a pending case challenging the Executive's previously unauthorized action—without any suggestion that the ratification's effect was in any tension with *United States* v. *Klein*, 80 U.S. 128 (1871) or Article III principles.[3] See *Heinszen*, 206 U.S. at 387. The Court instead explained "the mere fact that, at the time the ratifying statute was enacted, this action was pending" did not "cause the statute to be repugnant to the Constitution." *Ibid.* Petitioners argue that *Heinzsen* involved a law of "general applicability." WS Resp. 24. Not so: the ratification statute identified the ratified tariffs by date and location. *Heinszen*, 206 U.S. at 381. And while Congress may not ratify actions that it has no constitutional authority to authorize, *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 301 (1937); WS Resp. 24, Congress unquestionably had the power to authorize the actions at issue here. The ratification of this action creates new law, and

[3] Although the challengers in *Heinszen* did not raise an Article III argument, the Court upheld the ratification over arguments that, by vitiating the challengers' pending challenge to executive action, the ratification statute effected a taking. 206 U.S. at 387.

its application to these pending cases is clearly constitutional under this Court's precedents.

Petitioners next contend that Section 324 "go[es] beyond" the statutes this Court upheld in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), and *Bank Markazi*. WS Resp. 22. That is wrong; those decisions in fact establish that Section 324 is constitutional. Petitioners argue that the statute in *Robertson* was constitutional because it replaced pre-existing governing environmental standards with a new rule providing that identified agency actions were valid if they complied with a BLM agreement. *Ibid*. So too here: the ratification provides new law, replacing pre-existing environmental standards. And *Robertson* and *Bank Markazi* dispose of Petitioners' complaint that Section 324 defines "Mountain Valley Pipeline" by reference to particular FERC Dockets, which in turn contain multiple documents required by NEPA enumerating specific permits required for the project. Act § 324(a); WS Resp. 23. The statutes in those cases also identified their subject matter by docket number. Petitioners next attempt to distinguish *Bank Markazi* on the ground that here the ratification provision gives courts too little to adjudicate. WS Resp. 23; AV Resp. 21. But the Court has made clear that when Congress enacts *new* law, that law does not infringe the judicial power simply because its application to pending cases is obvious or undisputed. As *Bank Markazi* explained in distinguishing *Klein*, "the statute in *Klein* infringed the judicial power, not because it left too little for courts to do, but because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe." *Bank Markazi*, 578 U.S. at 228. By contrast, as even petitioners concede, the statutory term "necessary" "may imply some measure of judgment." WS Resp. 23. Moreover, contrary to petitioners' assertions, the text of Section 324 does not anywhere define "necessary" to mean "listed in the Environmental Impact Statement" prepared by FERC or otherwise make the statute coextensive with FERC's findings on that score. The statute supplies

more "new law" and retains a greater role for courts than the statute upheld in *Bank Markazi*.

Second, Section 324(e)(1) permissibly eliminated the courts' jurisdiction to review agency actions "necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline." Act § 324(e)(1). Because Congress clearly has authority to narrow the lower courts' jurisdiction, *Patchak* v. *Zinke*, 138 S. Ct. 897, 906 (2018), such statutes do not violate Article III unless they attempt to do indirectly what Congress cannot do directly: direct a result in a pending case without making any substantive change in existing law. *Id*. at 917, 919-920 (Roberts, C.J., dissenting). Section 324 does not do that: its ratification provision alters the governing law by providing authority for the agency actions in question. See pp. 7-8, *supra*.

Petitioners' contrary arguments rely entirely on the *Patchak* dissent and *Klein*. See WS Resp. 27-28; AV Resp. 16-19. But Section 324 would be constitutional even under the *Patchak* dissent's reasoning. Section 324(e)(1) applies to an indefinite "class of cases" rather than creating a "one-case-only-regime" because it applies not only to the class of eight separate pending cases involving the Pipeline (which raise challenges under numerous federal statutes), but also to *future* cases based on permits not yet issued at the time of enactment. *Patchak*, 138 S. Ct. at 918-919 (Roberts, C.J., dissenting); see also U.S. Resp. 23-24. Petitioners—who concede that Congress may strip jurisdiction in a generally applicable statute—have no answer for Section 324's application to multiple pending and future cases. Section 324 also leaves an adjudicative role for the courts: a court must consider whether the challenged permit is issued by a covered agency and is "necessary to the construction or operation at full capacity of the Mountain Valley Pipeline." Act § 324(e)(1). The provision thus has precisely the kind of "generality or preservation of an adjudicative role for the courts" that the dissent viewed as absent in *Patchak*. 138 S. Ct. at 920. Moreover, Section 324—unlike the statute in *Patchak*—does not direct the courts to dismiss any

actions, thereby leaving no doubt that the courts have authority to determine the application and consequence of the elimination of jurisdiction.

Finally, Petitioners resort to overreading *Klein*. *Bank Markazi* forecloses their argument. There, the Court definitively rejected the amorphous considerations Petitioners would divine in *Klein*'s reasoning, stating that the *Klein* statute "infringed the judicial power" because "it attempted to direct the result without altering the legal standards governing the effect of a pardon"—an alteration that Congress would have been powerless to effect given the Executive's exclusive pardon authority. See *Bank Markazi*, 578 U.S. at 227-228. And in all events, Petitioners' complaint that Congress has improperly engaged in "self-dealing" by stripping jurisdiction in a manner that favors the government is meritless. Congress unquestionably has authority to legislate in a manner that effectively compels a ruling for the government in a pending action; that is precisely what the statute in *Heinszen* did. 206 U.S. at 382; *see Patchak*, 138 S. Ct. at 910 (plurality op.) (upholding statute that stripped jurisdiction resulting in victory for government).

III. THE STAY ORDERS INFLICT IRREPARABLE HARM, AND THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR VACATING THE STAYS

A. Petitioners have no real response to MVP's showing that the stay orders cause obvious irreparable harm to the government, the public interest, and MVP. WS Resp. 32; AV Resp. 29-30. As the government notes, the "stays are preventing the government from complying with" the "requirement[s] of a 'duly enacted statute to help prevent the[] injuries' to the national interest that Congress determined would result from further delays." U.S. Resp. 31 (quoting *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). Congress has concluded that "the *timely completion* of construction and operation of the [Pipeline] is *required in the national interest*" because the Pipeline will, among other things, increase "availability of natural gas at reasonable prices." Act § 324(b) (emphasis added). Every day that the stays are in

place frustrates Congress's unambiguous direction as to what the public interest requires.

Petitioners also disregard the harm that delay through the winter will cause to the public and MVP's customers, including individuals who depend on natural gas to heat their homes, cook their food, and keep their lights on. Winter storms put extreme and unpredictable strains on natural gas supply and cause price spikes at exactly the time gas is most needed. See, *e.g.*, Roanoke Gas Amicus Br. 8; American Gas Association Amicus Br. 11-12. Consistent supplies from pipelines reduce those risks. *Ibid.* Wilderness Society does not dispute those harms. WS Resp. 34-35. Appalachian Voices merely speculates (at 34) that this winter might be warmer than most. Wishful thinking cannot overcome the reality that winter causes demand and prices for natural gas to rise.

MVP is also irreparably harmed. App. 25-26. Every month construction remains on hold costs MVP an *extra* $20 million. App. 27. If the stays are not vacated and the Fourth Circuit rules within 15 months (the shortest time in which it has resolved recent cases involving the Pipeline, see *Wild Virginia* v. *U.S. Forest Service*, No. 21-1039(L)), the court will not rule until July 2024, costing MVP *$240 million* in additional construction costs alone. Those costs are unrecoverable under MVP's long-term contracts with shippers and therefore constitute irreparable harm. See, *e.g.*, *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489 (finding a "risk of irreparable harm" warranting a stay where landlords were deprived "of rent payments with no guarantee of eventual recovery"); *Georgia* v. *President of the United States*, 46 F.4th 1283, 1302 (11th Cir. 2022) (unrecoverable economic loss is an irreparable harm). Petitioners speculate that MVP can recoup the costs by raising rates. But MVP is not charging cost-based rates here; the Pipeline is 100 percent fully subscribed under already-negotiated rate agreements, so MVP will not recoup any of the additional costs under those agreements. *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at ¶¶ 12, 54, 75, 2017 WL 4925425 at *4, *13 (Oct. 13, 2017) (FERC Certificate Order).

B. Petitioners also make baseless assertions about the alleged irreparable environmental harm.[4] But they ignore that in enacting Section 324, Congress "prioritize[d] the timely completion of MVP over the interests protected by federal statutes like the ESA." U.S. Resp. 29. That prioritization is within the core of Congress's authority to balance the interests served by the environmental statutes Congress itself enacted with the public interest served by quickly completing the Pipeline. Now that Congress has made it "abundantly clear that the balance has been struck in favor of" the timely completion, notwithstanding any environmental or other risks, the Fourth Circuit was not free to reweigh the interests under the guise of balancing the equities. *TVA* v. *Hill*, 437 U.S. 153, 194 (1978).

Moreover, Petitioners' claim that further construction of the Pipeline will irreparably harm the environment is wholly unpersuasive. Petitioners rely almost exclusively on their standing-related citizen declarations, but lay declarations cannot establish the irreparable environmental harm necessary to support the stay orders. See *Amoco Prod. Co.* v. *Vill. of Gambell, AK*, 480 U.S. 531, 541, 545-546 (1987) (reversing the entry of a preliminary injunction based on unsupported assertions of harm to the environment); *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 157 (2010) (rejecting presumption that a NEPA violation means that irreparable environmental harm will follow without injunctive relief). In any case, the Pipeline is "already mostly finished," *Appalachian Voices* v. *U.S. Dep't of the Interior*, 25 F.4th 259, 282 (4th Cir. 2022), having been constructed pursuant to permits issued under NEPA and the Natural Gas Act and upheld by the courts, *e.g.*, *Appalachian Voices* v. *FERC*, No. 17-1271, 2019 WL 847199, at *2 (D.C. Cir. Feb.

[4] Wilderness Society also contends that this Court should defer to the Fourth Circuit's weighing of the equities. That cannot be right. The Fourth Circuit did not "weigh" the parties' showings at all, because the court granted the stay in one case *before it received any argument or any evidence from MVP or the government*. See U.S. Resp. 8-9. And more importantly, discerning the equities here does not require any consideration of the record of the petitions for review, contra WS Resp. 31. Congress has already weighed the equities and enacted its conclusion into law.

19, 2019). And because the Pipeline is nearly complete—the Project crosses only 3.5 miles of the forest and will affect only 54 acres of the 723,300-acre forest during construction, and 99.924% of trees to be cleared already have been[5]—Petitioners wildly exaggerate the effect of remaining construction on the environment. As FWS found, the remaining construction will have little or no permanent effects on the three species implicated by Appalachian Voices' challenge to the Biological Opinion. No. 23-1384, ECF No. 17-3 Ex. A at 5, 255-256, 262 (4th Cir. Apr. 27, 2023).

Equally to the point, the hypothetical environmental risks petitioners assert must be weighed against the risk of environmental injury due to indefinitely suspended construction. See West Virginia Amicus Br. 13-18 (detailing environmental risks of suspended construction). FERC has previously permitted pipeline construction to proceed notwithstanding litigation because, in its expert judgment, "*completion of construction* and final restoration * * * is best for the environment and affected landowners." Order Partially Lifting Stop Work Order and Allowing Certain Construction to Proceed, *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,027 at ¶ 29 (2020). Petitioners ignore this consideration.

Finally, petitioners are particularly ill placed to contend that the equities favor them. Any time during the almost two months since enactment of Section 324, they could have sought adjudication of the constitutional issues in the D.C. Circuit. Petitioners knew that MVP possessed the necessary permits to restart construction—and that Section 324 deprived the Fourth Circuit of jurisdiction to enter stays or consider the statute's constitutionality. They could have asked the D.C. Circuit to resolve the statute's constitutionality or to enter a stay pending resolution before construction resumed. Petitioners instead chose to manipulate the D.C. Circuit docket to avoid a definitive constitutional ruling from that court.

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[5] United States Forest Service, Mountain Valley Pipeline and Equitrans Expansion Project, Final Supplemental Environmental Impact Statement at 86 (May 2023), https://tinyurl.com/najv64s4.

IV. THE COURT MAY ALSO TREAT THIS APPLICATION AS A PETITION FOR A WRIT OF MANDAMUS

As the United States agrees, the "Fourth Circuit's extraordinary exercise of judicial power in the face of an Act of Congress depriving it of jurisdiction * * * provides ample reason for mandamus." U.S. Resp. 32.

Only Wilderness Society (at 36) attempts to identify any other "adequate means to attain relief." But its arguments that MVP could seek further relief in the Fourth Circuit ignore that the Fourth Circuit has, by issuing the stays, *already found* that Section 324 is likely unconstitutional, App. 31—and it has done so despite Section 324(e)(2)'s clear elimination of jurisdiction to do so.

Petitioners' protestations that MVP's right to relief is not "clear and indisputable" track their merits arguments and are wrong for the same reasons. WS Resp. 37; AV Resp. 34. Contrary to Appalachian Voices' argument, this Court has awarded mandamus in cases of first impression, *e.g.*, *Ex parte Peru*, 318 U.S. 578, 590 (1943), and a party has a "clear and indisputable" right not to have a court exceed its jurisdiction, even in cases of first impression. See, *e.g.*, App. 32.

For much the same reasons, the Court could treat the application as a petition for certiorari and summarily dismiss the petitions for review. *Fed. Power Comm'n* v. *Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 330-331 (1976). Petitioners' contrary arguments ignore that the Fourth Circuit has defied Congress's express commands—and that dismissal would leave the Act's constitutionality to be determined by the D.C. Circuit, in accordance with Congress's intent.

CONCLUSION

For the foregoing reasons, the application to vacate the stays of the challenged agency authorizations pending adjudication of the petitions for review should be granted and the stays vacated. The Court may also treat the application as a petition for writ of mandamus and issue an order directing the Fourth Circuit to dismiss the petitions for review.

Dated: July 26, 2023

Respectfully submitted,

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