No.

In the Supreme Court of the United States

Cletus Woodrow Bohon; Wendell Flora; Robert Matthew Hamm; Beverly Ann Bohon; Mary Flora; Aimee Chase Hamm,

Applicants,

v.

Federal Energy Regulatory Commission; Willie Phillips, In his official capacity as Chairman of the Federal Energy Regulatory Commission; Mountain Valley Pipeline, LLC,

Respondents.

On Emergency Application from the denial of limited injunctive relief by the U.S. Court of Appeals for the District of Columbia Circuit, No.20-5203

TO THE HONORABLE CHIEF JUSTICE JOHN G. ROBERTS, JR.

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION TO PRESERVE THE STATUS QUO ON THREE PARCELS OF LAND PENDING ADJUDICATION OF THIS NON-DELEGATION DOCTRINE CASE AND THE CONSTITUTIONALITY OF SECTION 324

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QUESTIONS PRESENTED

The request for limited and temporary injunctive relief implicates three serious constitutional questions:

Whether Landowners are likely to prevail on jurisdiction over this structural Non-Delegation Doctrine challenge in light of this Court's unanimous 9-0 decision in *Axon Enter. v. FTC*, 143 S. Ct. 890 (2023), and FERC's admission it cannot adjudicate separation of powers claims to the agency's enabling legislation?

Whether §324 of the Debt Ceiling Bill, enacted to bypass environmental permitting cases in the Fourth Circuit, applies and strips jurisdiction over this Non-Delegation Doctrine case even though Landowners are alleging *constitutional* (not statutory) violations and this Court has never allowed Congress to pass one unconstitutional law (the NGA) and then pass a second law (§324) preventing courts from reviewing the *constitutionality* of the first? If the inquiry does not end there, whether §324 is unconstitutional?

Whether the overly broad transfer of legislative powers via the Natural Gas Act in 1938 violates the Non-Delegation Doctrine under Articles I-III of the Constitution by ceding "unfettered discretion" (with no intelligible principle) to the executive branch as in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and whether a private entity can wield legislative powers to condemn *private* land for *private* gain?

PARTIES AND RULE 29.6 STATEMENT

Applicants are three families residing in different parts of rural Virginia: Cletus Woodrow and Beverly Ann Bohon (the Bohons) residing near Poor Mountain in Montgomery County, Virginia, Aimee Chase and Robert Matthew Hamm (the Hamms) residing on Bent Mountain in Roanoke County, Virginia, and Wendell Wray and Mary McNeil Flora (the Floras) residing in Boones Mill, Franklin County, Virginia.

Respondents are the Federal Energy Regulatory Commission (FERC); Willie L. Phillips, in his official capacity as Acting Chairman of the Federal Energy Regulatory Commission; and Mountain Valley Pipeline, LLC (MVP), a private entity.

Amici presently before the D.C. Circuit are: (1) *amicus curiae* U.S. House of Representatives in support of FERC and MVP; and (2) *amici curiae* Constitutional Law Professors, in support of Landowners.

Amici previously before this Court in Sup. Ct. Case No. 22-256 are Center for Constitutional Jurisprudence of the Claremont Institute, in support of Landowners.

RELATED PROCEEDINGS

Bohon v. Federal Energy Regulatory Commission, 37 F.4th 663 (D.C. Cir. 2022) was vacated and remanded by the United States Supreme Court for further proceedings by *Bohon v. Federal Energy Regulatory Commission*, 143 S. Ct. 1779 (2023).

DECISIONS BELOW

The order of the U.S. Court of Appeals for the D.C. Circuit denying Applicants' motion for limited injunctive relief to preserve the status quo on their three properties during the delays in this case and pending adjudication of the Non-Delegation Doctrine claims is attached hereto as **Exhibit A**.

No opinion or explanation was given on why the limited injunctive relief was denied.

JURISDICTION

Applicants have a pending appeal on remand in the U.S. Court of Appeals for the D.C. Circuit following this Court's grant of certiorari in April 2023. This Court has jurisdiction under 28 U.S.C. § 1651.

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TO THE HONORABLE CHIEF JUSTICE JOHN G. ROBERTS, JR.
CIRCUIT JUSTICE FOR THE D.C. CIRCUIT

Pursuant to Rules 20-23 of the Rules of this Court, and 28 U.S.C. § 1651, Applicants Cletus and Beverly Bohon, Aimee and Matthew Hamm, and Wendell and Mary Flora ("Landowners") respectfully request a writ of injunction to temporarily halt further irreparable harm while their Non-Delegation Doctrine case is adjudicated. Landowners seek only limited injunctive relief narrowly tailored in scope and duration to the three parcels owned by the named plaintiffs who invoked the Non-Delegation Doctrine *four years ago* and are *still* waiting for their day in court.

The Non-Delegation Doctrine is critical for the preservation of individual liberty. The Framers intentionally dispersed power into three branches to protect citizens from unelected agencies like FERC and powerful corporations like MVP who forcibly seized their property for private gain.

Seven months ago, this Court granted certiorari and remanded this case for further proceedings. Since then, it has been delayed four times. Landowners opposed each delay. After the most recent delay, when it became apparent the case would not be adjudicated until next year, Landowners requested a temporary injunction to halt further injury to their land until this Non-Delegation Doctrine case is heard and the constitutionality of §324 adjudicated.

Without explanation, the D.C. Circuit denied Landowners' request. In the meantime, MVP *ramped up* construction on the Bohon and Hamm parcels in an effort to complete the project on *those* parcels before these serious constitutional claims are heard. In light of this Court's unanimous jurisdictional mandate in *Axon*, FERC and

MVP have now shifted gears and seek to evade *Axon* altogether by invoking §324—a new bill that includes a jurisdiction-stripping provision.

But this Court has never upheld a jurisdiction-stripping provision that precludes review of *constitutional* claims. Accordingly, §324 does not—and cannot—bar review of this Non-Delegation Doctrine case.

INTRODUCTION

Imagine a 12-year-old boy who goes for a spin in his father's car. Whether the boy *steals* the keys, or his dad *gives* them to him, it is still illegal for a 12-year-old boy to drive. The father's permission does not change the nature of the act. An underage driver cannot drive, even with his father's blessing.

Now imagine the boy is pulled over by the police, who call his father. When notified, his father says, "My son is a good driver, officer. I trust him to drive my car." The father's ratification does not change the law. Whether the boy *steals* the keys, or the dad *gives* his blessing, it is illegal for a 12-year-old to drive.

So too here. Whether legislative power is *taken* from Congress against its will or Congress *willingly* hands over the keys, the transfer is unconstitutional, *even* with Congress's blessing. The "law" is the Constitution. Congress is the father and FERC is the boy. Congress cannot exempt anyone from the Constitution any more than the father could exempt his son from the law. Congress's blessing cannot ratify an *unconstitutional* act or insulate it from constitutional scrutiny. The father can exempt his child only from a rule *the father* made, i.e., one involving a chore or curfew, but he cannot waive rules outside his jurisdiction.

The Constitution is outside of Congress's jurisdiction; it is the law above the law even Congress cannot break. The Constitution created Congress and set clear restrictions on which branch can wield which powers. It does not matter whether two branches consent—as here—to allow one to exercise the other's powers. The Founders created the judiciary to prevent precisely that.

MVP, by extension, is a reckless driver whose license was revoked.[1] Regardless of who gives MVP the keys, the law deems it too dangerous for a reckless driver to operate a vehicle. Likewise, the Constitution deems it too dangerous to allow a *private* actor to wield legislative power to condemn *private* land. While Congress can certainly wield its *own* powers to seize this land, it cannot outsource those unpopular decisions to avoid accountability to the electorate, which is what has happened here.

At the end of the day, only the father can drive the car. The father may chauffeur the son or reckless driver around, but the law does not allow them to drive. Likewise, here, *Congress* may exercise its own legislative power to seize Cletus's private land within the bounds of the Constitution. But *Congress* has <u>not</u> done that.

FERC and MVP argue §324 has "cured" the constitutional problems by greenlighting environmental permits for the project which supposedly evidences Congress's "consent." But this case has nothing to do with environmental permits. And Congress's consent to an *unconstitutional* act is just as irrelevant as the father's permission for his minor child to drive. Section 324 was about bypassing permitting

[1] While MVP never had a license from the Constitution to wield legislative power, "reckless" seems particularly apt here where MVP's parent company was recently charged with a felony after a gas explosion blew up a neighborhood home in Pennsylvania, *see* **Exhibit J**, and where an MVP worker was airlifted to the hospital after being injured near Poor Mountain where Cletus resides.

issues—which were *statutory* claims—in the Fourth Circuit; it has no application to this *constitutional* Non-Delegation Doctrine case.

The unconstitutional structure of the NGA is what enables this seizure, not §324. Those constitutional defects in the NGA remain no matter where the pipeline is routed, when the project is completed, or how many permits are issued. Even today, FERC and MVP continue to exercise legislative power pursuant to the unconstitutional provisions in the NGA, not the Fiscal Responsibility Act. It is the NGA, not the FRA, that enables FERC to run rogue and MVP to condemn this land. The 12-year-old-boy and reckless driver are *still* on the road in Virginia.

Eminent domain is a dangerous power. For that reason, it is, and always has been, legislative. Blackstone said it. The Founders knew it. Delegating that power is just as dangerous as usurping it. If Congress wants help from an executive agency, Congress must *prescribe* the tests for the use of that legislative power to ensure the agency is carrying out Congress's will and not its own. Unfortunately, here, FERC has a "blank check" in the NGA to exercise unfettered discretion while wielding legislative power. By extension, if Congress wants the land, Congress is free to take it and explain that taking to the electorate. That, too, has not happened here. Instead, MVP—a private entity—has condemned this land, which means MVP is taking it by wielding legislative power. MVP, not Congress, has condemned and seized Cletus's property. The unlawful structure in the NGA is the mechanism that has enabled these private takings for nearly a century.

Even if Congress passes a new bill today expressly directing dismissal of this Non-Delegation Doctrine case, that too would be unconstitutional. Congress cannot pass one unconstitutional bill (the NGA) and then pass a second bill (the FRA) barring review of the constitutionality of the first. This Court has never allowed that because Congress's power is limited by the Constitution just as the father's power is limited by the law.

Congress cannot hand over the keys to "drive" its legislative powers any more than the father could authorize his 12-year-old son to drive, however gifted, skilled, or learned the child may be.

FACTUAL AND PROCEDURAL BACKGROUND

Four years ago, three Virginia families invoked the Non-Delegation Doctrine to challenge the unfettered delegation of legislative power to an executive agency (FERC) and a private company (MVP). Congress created this unconstitutional *structure* in 1938 when it enacted the Natural Gas Act and transferred unchecked power to the executive branch. The unconstitutional structure of the NGA gives FERC a blank check; it enables the seizure of *private* land for *private* gain without any guidance to FERC to decide which parties can exercise eminent domain authority. After three years of jurisdiction battles, this Court granted certiorari, vacated the lower court's order, and remanded this Non-Delegation Doctrine case for further proceedings in light of the Court's unanimous 9-0 decision in *Axon*.

Seven months later, this Non-Delegation Doctrine case has *still* not "proceeded" in any practical sense. Since April, the case has been **delayed four times** as follows: July 10, 2023 (**at MVP's request**); August 7, 2023 (**at MVP's request,** expanding briefing on § 324); October 11, 2023 (**at MVP's request**); November 13, 2023 (adding another 30-day extension **at FERC's request**). Each time, Landowners opposed the delay. Each time, the D.C. Circuit granted the extension despite the escalation of irreparable injury to the land during the delays.

When the case was first argued on December 15, 2021, the D.C. Circuit waited until late June 2022 to issue a short opinion affirming dismissal. At this rate, the jurisdiction issue alone—which this Court has twice decisively addressed in Landowners' favor—will not be resolved until *after* MVP claims it will complete construction next year. FERC and MVP hope to stall adjudication of this Non-Delegation Doctrine case as long as possible and then claim it is "moot."[2]

Because *Axon's* 9-0 mandate sinks their jurisdiction argument, FERC and MVP have shifted gears to argue §324 of the Fiscal Responsibility Act ("FRA" or the "Debt Bill"), bars Landowners' claims. But §324 does not address *constitutional* claims, nor could it. The plain text and legislative history show its purpose was to bypass the environmental permitting obstacles in the Fourth Circuit. It has no impact on this Non-Delegation Doctrine case in the D.C. Circuit and would be unconstitutional even if so applied. This Court has never held a statute may strip jurisdiction over *constitutional* claims.

[2] Completion would not moot Landowners' case, but these delay games are a far cry from justice. Landowners filed this case four years ago and are still waiting for their day in court.

MVP will no doubt claim its project is 94%[3] complete (or somewhere in the 90th percentile) and any hindrance to construction—even if limited to only three parcels—will cause America to freeze to death by delaying a project that is "almost finished." That was not true in July—when MVP begged this Court to "urgently" lift the Fourth Circuit stays—and it is not true now. As of September 2023, MVP's **own disclosures** to FERC show the **total** project is actually only **55.8% complete to final restoration**! *See infra*, section II(b). Two days after Landowners requested an injunction questioning MVP's dubious completion rates, MVP admitted to the SEC that its own previous representations were incorrect, despite the glaring absence of any further obstacles in the Fourth Circuit. When MVP says, "We are 94% *complete*," it is not using the term "complete" as ordinarily understood by an average layperson, investor, reporter, or judge. MVP was confused, at best, when it told this Court in July that the project was "already mostly finished." MVP's Emergency Application to Vacate Stays at 2 (July 14, 2023). MVP is now being investigated[4] by at least two nationally renowned firms for misleading investors about its actual completion progress.

Accordingly, MVP has much work left to do without disturbing Landowners' three properties.

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[3] These numbers appear to change depending on MVP's audience.

[4] *See* Shareholder Alert (Pomerantz LLP) Available at: https://www.prnewswire.com/news-releases/shareholder-alert-pomerantz-law-firm-investigates-claims-on-behalf-of-investors-of-equitrans-midstream-corporation---etrn-301977563.html; *see also* Class Action Alert (Bronstein, Gewirtz & Grossman, LLC) Available at: https://www.accesswire.com/796560/equitrans-midstream-corporation-etrn-investigation-bronstein-gewirtz-grossman-llc-encourages-investors-to-seek-compensation-for-alleged-wrongdoings

REASONS FOR GRANTING THE APPLICATION

I. LANDOWNERS ARE LIKELY TO PREVAIL ON THE MERITS

a. Landowners are likely to succeed on jurisdiction

i. The nature of the claim establishes jurisdiction over this structural Non-Delegation Doctrine case.

This Court has already twice declared that district courts retain jurisdiction over structural Non-Delegation Doctrine challenges and remanded this case in light of its recent decision in *Axon Enter. v. FTC*, 143 S. Ct. 890 (2023). In *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021), this Court held district courts retain jurisdiction over constitutional challenges *in the precise context of* a delegation challenge[5] relating to the Natural Gas Act. More recently, in *Axon Enter. v. FTC*, this Court issued a unanimous 9-0 decision again confirming Landowners' position that district courts retain jurisdiction to adjudicate separation of powers challenges to an agency's enabling legislation, notwithstanding the agency's exclusive review scheme. 143 S. Ct. 890 (2023).

This Court unequivocally rejected federal agencies' false claims of "expertise" to evaluate separation of powers challenges, noting "The Commission knows a good deal about competition policy, but nothing special about the separation of powers." *Id.* at 905 (emphasis added). "For that reason, we observed two Terms ago, 'agency adjudications are generally ill suited to address structural constitutional challenges'—like those maintained here." *Id.* (quoting *Carr v. Saul*, 593 U.S. __, 141

[5] *PennEast* only touched upon Count III in Landowners' Complaint, not Counts I or II. But the jurisdiction principle is the same as in *Axon*.

S. Ct. 1352, 209 L. Ed. 2d 376 (2021) (slip op., at 9)). Likewise, here, FERC has no expertise evaluating the Non-Delegation Doctrine and has openly admitted it cannot adjudicate separation of powers challenges to its authority. *See* 161 FERC ¶ 61,043 (2017) (FERC's admission it cannot adjudicate constitutional claims).

Jurisdiction hinges on "the nature of the claim, not the status (pending or not) of an agency proceeding." *Axon*, 143 S. Ct. 890, 905 (2023). Despite this controlling precedent, FERC and MVP *still* claim the existence of an "agency order" here abolishes the court's jurisdiction. But MVP knows this Court has already rejected these failed arguments. *Id.* at 904. That is why they have shifted gears to §324. But the nature of the claim—separation of powers—shows this case falls well outside its reach.

As explained, *infra*, Landowners' Complaint raises three structural separation of powers challenges. *See* **Exhibit B** (Complaint). Count I invokes the *federal* Non-Delegation Doctrine to challenge the transfer of legislative power to FERC, an agency within the executive branch. Count II challenges the sub-delegation of power. Count III invokes the *private* Non-Delegation Doctrine to challenge the transfer of eminent domain power directly from Congress to MVP, a private entity.

Given this controlling precedent, there is a strong likelihood of success on the jurisdiction issue, allowing Landowners to finally receive their "day in court" on the merits of this Non-Delegation Doctrine case filed almost four years ago. *Axon,* 143 S. Ct. at 917 (2023) (Gorsuch, J., concurring) ("Ms. Cochran and Axon have already endured **multi-year odysseys** through the entire federal judicial system—**and no**

judge yet has breathed a word about the merits of their claims") (emphasis added).

ii. The plain language and jurisdiction-stripping provision of §324 do not preclude this Non-Delegation Doctrine case.

The plain text and legislative history of §324 show it was specifically drafted to target environmental permitting cases involving *statutory* claims in the Fourth Circuit. It has nothing to do with this *constitutional* Non-Delegation Doctrine case in the D.C. Circuit.

Since 2018, the Fourth Circuit has repeatedly sided with environmental groups challenging permits MVP was required to obtain to complete construction. *See* **Exhibit C**, at 2-3. In May 2022, MVP—upset over these losses—asked the Fourth Circuit to appoint a different panel to hear the myriad of environmental permit challenges filed in that court. *See id., generally*. When that effort failed, MVP's champion, Sen. Joe Manchin, extracted a promise as part of the 2022 Climate Bill to streamline permit approvals and route challenges exclusively to the D.C. Circuit. *See* **Exhibit D.** However, that promise proved elusive and the Fourth Circuit continued ruling against MVP in permit challenges. *See* **Exhibit E**. Sen. Manchin called the Fourth Circuit's decision "to side with activists" opposing necessary environmental permits "infuriating." **Exhibit F.**

On May 20, 2023, Sen. Manchin issued a statement titled "Permitting Reform Necessary For America's Future" that bemoaned "[o]ur inability to permit projects in West Virginia and across the country on a timely basis ...." *See* **Exhibit G**. He highlighted his efforts to "address our nation's broken permitting system" and secure

"comprehensive permitting reforms." *Id*. Sen. Manchin recounted how he "secur[ed] a commitment to get permitting reform done" in 2022 and referred to his proposed legislation as "the only comprehensive Senate permitting bill to have bipartisan support ...." *Id*. Sen. Manchin cited various forms of the word "permit" **21 times** in this two-page statement. *See id.* Days later, Sen. Manchin successfully lobbied his colleagues to add language to the FRA to eliminate permitting roadblocks to MVP. That provision requires agencies to grant all environmental permits needed to complete and operate MVP, maintain those permits and approvals, and strips the Fourth Circuit of jurisdiction to review agency action. FRA §324(c-d).

MVP now seeks to weaponize this provision against Landowners in a completely unrelated structural challenge to the delegation of power contained in the Natural Gas Act, 15 U.S.C. § 717 *et seq*, a *constitutional* challenge in the D.C. Circuit which has nothing to do with environmental permits.

The plain text of §324(c) merely ratifies permits and directs agencies to maintain them. Section 324(d) requires the Secretary of the Army to "issue all permits or verifications necessary" to complete and operate MVP. Section 324(e)(1) deprives all courts of jurisdiction to review actions ***taken by state or federal agencies***. Landowners are not challenging action "taken by state or federal agencies." Nor are they challenging any permits. Landowners challenge action ***taken by Congress*** in 1938 when it delegated expansive legislative authority to the executive branch and private actors. These structural challenges arise under the Constitution, not laws created by Congress or regulations promulgated by agencies.

Nothing in §324 "cures" the constitutional defects in the NGA. Just as the father cannot authorize an unlawful act by giving his blessing, neither can Congress make an unlawful transfer of legislative power constitutional by "ratifying" it. FERC continues exercising unfettered discretion and *MVP* (not Congress) continues exercising eminent domain to seize this land. The same constitutional violations and injuries remain, before and after §324.

Section 324 does not even identify Landowners' parcels. Unlike in *Patchak v. Zinke*, 138 S. Ct. 897 (2018), where the statute specifically identified the Bradley property owned by the tribe, there is no description anywhere in §324 relating to "the Bohon property," "the Hamm property," or "the Flora property." The plain text and legislative history show §324 does not, and was never intended to, preclude this case.

iii. Section 324 would be unconstitutional if applied to preclude this Non-Delegation Doctrine case because this Court has never upheld a statute that strips jurisdiction over *constitutional* claims.

Section 324 does not preclude this case but would be unconstitutional even if so applied. Congress cannot pass one unconstitutional law, then pass a second law barring review of the constitutionality of the first. *See Bartlett v. Bowen,* 816 F.2d 695, 707 (D.C. Cir. 1987) ("The Supreme Court has never upheld such an enactment, and we will not do so here.").

In *Patchak,* this Court confirmed its holding would not apply to constitutional claims. Justice Thomas reasoned Congress could strip courts of jurisdiction *only* "so long as Congress does not violate other constitutional provisions." *Patchak*, 138 S. Ct. at 906. Patchak's underlying claim alleged *statutory*, not constitutional, violations.

Congress could *only* alter the court's jurisdiction because it was exempting review of its *own* laws (not the Constitution). The nature of the claim distinguished *United States v. Klein,* 80 U.S. 128 (1871) from *Patchak*: Patchak's underlying claim invoked the Administrative Procedure Act and the Indian Reorganization Act—laws created by Congress—alleging the Secretary lacked *statutory* authority to take the Bradley Property into trust, not that he lacked *constitutional* authority. By contrast, Landowners' claims here, like those in *Klein,* arise under the Constitution.

Justice Breyer observed the same distinction. *Id.* at 912 (Breyer, J., concurring) ("Here Congress has used its jurisdictional power to supplement, without altering, action that **no one has challenged as unconstitutional**"). *Accord Nat'l Coalition to Save Our Mall v. Norton,* 269 F.3d 1092 (D.C. Cir. 2001) (holding the Coalition "poses no constitutional objection," only *statutory* ones). By contrast, Landowners *have* challenged the NGA as *unconstitutional*. Because Congress is "powerless to prescribe," alter, ratify, condone, or strip review of unconstitutional action, Landowners easily prevail here under the plurality holding in *Patchak*.

Expressing "great skepticism," Justice Sotomayor went further, agreeing with the *dissent's* rationale and only joining the plurality in the outcome because, once again, Congress was merely altering its own law, the APA, by reinstating immunity.

The D.C. Circuit likewise observed the same distinction between constitutional and statutory claims. In *Bartlett v. Bowen,* 816 F.2d 695 (D.C. Cir. 1987), the D.C. Circuit held that Congress cannot preclude constitutional challenges. In *Bartlett*, the claimant raised a facial constitutional challenge to the Medicare Act. 816 F.2d at 701.

The defendants argued Congress stripped jurisdiction because the amount in controversy was less than $1,000. *Id*. at 700. But the court disagreed, holding that Congress did *not* intend to preclude "*constitutional challenges to the Act itself*." *Id*. The court further held "Congress may not exercise Article III power over the jurisdiction of the [federal] courts in order to deprive a party of a right created by the Constitution." *Id*. at 705-06. The "delicate balance implicit in the doctrine of separation of powers would be destroyed if Congress were allowed not only to legislate, but also to judge the constitutionality of its own actions." *Id*. at 707. Applying *Klein*, the D.C. Circuit reasoned the "constitutional guarantee of an independent judiciary" prevents Congress from stripping jurisdiction over constitutional claims. *Id*. at 705.

> However, it is quite another matter to suggest that Congress may, as it sees fit, act to bar all courts from considering the constitutionality of a legislative act. If Congress attempts to go this far, it has "passed the limit which separates the legislative from the judicial power." **The Supreme Court has never upheld such an enactment, and we will not do so here.**

Id. at 707. Likewise, here, to strip jurisdiction over Landowners' constitutional claims would violate their Fifth Amendment due process right to have an independent judiciary review constitutional violations.

> **It makes absolutely no sense to us,** under any meaningful system of separation of powers, **to allow the legislative branch to** pass such a law and then **avoid judicial review of a broad category of constitutional challenges by individuals injured by the law.**

Id. The court in *Bartlett* pointed out the "folly of such a view." *Accord Battaglia v. General Motors*, 169 F.2d 254 (2d Cir. 1948) (recognizing that congressional power over jurisdiction is limited by the due process clause).

Preclusion would thus deprive Landowners of their constitutional right to have an independent judiciary adjudicate their Non-Delegation Doctrine claims. Just as FERC admitted[6] it has no jurisdiction to adjudicate the constitutionality of the NGA, the D.C. Circuit Court observed the same in *Bartlett*: "It is critically important to recall that the Secretary has no authority to rule on a constitutional challenge to the Act that enables him." *Id*. at 702. In both cases, the agency has no authority to adjudicate the constitutionality of its enabling legislation. Landowners would be left with no forum at all if Article III courts could not review their claims, a clear violation of due process. MVP and FERC claim Landowners *had* a forum, i.e., the review scheme. But this Court unanimously rejected that in *Axon*, noting agencies have no authority or expertise to adjudicate constitutional claims meaning such claims cannot be brought to the agency. This principle was settled even before *Axon*. *See Johnson v. Robison,* 415 U.S. 361 (1974) (holding constitutional challenges were reviewable despite an exclusive review scheme saying they were unreviewable because "[t]he questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged."); *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

[6] 161 FERC ¶ 61,043 (2017) (Certificate Order to MVP) ("**[S]uch a question is beyond our jurisdiction: only the Courts can determine whether Congress' action in passing section 7(h) of the NGA conflicts with the Constitution**.").

iv. Section 324 is unconstitutional on its face.

The plurality's holding in *Patchak* does not bar review of *constitutional* challenges. But several Justices have refused to uphold jurisdiction-stripping provisions even where the underlying claims are not constitutional but merely *statutory* violations, i.e., where the father in our analogy merely changes his *own* rules such as curfew time or chore mandates. *See Patchak*, 138 S. Ct. at 914-15. The rationale is clear.

Suppose two children compete to win rewards after completing a list of identical chores. Now suppose the father changes his own rules after the children begin completing the list and strikes all remaining chores on his son's list, but not his daughter's, specifically so his son will get the reward. Several Justices deem even that type of *selective statutory alteration*, whereby Congress changes its *own* rules for certain litigants midway through the game, unconstitutional because it rigs the outcome, i.e., it directs the results by changing the rules for some (the son) but not others (the daughter).

In a republic where the rule of law preserves order and freedom, its unequal application is indefensible. MVP and FERC argue, "*Congress makes the rules; therefore Congress can change them*." That is true only if Congress changes them for *everyone*. In our analogy, parents can play favorites because Mom and Dad are dictators; there is no "rule of law" in the family household that prevents parents from setting different rules for specific children, however unwise or unfair that may be. But in the constitutional republic created by our Founders, the rule of law prevents

Congress from passing laws that are not generally applicable. If Congress wants to change its own laws, it must change them for everyone. Congress has not done that here. It has changed the rules for MVP, but not for any other company in America.[7] All of MVP's competitors must meet permitting requirements; only MVP is exempt. The authority of all other agencies can be challenged, but FERC claims it is untouchable.

The Founders did not recognize these arbitrary "decrees" as laws because they result in injustice, inequality, and disorder. John Locke observed, "[F]reedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it … and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man." J. Locke, Second Treatise of Civil Government §22, p. 13 (J. Gough ed. 1947).

Here, §324 is an *arbitrary* decree imposed by the legislative body proclaiming that *only* MVP—no other company in America—is exempt from the rules governing all others. Section 324 is not "the law of the land" because it is not generally applicable. If Congress wanted to change the law and revoke all permitting requirements, it could. But it must do so for *everyone*; it cannot pass bills governing some but not others. While Congress could direct courts to apply a "new legal standard," §324 is not a new legal standard; it does not change Congress's laws. It does not amend the NGA. Even today, Landowners' property is *still* being seized

[7] Curiously, MVP's most vocal supporters in Congress received well-timed campaign donations from MVP's investors. *See* https://newrepublic.com/article/167869/mountain-valley-pipeline-nextera-schumer-manchin (revealing NextEra energy donated hundreds of thousands of dollars to Senate Majority Leader Schumer's campaign just before §324 was hastily rammed through Congress).

pursuant to the NGA, not §324. Section 324 is merely a royal proclamation from the king exempting MVP from environmental permitting regulations still in place for all of its competitors.

William Blackstone echoed this principle, noting law is *only* law if it is generally applicable. *See* William Blackstone, 1 Commentaries 44, 129, 134, 137-138. No subject can "be deprived of core private rights except in accordance with the law of the land." For this reason, the Founders created the judiciary as a check and balance. The Federalist No. 51, at 321. *Bartlett*, 816 F.2d at 710 ("**Judicial review has been with us since *Marbury v. Madison*, and no one has ever before suggested that it is discretionary on Congress' part**."); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803); *Ass'n of Am. R.R.*, 575 U.S. at 74 (2015) (Alito, J., concurring).

Justice Thomas observed in *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 116 (2015) how the Constitution's separation of powers was informed by "centuries" of political thought, including the English Civil War. Fearing the "dangers of tyrannical government," a clear separation was drawn. *See Perez*, 575 U.S. at 116-17 (citing The Royalist's Defence 80 (1648) and M. Vile, Constitutionalism and the Separation of Powers 38, 168-169 (2d ed. 1998) (Vile)). As Montesquieu warned, "power should be a check to power" lest the legislature . . . "soon destroy all the other powers." *Id.* (citing Montesquieu, Spirit of the Laws, at 150, 157).

In America, the Framers learned from history and separated power into three branches at the Convention. This "structure represented the 'great security' for

liberty in the Constitution." *Id.* at 118 (citing The Federalist No. 51, p. 321 (C. Rossiter ed. 1961)).

The rule of law was so important the Founders added additional protections, including prohibitions on titles of nobility, *ex post facto* laws, and bills of attainder. U.S. Const. art. I, §§ 9-10. *See* The Federalist Nos. 39 and 84. That principle is complemented by the Fifth Amendment's Due Process Clause and Fourteenth Amendment's Equal Protection Clause.

This Court has recognized the legislature's power "to prescribe ***general*** rules for the government of ***society***," but "the application of those rules to individuals in society" is the "duty" of the Judiciary. *Patchak*, 138 S.Ct. at 915 (Roberts, J., dissenting) (citing *Fletcher v. Peck*, 10 U.S. 87 (1810)). Congress *can* change the law only if there is "some measure of generality" or "preservation of an adjudicative role for the courts." *Id.* at 920. Here, there is none. MVP claims no court can hear *any* claim, whether environmental, constitutional, or otherwise. The king has proclaimed MVP and FERC exempt from the rule of law that governs all others and no court anywhere can entertain challenges to this royal proclamation. *See* An Act that Proclamations Made by the King Shall be Obeyed, 31 Hen. VIII, ch. 8, in Eng. Stat. at Large 263 (1539)).

But this is America. We are a constitutional republic, not a monarchy. There are no royal proclamations. Law is only law if it applies equally. "Changing the law" means changing it for everyone. Section 324 does not. It strips challengers of their right to an independent judiciary and strips the judiciary of its Art III power. Such a

fate the Framers decried. *See* The Federalist No. 78, at 470. Fortunately, they foresaw this threat and created the judiciary for such a time as this.

b. Landowners are likely to succeed on the merits of the Non-Delegation Doctrine claims raised in Counts I-III

Eminent domain abuse in America has run rampant. Federal agencies like FERC—detached from electoral accountability—dictate the seizure and transfer of *private* land to wealthier *private* parties under the guise of "economic development." But *who* decides what land gets condemned? Not Congress. Congress outsources that politically unpopular decision to rogue agencies like FERC and gives them a "blank check" to decide when eminent domain power should be used to seize private property from Cletus and transfer it to another private actor. Like the overly broad delegation in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), this delegation is unrestricted.

Unelected Washington bureaucrats have no constitutional authority to exercise unlimited power to seize private land from Peter and give it to Paul. If Congress wants Peter's land, Congress should exercise its own power to take it and explain that vote to Peter when its members run for re-election. That is the system of political accountability the Constitution demands.

These principles are not new. This Court has already reined in the EPA and OSHA when exercising unconstitutional powers. But FERC exercises a power far more dangerous with far fewer controls—the ability to unilaterally decide when *private* land is seized for *private* gain. Principled jurisprudence requires that the Non-Delegation Doctrine be applied equally to *all* federal agencies. Turning a blind eye to

FERC's use of unconstitutional power to facilitate construction of a pipeline flouts the rule of law just as much as any other selective application of jurisprudence.

i. Counts I & II: The federal Non-Delegation Doctrine prohibits overly broad delegations of power to agencies like FERC.

The Non-Delegation Doctrine is an important structural mechanism for ensuring "democratic accountability" for unpopular decisions, i.e., seizing private land in rural Virginia for private gain. *See National Federation of Independent Business v. OSHA,* 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring):

> The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. Sometimes **lawmakers may be tempted to delegate power to agencies to reduc[e] the degree to which they will be held accountable for unpopular actions**.

(internal quotations omitted) (emphasis added). That is precisely what has happened here. Congress has "outsourced" both the decision-making and the seizure of land to FERC and MVP so as to avoid political accountability for unpopular seizures of private land. But the Non-Delegation Doctrine forbids that.

Count I invokes the federal Non-Delegation Doctrine to challenge Congress's overly broad transfer of *legislative* power to the *executive* branch (FERC). This challenge is identical to that raised in *A. L. A. Schechter Poultry Corp. v. United States* where this Court held Congress's overly broad delegation of code-making power to the executive branch was a "delegation running riot." 295 U.S. 495, 553 (1935) (Cardozo, J., concurring). *See* ECF Doc. No. 2022031, *Emergency Motion for Injunction* (Oct. 16, 2023) (explaining Counts I-III). So too here. Just as the statute in *Schechter Poultry* delegated overly broad power to the President to create his own

tests for slaughterhouses, so too the Natural Gas Act delegates overly broad legislative power to FERC (also part of the executive branch) to create its own tests for deciding who can wield Congress's power of eminent domain instead of *prescribing* those tests in the Act. *See* **Exhibit B**, at Count I. There is no so-called intelligible principle—no restrictions—prescribed by Congress to ensure that FERC is carrying out Congress's will. Instead, much like the President in *Schechter Poultry*, FERC is running rogue, drafting and prescribing its own tests for the use of Congress's legislative power of eminent domain. These "blank checks" are unconstitutional and should never have been written. *See Gundy v. United States*, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting).

This Court has already applied similar principles to rein in other agencies and should do the same here with FERC. *See West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022) (applying the Major Questions Doctrine to restrain the EPA's power); *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (applying the Major Questions Doctrine to grant stays because OSHA's authority to ensure "safe and healthful working conditions" did not encompass the power to mandate the vaccination of most employees); *Gundy v. United States*, 139 S. Ct. 2116 (2019) (confirming the viability and existence of the federal Non-Delegation Doctrine); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92 (2015) (limiting agency rulemaking authority); *Dept. of Transp. v. Association of American Railroads*, 575 U.S. 43 (2015) (condemning delegations of legislative power to *private* entities as opposed to governmental ones).

ii. Count III: The private Non-Delegation Doctrine prohibits the delegation of legislative eminent domain power to a private actor.

Counts II and III are pleaded in the alternative to account for both a sub-delegation or a direct delegation to a private entity. Count II challenges FERC's sub-delegation of power to private actors. *See J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 405-06 (1928) ("*Delegata potestas non potest delegari*," meaning power cannot be subdelegated). Count III invokes the private Non-Delegation Doctrine to challenge Congress's direct transfer of eminent domain power to a private entity, which appears to be the prevailing view. But these delegations of legislative power to private actors are unconstitutional. *See DOT v. Association of American Railroads,* 575 U.S. 43, 62 (2015) (Alito, J., concurring) ("When it comes to [delegations of power to] **private entities**, however, **there is not even a fig leaf of constitutional justification**."). The delegation in *Amtrak* would have been unconstitutional had Amtrak been purely private, like MVP, not "quasi-governmental." Because eminent domain is a legislative power, Congress cannot delegate it to a private actor. A private party cannot wield legislative power with Congress's blessing just as a person whose license has been revoked cannot lawfully drive a car even if the owner gives him the keys.

Absent the unlawful delegation of legislative power, MVP would have to purchase this land on the open market like all other private actors must do. Or, Congress could seize the land itself. The wrinkle, naturally, is that Congress does not actually *want* to exercise its own power to lawfully seize this land because that would

be unpopular. Members would have to answer to the electorate and explain why they seized private land from one person and transferred it to another (often much wealthier) person. Instead, Congress chose the easy, albeit unlawful, route and outsourced this decision to the executive agency, which results in the constitutional absurdity of a private entity condemning private land using legislative power. What fate is that but the one our Founders rejected? Section 324 does nothing to address these unlawful delegations in the NGA; it merely instructs courts to ignore environmental laws and rubber stamp permits for MVP.

Oddly, as concerns *only* Count III, in *PennEast*, the 5-4 majority implicitly reasoned that Congress *can* delegate its eminent domain power to a pipeline company. But that particular issue, though identified by the Court, was hardly addressed by the parties. 141 S. Ct. at 2262. The parties, instead, focused on Eleventh Amendment immunity, not the delegation of eminent domain power to private parties. Only after the majority reinterpreted the delegation issue as the same one identified in Count III here did it uphold that delegation by a single vote. All other precedent, before and after, strictly prohibits delegations of legislative power to private entities. Eminent domain is, and always has been, legislative power. *See, e.g.,* I William Blackstone, Commentaries on the Laws of England, *135. Were it not, Congress could not delegate it at all. MVP—a private party—cannot wield legislative power. If Congress wants to seize land using eminent domain, Congress must exercise its own legislative power to seize the land. FERC's experts can propose the best route that inflicts the least amount of environmental harm, minimizes costs, and

maximizes efficiency. But only Congress can exercise eminent domain power to take the land. The Founders adopted this restriction to protect private property and secure individual liberty.

II. THE OTHER FACTORS STRONGLY FAVOR LANDOWNERS

a. Landowners will suffer irreparable harm in the absence of injunctive relief

It is well settled that a continuing trespass on real property causes "irreparable injury" that favors injunctive relief. *See, e.g., Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 62 (2008). Even where damages to the real property are theoretically "quantifiable," injunctions are *still* appropriate to protect landowners. *Blue Ridge Poultry & Egg Co. v. Clark,* 211 Va. 139 (1970). "The doctrine of 'balancing of equities' must be viewed in light of our long-standing pronouncement that **a private landowner is to be protected for injuries** he may sustain '**even though inflicted by forces which constitute factors in our material development and growth**.'" *Id*. at 144 (emphasis added).

D.C. Circuit courts "have broadly held that '[w]hen land is the subject matter of the agreement, the legal remedy is assumed to be inadequate, since **each parcel of land is unique**." *Patriot-BSP City Ctr. II v. U.S. Bank Nat'l Ass'n*, 715 F. Supp. 2d 91, 96 (D.D.C. 2010) (emphasis added) (quoting *Monument Realty LLC v. Wash. Metro. Area Transit Auth.*, 540 F. Supp. 2d 66, 75 (D.D.C. 2008)). "'It is settled beyond the need for citation … that a given piece of property is considered to be unique, and **its loss is always an irreparable injury**.'" *Peterson v. District of Columbia Lottery & Charitable Control Bd.*, 1994 U.S. Dist. LEXIS 10309, *14 (D.D.C. 1994) (emphasis

added) (quoting *United Church of the Medical Ctr. v. Medical Ctr. Comm'n,* 689 F.2d 693, 701 (7th Cir. 1982)). *See also S. Utah Wilderness Alliance v. Allred*, 2009 U.S. Dist. LEXIS 30664, *8 (D.D.C. 2009) ("Because of the **threat of irreparable harm** to public land if the leases are issued, the balancing of equities also tips in favor of the plaintiffs") (emphasis added).

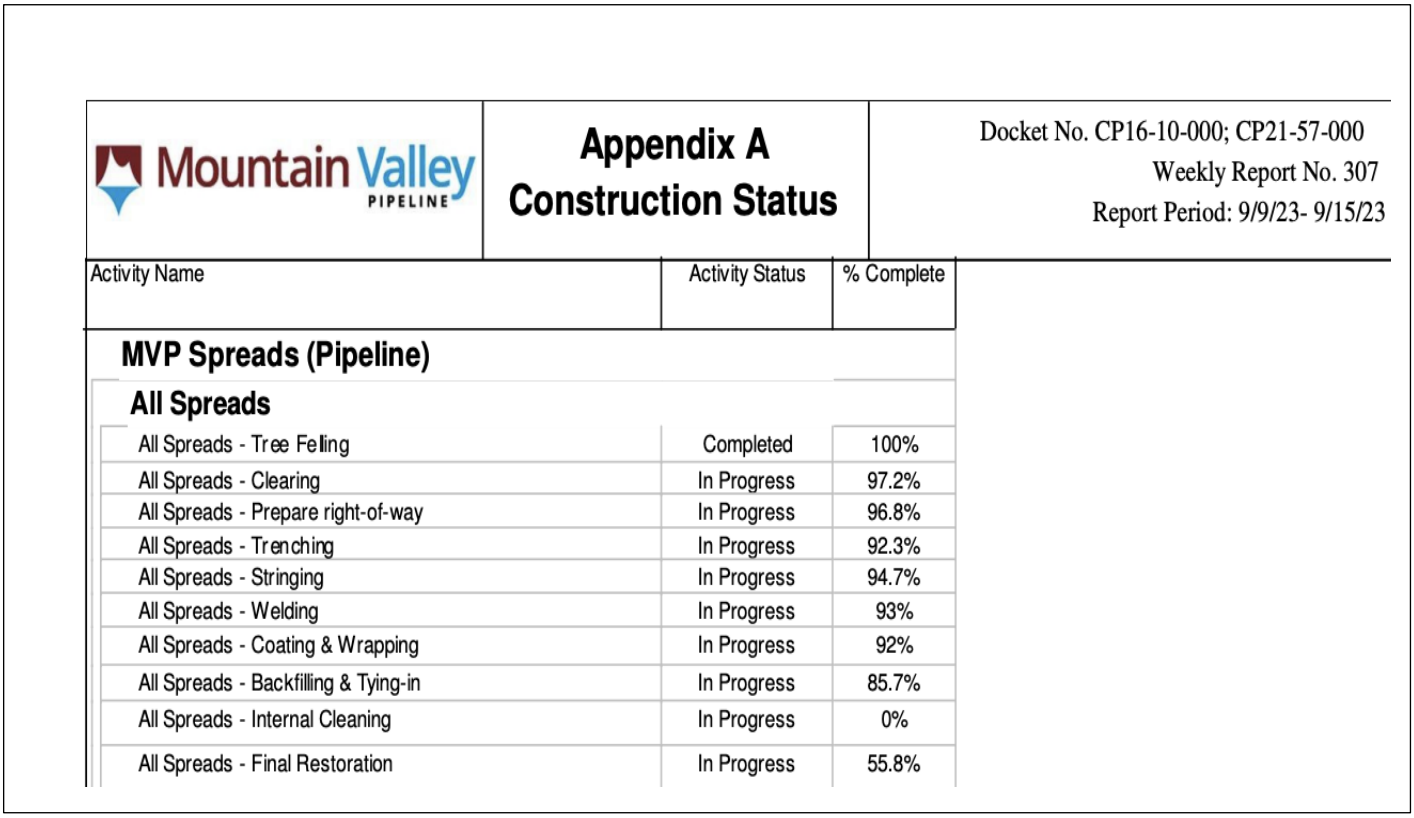
It is thus beyond dispute that the ongoing trespass on Landowners' private property is causing irreparable harm. MVP is blasting, digging, clearing trees, and trespassing on the land using the unlawful eminent domain power granted via the NGA. *See* **Exhibit H**, Declarations of Cletus Bohon and Aimee Hamm. MVP's presence on the land is made possible only via the NGA's unlawful grant of legislative powers to FERC and MVP. To prevent further irreparable harm, this Court should temporarily enjoin MVP from using the power of eminent domain to access Landowners' property until these serious constitutional issues are adjudicated.

b. The balance of equities tips in favor of Landowners and against Respondents who have intentionally stalled adjudication of the merits of this case

MVP will no doubt claim its project is "94% complete" and any hindrance to construction—even if limited to just these three parcels—will delay the project's completion.[8] That is not true. MVP has been claiming the project was 94% complete for over two years! *See*, *e.g.*, **Exhibit I** (MVP's Progress Report from September 2021 claiming "MVP's total project work is nearly 94% complete"). MVP has either made no progress at all in two years or its evaluations of its progress are wholly unworthy

[8] *See* https://www.bloomberg.com/features/2023-mountain-valley-pipeline-west-virginia

of belief. As of September 2023, per its **own disclosures**, MVP's total completion to final restoration is actually **only 55.8%**.[9]



Mountain Valley PIPELINE

Appendix A
Construction Status

Docket No. CP16-10-000; CP21-57-000
Weekly Report No. 307
Report Period: 9/9/23- 9/15/23

Activity Name	Activity Status	% Complete
MVP Spreads (Pipeline)		
All Spreads		
All Spreads - Tree Felling	Completed	100%
All Spreads - Clearing	In Progress	97.2%
All Spreads - Prepare right-of-way	In Progress	96.8%
All Spreads - Trenching	In Progress	92.3%
All Spreads - Stringing	In Progress	94.7%
All Spreads - Welding	In Progress	93%
All Spreads - Coating & Wrapping	In Progress	92%
All Spreads - Backfilling & Tying-in	In Progress	85.7%
All Spreads - Internal Cleaning	In Progress	0%
All Spreads - Final Restoration	In Progress	55.8%

See Mountain Valley Pipeline, App. A: Construction Status, FERC e-library, Dkt. No. CP16-10-000; CP21-57-000 (Filed September 22, 2023).[10] Yet, in July, MVP told this Court it needed to urgently lift the Fourth Circuit stays because MVP only needed "three more months" of "uninterrupted" work to complete the project.

When MVP says, "We are 94% complete," it is not using the term "complete" as ordinarily understood by an average layperson, investor, reporter, or judge. To the

[9] https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20230922-5175&optimized=false
[10] Available at https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20230922-5175&optimized=false

average reader, 94% complete sounds like the *entire* project, from start to finish, is almost done. In reality, that number is much lower. And the most difficult work, in the Jefferson National Forest and stream crossings, is nowhere close to "done." The other (higher) numbers are misleading; they represent *aspects* of the project, such as tree clearing, welding, or miles of pipe laid on the ground, not total completion rate.

Indeed, only two days after Landowners first requested a limited injunction on October 16, 2023, questioning MVP's dubious progress reports, it panicked and admitted to the U.S. Securities and Exchange Commission that the project would not be done this year after all (despite its recent contrary representations to this Court and the glaring absence of any further environmental obstacles in the Fourth Circuit). *See* MVP Emergency Application to U.S. Supreme Court at 27 (MVP complaining that the pipeline could not become operational in 2023 **unless** this Court immediately intervened to lift the stays: "With approximately **three months of work remaining, the Pipeline will not be operational** in 2023 **unless MVP may begin uninterrupted construction by July 26, 2023.")** (emphasis added). Relying on these "facts," this Court lifted the stays. Construction resumed, *uninterrupted*, just as MVP requested. The "activists" in the Fourth Circuit were silenced. But MVP has now admitted to the SEC its previous representations were incorrect. It appears MVP was confused, at best, when it told this Court in July that the project was "already mostly finished." MVP's Emergency Application to Vacate

Stays at 2 (July 14, 2023). MVP is now being investigated[11] by at least two nationally renowned firms for misleading investors about its actual completion progress.

What *is* true is that MVP has *sped up* construction on the Bohon and Hamm parcels.[12] **Exhibit H**, Second Declarations of Cletus Bohon & Aimee Hamm. Their land is being irreparably damaged every day while MVP and FERC have engaged in various delay games to stall adjudication of this Non-Delegation Doctrine case.

MVP has plenty of work left to do without disturbing Landowners' three properties. Given the serious constitutional issues presented here and their wide-ranging impact on individual liberties, preserving the status quo on these three parcels until these issues are adjudicated is in the public interest.

Lastly, MVP and FERC told the D.C. Circuit they needed "months" to brief these complex constitutional issues. FERC proclaimed the constitutional issues involved here are so important and complex that the U.S. Government needed to join forces and coordinate its defense with multiple federal agencies. Congress has even stepped in now to defend §324. Since April, MVP has requested multiple delays to file briefs, each time inventing a new excuse for the delay. Yet, when the Fourth Circuit stopped pipeline construction several months ago, MVP drafted and filed a **35-page**

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[11] *See* Shareholder Alert (Pomerantz LLP) Available at: https://www.prnewswire.com/news-releases/shareholder-alert-pomerantz-law-firm-investigates-claims-on-behalf-of-investors-of-equitrans-midstream-corporation---etrn-301977563.html; *see also* Class Action Alert (Bronstein, Gewirtz & Grossman, LLC) Available at: https://www.accesswire.com/796560/equitrans-midstream-corporation-etrn-investigation-bronstein-gewirtz-grossman-llc-encourages-investors-to-seek-compensation-for-alleged-wrongdoings

[12] The pipe is already buried on the Floras' land, which is now being used for access. The Floras are awaiting trial on just compensation, which has again been delayed to summer 2024. The Bohons did not even get a trial on just compensation; the district court excluded Cletus's evidence and granted summary judgment to MVP on the value of Cletus's land, an issue currently on appeal to the Fourth Circuit.

Emergency Motion to this Court only ***three days later***—a feat of speed Landowners' counsel is plainly unable to accomplish. *Compare dates of* Order Granting Stay Pending Appeal, No. 23-1592 (4th Cir. **July 10, 2023**) *and* Order Granting Stay Pending Appeal, No. 23-1384 (4th Cir. **July 11, 2023**) *with* MVP's Emergency Application to Chief Justice Roberts to Vacate the Stays (**July 14, 2023**). Likewise, when Landowners filed their Motion for an Emergency Injunction in the D.C. Circuit on October 16, 2023, MVP and FERC once again remarkably drafted and filed briefs in opposition within ***four days***—right after claiming they needed **another month** to research the issues. MVP and FERC only need "more time" when the delay is convenient. Otherwise, they can draft complex motions in a matter of days.

c. Injunctive relief pending review of serious constitutional questions is in the public interest.

Given the grave nature of these structural constitutional issues, an injunction is in the public interest. As Justice Kavanaugh observed when considering an injunction request, the public is not served by allowing agencies to continue wielding unlawful powers derived from an unconstitutional structure:

> The public interest is not served by letting an unconstitutionally structured agency continue to operate until the constitutional flaw is fixed. And in this circumstance, **the equities favor the people whose liberties are being infringed, not the unconstitutionally structured agency.**

Doe Co. v. Cordray, 849 F.3d 1129, 1137 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (emphasis added) (opining that an injunction was appropriate where petitioner claimed it was being regulated by "an unconstitutionally structured agency"). This Court has likewise observed that plaintiffs are not required to "bet the farm" in order

to challenge the constitutionality of the agency's enabling legislation. *Id.* at 1136 (quoting *Free Enterprise Fund*, 561 U.S. at 490). Here, the harm is much worse than in a typical 'bet the farm' scenario because Landowners are not merely *risking* the farm. They are literally *losing* the farm pursuant to an unconstitutional structure that has delegated overly broad—and extremely coercive—legislative powers to an unelected agency to unilaterally decide when a private company can condemn private land. Thus, unlike a typical 'bet the farm' scenario where plaintiffs are merely incurring the *risk* of irreparable harm, Landowners are *guaranteed* irreparable harm absent an injunction.

Moreover, even when *eventually* completed, this pipeline will not affect the supply of natural gas in this country for several years. The Northeast, Mid-Atlantic, and Southeast regions are already amply supplied by existing pipeline infrastructure including the Transcontinental Gas Pipe Line ('Transco') system. Even if completed today, MVP is not capable of increasing the supply for at least several years because the Transco system it will connect to is already fully subscribed.

Given the amount of work left on the project, the only irreparable injury here is to Landowners whose land is being damaged every day while MVP and FERC take turns inventing excuses to stall this Non-Delegation Doctrine case.

In July, MVP told this Court the project was almost finished. Without the Fourth Circuit, the project would be done in "three months," they said. In October, MVP admitted to the SEC it would not be done any time soon. MVP's estimates are plainly unworthy of belief.

In the meantime, MVP has hired an army of lawyers to delay this Non-Delegation Doctrine case until after the project is eventually completed. The D.C. Circuit has allowed it, blessed it, and effectively rewarded FERC and MVP for this brazen gamesmanship. They have unleashed the full wrath of the U.S. Government upon the Bohons of Poor Mountain, the Hamms of Bent Mountain, and the Floras of Boones Mill, with the legislative and executive branches uniting to usurp the judiciary's power. A greater concerted effort King Henry VIII could not have proclaimed.

CONCLUSION

From the Bronx to the Appalachians, from the inner cities to John Denver's country roads, these forced takings have been dismal failures. As Justice O'Connor predicted, they have resulted in abandoned malls and failed projects, all in the name of "efficiency" and "progress."

The Constitution does not contort itself to achieve progress, pipelines, or profit margins. The Constitution does not account for such concerns. But it cares a great deal about individual liberty. That liberty lives in Cletus, in *his* rights, and in *his* land. That liberty is at stake here. Cletus represents all of us—the average American—whose will the Constitution embodies and whom the judiciary is designed to protect. That, after all, is why the Framers dispersed our federal government's powers. And where the Constitution reigns supreme, neither the legislature nor the executive, working separately or in tandem, can usurp that duty.

For the reasons stated in this application, Landowners meet the requirements for limited injunctive relief narrowly tailored to halt further irreparable harm and preserve the status quo on their three parcels of land pending adjudication of these serious constitutional issues.

Respectfully submitted,

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