Nos. 18-1584 and 18-1587

In The Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL.,

Petitioners,

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION, ET AL.,

Respondents.

ATLANTIC COAST PIPELINE, LLC,

Petitioner,

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION, ET AL.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICUS CURIAE* MOUNTAIN VALLEY PIPELINE, LLC SUPPORTING PETITIONERS

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QUESTION PRESENTED

This case involves the intersection of three federal public lands laws—the Weeks Act, National Trails System Act, and Mineral Leasing Act—and Congress's plenary Property Clause authority to choose which Executive Branch department will have jurisdiction over certain portions of the federal public lands.

The 1911 Weeks Act authorized the federal acquisition of private forest lands in the eastern United States, to be "permanently reserved, held and administered" by the Secretary of Agriculture "as national forest lands." 16 U.S.C. § 521. The 1968 National Trails System Act ("Trails Act") designated the Appalachian Trail as a national scenic trail to "be administered primarily as a footpath by the Secretary of the Interior," 16 U.S.C. § 1244(a)(1), but did not "transfer among Federal agencies any management responsibilities established under any other law for federally administered lands" traversed by a designated trail, *id.* § 1246(a)(1)(A). The Mineral Leasing Act (MLA), as amended in 1973, authorizes the "Secretary of the Interior or appropriate agency head" to grant rights-of-way through any federal lands "for pipeline purposes for the transportation of oil [and] natural gas." 30 U.S.C. § 185(a). "Federal lands" means "all lands owned by the United States except lands in the National Park System." *Id.* § 185(b)(1). The question presented is:

Whether the Forest Service has authority to grant rights-of-way under the Mineral Leasing Act through lands traversed by the Appalachian Trail within national forests.

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INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, Mountain Valley Pipeline, LLC ("Mountain Valley") submits this brief as *Amicus Curiae* in support of the Petitioners United States Forest Service ("Forest Service"), et al. in No. 18-1584 and Atlantic Coast Pipeline, LLC ("Atlantic Coast") in No. 18-1587.[1]

Mountain Valley is developing the Mountain Valley Pipeline ("MVP" or "Project"), a 303.5-mile natural gas pipeline from northeastern West Virginia to southern Virginia. The route crosses the Appalachian National Scenic Trail ("Appalachian Trail" or "Trail") along the West Virginia-Virginia border within the Jefferson National Forest, which the Forest Service administers.[2] The federal statutory regime that governs the Atlantic Coast Pipeline ("Atlantic") also governs MVP.

MVP would connect areas of natural gas production in the Appalachian Basin with growing markets in the Northeast, Mid-Atlantic, and Southern United

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[1] Counsel for all parties in Nos. 18-1584 and 18-1587 have provided written consent to this filing and were given proper timely notice of *Amicus Curiae's* intent to file a brief under Rule 37.2. Pursuant to this Court's Rule 37.6, no person or entity other than Mountain Valley and its counsel authored this brief in whole or in part, and Mountain Valley has exclusively funded the brief's preparation.

[2] Bureau of Land Mgmt., Mountain Valley Pipeline Project Record of Decision, at v (Dec. 20, 2017) ("MVP ROD"), https://eplanning.blm.gov/epl-front-office/projects/nepa/75521/130130/158226/BLM_MVP_Record_of_Decision.pdf.

States.[3] MVP is designed to meet rising demands for natural gas and alleviate constraints on natural gas production and transportation.[4] The Federal Energy Regulatory Commission (FERC), in cooperation with the Forest Service and other federal agencies, prepared an environmental impact statement for MVP pursuant to the National Environmental Policy Act (NEPA), and issued a Certificate of Convenience and Public Necessity for the Project in October 2017.

FERC's approval provides Mountain Valley the legal right to construct and operate MVP on a delineated route and requires Mountain Valley to take steps to protect public safety and the environment.[5] FERC's approval specifies that Mountain Valley is to obtain and comply with the terms of a right-of-way to cross the Jefferson National Forest, including the portion traversed by the Appalachian Trail. The same MLA authority that is the subject of the Petitions provides Mountain Valley its right-of-way to cross the Jefferson National Forest and the Trail.[6]

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[3] *See* Fed. Energy Regulatory Comm'n, Mountain Valley Pipeline Project Final Environmental Impact Statement ES-2, 1-8, 2-3 (2017) ("MVP FEIS"), https://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20170623-4000.

[4] MVP FEIS 1-8, 1-9; MVP ROD, Attach. B (Plan of Development) 1-5, 1-6, https://eplanning.blm.gov/epl-front-office/projects/nepa/75521/130388/158585/Attachment_B:_Plan_Of_Development.pdf.

[5] MVP ROD 5.

[6] MVP's right-of-way also includes a small area under the jurisdiction of the U.S. Army Corps of Engineers. The Department of the Interior's Bureau of Land Management (BLM) issued MVP's right-of-way in consultation with the Forest Service

Conservation groups did not challenge the statutory authority for MVP's Trail crossing right-of-way.[7] By the time the Fourth Circuit issued the decision that Petitioners ask to be reviewed, Mountain Valley had completed roughly 67 percent of the Project, an investment of roughly $3 billion. Mountain Valley had prepared to drill a borehole under the Trail but suspended its plans after the decision below. The MVP Trail crossing remains unfinished today—a key missing link for the almost-completed MVP project.

This Court's decisions on the Petitions will directly affect Mountain Valley. Petitioners in No. 18-1584 correctly note that any alternatives for federal approval to cross the Trail are uncertain. Pet. 27, n.15 (No. 18-1584).[8] Every alternative route crosses the Trail. All

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because the MLA assigns BLM responsibility to issue rights-of-way involving lands under jurisdiction of two or more federal agencies. MVP ROD, at v, 1.

[7] Conservation groups did challenge MVP's right-of-way on other MLA grounds and associated Forest Service forest plan revision and NEPA grounds. *See Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 604-05 (4th Cir. 2018). The Fourth Circuit rejected most of the groups' arguments but did identify three procedural flaws in the agencies' actions. The court vacated the BLM and Forest Service decisions and remanded for proceedings consistent with the court's decision. *Id*. at 587, 596, 601-06.

[8] Mountain Valley owns land adjacent to the Jefferson National Forest in Virginia that the Trail crosses, which appears to be the only remaining private parcel where the Trail is not protected from commercial development through a conservation easement or federal ownership. Both the Forest Service and National Park Service have the authority under their respective jurisdictions to exchange real property interests with Mountain Valley. Both agencies, pursuant to congressional direction, have

alternatives would require Mountain Valley to restart the federal approvals process, guaranteeing additional years of delay and uncertainty. All alternative routes studied in the MVP EIS demonstrated greater degrees of environmental or safety risk.[9] No alternative is available to Mountain Valley that is not likely to be challenged before the Fourth Circuit by the same conservation groups that are parties to this action or those that challenged MVP.

BACKGROUND

1. As approved by the Forest Service and FERC, MVP would cross under the Trail footpath on the forested ridge marking the Virginia-West Virginia border, west of Roanoke, Virginia. The Forest Service required Mountain Valley to construct a 600-foot-long bore roughly 80 feet beneath the ridgetop and Trail. By placing the pipeline at this depth, the Forest Service preserved a football field-length (300-foot) forested buffer to each side of the Trail. Drilling equipment would temporarily be placed in pits downslope and not visible from the Trail. All construction-related impacts,

worked for decades to obtain permanent protection for the entirety of the Trail. However, the uncertainty resulting from the Fourth Circuit's decision regarding agency jurisdiction has created a further obstacle to completing a land exchange that would protect the Trail while providing a right-of-way for MVP.

[9] *See* MVP FEIS § 3.0; MVP ROD 23-27.

such as noise, would be temporary, and no construction would occur on the footpath.[10]

The Forest Service and BLM were well on their way to addressing the Fourth Circuit's remand regarding MVP's approvals to cross the Jefferson National Forest when the Fourth Circuit issued the decision below. Mountain Valley was not a party to that proceeding, but the decision had the same practical effect for MVP as it did for Atlantic—no federal agency could lawfully issue an MLA right-of-way to either pipeline to cross the Trail on national forest lands.

2. The Appalachian Trail was conceived by private individuals and hiking clubs in the 1920s as a footpath from Maine to Georgia.[11] With the support of the Forest Service, the George Washington and Jefferson national forests and six other national forests along the Appalachians have included segments of the Trail since its beginning. The National Park Service ("Park Service") supported Trail construction in Shenandoah and Great Smoky Mountains national parks.

Groups of private volunteers, including numerous hiking and outdoor recreation-oriented clubs along the eastern seaboard, took responsibility for construction

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[10] MVP ROD 27.

[11] *See* Nat'l Park Serv., U.S. Dep't of the Interior, *Trails for America: Report on the Nationwide Trail Study* 32-33 (1966) ("*Trails for America*"), https://www.nps.gov/noco/learn/management/upload/trails-for-america-1966.pdf.

and maintenance of local trail segments.[12] The Forest Service and the Park Service dedicated significant effort to trail-building under various Depression-era public works programs.[13] By the time the Trail was completed in 1937, more than 700 miles of the 2,200-mile footpath had been constructed on federal lands, mostly national forests. The majority of the newly completed Appalachian Trail, however, remained on private or state lands.[14]

The Park Service and the Forest Service were both proponents of the Trail throughout its construction and worked cooperatively to ensure maintenance and protection of the Trail after its completion.[15] Despite the federal land managers' important roles, most responsibility for trail management remained with the local trail clubs.[16]

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[12] *Trails for America*, 32-33; *see generally* Appalachian Trail Conservancy, *The Appalachian Trail: Celebrating America's Hiking Trail* 15-38 (2012).

[13] Sally K. Fairfax, *Federal-State Cooperation in Outdoor Recreation Policy Formation: The Case of the Appalachian Trail* 26-27 (1974) (Ph.D. dissertation, Duke University). Sally Fairfax is a professor of forest policy, emerita, at the University of California, Berkeley, College of Natural Resources, where she was the Henry J. Vaux Distinguished Professor of Forest Policy. She is the co-author of what for years was the standard college text on United States forest and rangelands policy. *See* Samuel Trask Dana & Sally K. Fairfax, *Forest and Range Policy* (McGraw-Hill Series in Forest Resources) (1980).

[14] Fairfax, *Federal-State Cooperation*, *supra* note 13, at 27.

[15] *See id.* at 26-27.

[16] *See Nationwide System of Trails: Hearing on S. 827 Before the Comm. on Interior and Insular Affairs*, 90th Cong. 66 (1967)

Demand for outdoor recreation rebounded after World War II. Close to major eastern cities, the Appalachian Trail drew increasingly heavy use by hikers. Commercial and residential developments on private forest and farm lands used by or visible from the Trail threatened to displace the Trail and damage hikers' experiences. Throughout the 1950s and 1960s, Trail advocates sought to win federal support for land acquisition and other related measures to protect and improve the Trail.[17] Discord and lack of coordination among the many different trail clubs, private landowners, and various agencies regarding the footpath revealed the need for a central entity to perform a unifying, coordinating role, especially with respect to government acquisition and protection of private lands.[18]

3. The hiking advocates' efforts culminated with passage of the National Trails System Act in 1968. The Trails Act designated the Appalachian Trail as one of the first national scenic trails. The Trails Act sought to provide a mechanism for coordination among and

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(statement of Edward Garvey, Secretary Appalachian Trail Conference).

[17] Fairfax, *Federal-State Cooperation*, *supra* note 13, at 31-32.

[18] *See*, *e.g.*, *Nationwide System of Trails Hearing*, *supra* note 16 at 66 (noting that most of the problems on the public land the Trail crosses "have resulted from lack of coordination among most agencies"); Fairfax, *Federal-State Cooperation*, *supra* note 13, at 31-33 (discussing developments encroaching on the Trail and discord among states, private land owners, trail clubs regarding management and access to the Trail).

additional resources to the numerous parties involved in maintenance of the Trail, providing that the Trail "shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture," 16 U.S.C. § 1244(a)(1). The Secretary of the Interior then delegated Trails Act responsibilities to the Park Service. While providing for inter-agency coordination, the Trails Act states that it does not "transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System," *id*. § 1246(a)(1)(A).

4. Today, the Appalachian Trail passes through 14 states, eight national forests (that, together, host 1,015 miles, or 47 percent of the trail); six national parks; two national wildlife refuges; land owned by the Smithsonian Institution; and 67 state-owned land areas.[19] Roughly half of the Trail remains on non-federal lands, where all but a small segment is protected under conservation agreements.

[19] Nat'l Parks Conservation Ass'n, *Appalachian National Scenic Trail: A Special Report* 1 (March 2010), https://www.nps.gov/appa/learn/management/upload/AT-report-web.pdf.

SUMMARY OF ARGUMENT

The decision below presents a question of exceptional importance for public lands administration and Congress's exercise of its plenary Property Clause power to decide how to manage federal lands and resources. *See Light v. United States*, 220 U.S. 523, 536-37 (1911) (upholding federal government's authority to establish forest reserves administered by Secretary of Agriculture). As this Court stated over a century ago, "it is not for the courts to say how" the national forests and the nation's public lands "shall be administered. That is for Congress to determine." *Id*.

By holding that the Appalachian Trail segment crossed by Atlantic consists of "lands in the National Park System," Pet. App. 55a, 57a (No. 18-1584), the Fourth Circuit not only misapplied the plain language of the law, but also usurped Congress's exclusive constitutional prerogative to allocate among federal departments jurisdiction over federal lands. The Fourth Circuit erroneously conflated the Trail-related coordination and administrative role that Congress assigned to the Secretary of the Interior—and which the Secretary later delegated to the Park Service—with the comprehensive land management and jurisdictional responsibility Congress assigned to the Secretary of Agriculture, acting through the Forest Service.

The Fourth Circuit's decision directly contradicts the Trails Act's recognition that the federal agency administering the lands over which a national trail passes may be different than the agency charged to

administer that trail. It also contradicts Congress's Weeks Act mandate that the national forest lands crossed by MVP and Atlantic would be "permanently reserved, held and administered as national *forest*," not national *park*, lands. 16 U.S.C. § 521 (emphasis added).

The Forest Service and Park Service had for over 50 years prior to the circuit court's decision consistently interpreted the Trails Act to not alter the Forest Service's jurisdiction. Congress chose to promote interagency and stakeholder coordination, but did so in a way that maintained the Department of Agriculture's jurisdiction. Congress never designated the strips of national forest lands used by the Trail as national park lands. Congress simply assigned to the Interior Secretary the responsibility to acquire lands and coordinate among the government agencies and trail clubs involved in managing various Trail segments.

REASONS WHY THE PETITIONS SHOULD BE GRANTED

Rather than applying the plain text of the Trails Act, which would harmonize it with the Weeks Act, the Fourth Circuit's decision found conflict where there is none. The Fourth Circuit's opinion usurps Congress's plenary Property Clause power and imposes a result that conflicts with a half-century of agency practice. *See* Pet. at 24-25 (No. 18-1587); Pet. at 19-21 (No. 18-1584). The Fourth Circuit's decision contradicts

the plain language of the Weeks Act and Trails Act and Congress's consistent record of careful, deliberate systematizing of departmental jurisdiction over public lands. Congress has been especially deliberate when deciding how to assign jurisdiction over public forest lands between national forests and national parks. National forests are managed for utilitarian, "multiple use" purposes. National parks are managed for preservation.

The Fourth Circuit's erroneous interpretation, if not addressed by this Court, will create broad uncertainty over public lands management and impose significant risks on Atlantic, MVP, and existing and planned energy infrastructure well beyond the sites, projects, and parties involved here. The Mineral Leasing Act provides the principal federal authority for granting oil and gas pipeline rights-of-way on federal public lands. The Forest Service emphasizes correctly that the Trail-crossing issue is the only aspect of the decision below that cannot be addressed by further agency analysis, factual review, public notice and comment, or clarification. *See* Pet. 13-14 (No. 18-1584). This critical point applies equally to MVP. If allowed to stand, the decision below eliminates federal MLA authority to grant or renew rights-of-way for gas pipelines serving the millions of Americans living along the eastern seaboard if the pipeline crosses the Trail, a court-erected barrier from central Maine to north Georgia.

I. The Appalachian Trail Segment Crossed By The ACP Project Is Not "Land In The National Park System" Under The Mineral Leasing Act.

The Forest Service used its management discretion eight decades ago to approve and assist with construction of the footpath, signs, and shelters on national forest lands to help create the Appalachian Trail. But it did not transfer the lands traversed by that footpath to the Park Service. Neither did the Trails Act.

At times, the Park Service has characterized the Appalachian Trail as a unit of the National Park System for its internal labeling purposes. *See*, *e.g.*, Pet. App. 55a (No. 18-1584). And some segments of the Trail are on lands inside national parks. But there is no basis in the law for concluding that the entire 2,200-mile footpath has been transformed into "lands in the National Park System" by a label. *See* 54 U.S.C. §§ 100102, 100501. The term is a convenient administrative catchall, evident in the fact that Park System "units" often include areas of non-federal ownership or areas under other agencies' jurisdictions. The Trail corridor contains a variety of areas administered by state and federal agencies and local entities.[20]

The Trail at the locations to be crossed by Atlantic and MVP is a congressional overlay of a trails system use and footpath on national forest land, but it does not change the character or jurisdiction of that land. The

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[20] Nat'l Parks Conservation Ass'n, *Appalachian National Scenic Trail: A Special Report* 3 (March 2010).

place remains national forest land. The inter-agency and stakeholder cooperation for the Trail coordinated by the Secretary of the Interior is a procedural requirement of the Trails Act, not a reallocation of land management jurisdiction from the Department of Agriculture to the Department of the Interior.

A. Statutory Background.

1. The National Forest System.

In 1891, Congress authorized the President to "set apart and reserve . . . public land bearing forests . . . as public reservations." Forest Reserve Act of 1891, ch. 561, § 24, 26 Stat. 1103 (codified at 16 U.S.C. § 471 (repealed 1976)). In the Organic Administration Act of 1897, Congress provided that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber." Organic Administration Act of 1897, ch. 2, § 1, 30 Stat. 34 (codified at 16 U.S.C. § 475). In 1905, Congress transferred jurisdiction over the national forests from the Department of the Interior to the Department of Agriculture. Forest Transfer Act of 1905, ch. 288, § 1, 33 Stat. 628 (codified as amended at 16 U.S.C. § 472). The Forest Transfer Act directs that "the Department of Agriculture shall execute . . . all laws affecting public lands heretofore or hereafter reserved" as forest reserves under the 1891 Act. 16 U.S.C. § 472. These acts, initially focused on public lands in the western United

States, established the foundation of the current national forest system. *See* 36 C.F.R. § 200.3(b)(2).

The 1911 Weeks Act then authorized the Secretary of Agriculture to acquire private lands to establish national forests in the eastern United States. Act of Mar. 1, 1911, ch. 186, § 9, 36 Stat. 962, § 6 (codified at 16 U.S.C. § 515).[21] Congress also directed that those lands be "permanently reserved, held, and administered as national forest lands under the provisions of" the 1891 Act as supplemented. 16 U.S.C. § 521; *see also id*. § 521a. Both the George Washington and Jefferson national forests were among the first national forests established pursuant to these authorities.[22]

From the beginning, national forests were to be managed for "multiple use," diverse public purposes including commercial activities such as timber harvest, mining, grazing, and energy development. *See*, *e.g.*, *United States v. New Mexico*, 438 U.S. 696, 706-09 & n.18 (1978); *United States v. Grimaud*, 220 U.S. 506, 515 (1911); Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-531; Charles F. Wilkinson & H.

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[21] *See also* Harold K. Steen, *The U.S. Forest Service: A History* 122-29 (1976) (history of the Weeks Act).

[22] *See* Proclamation No. 1448, 40 Stat. 1779 (1918) (establishing the Shenandoah National Forest); Exec. Order No. 5867 (June 28, 1932) (renaming the Shenandoah National Forest the George Washington National Forest); Proclamation No. 2165, 1 Fed. Reg. 227, 227-29 (Apr. 24, 1936) (establishing the Jefferson National Forest); *see also* Forest Serv., U.S. Dep't of Agric., *George Washington National Forest: A History* 11, 15 (1993), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3832787.pdf.

Michael Anderson, *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1, 20-23, 53-60 (1985).

Congress has adjusted the Forest Service's mission over time, but the mission has always included the responsibility to use the agency's wide discretion to make land and resource decisions that balance among various, often competing uses. When Congress decides to require the Forest Service to depart from multiple-use principles in order to exclude forest lands from commercial uses, Congress does so by specific direction, for instance by designating that certain areas be managed as national forest wilderness, including various locations that include the Trail footpath,[23] none of which are crossed by Atlantic or MVP.

2. The National Park System.

Congress established the National Park System to preserve, not develop, federal lands and resources. The Park Service's preservation mission is very different from the Forest Service's utilitarian mission.[24] In 1916,

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[23] *E.g.*, Act of Nov. 9, 2000, Pub. L. No. 106-471, 114 Stat. 2057 (designating the Priest Wilderness Area in Virginia); Act of Oct. 30, 1984, Pub. L. No. 98-586, 98 Stat. 3105 (designating the Thunder Ridge, Mountain Lake, Peters Mountain, Beartown, Little Wilson Creek, Lewis Fork, Priest Wilderness Areas in Virginia).

[24] *See*, *e.g.*, Joseph L. Sax, *Mountains Without Handrails, Reflections on the National Parks* 5-9 (1980) (describing early history and development of federal national parks policy); *see generally* John Ise, *Our National Park Policy: A Critical History* 185-95 (1961) (history of national park policy during the period preceding and accompanying completion of the Appalachian Trail); Elmo R.

Congress provided that the "fundamental purposes of the said parks, monuments, and reservations . . . is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same . . . unimpaired for the enjoyment of future generations." Nat'l Park Serv. Organic Act of 1916, ch. 408, § 1, 39 Stat. 535 (codified as amended at 54 U.S.C. § 100101).

National park lands are to be preserved and, where possible, enjoyed. But for the national forests, Congress has long emphasized that "there must always be . . . as primary objects and purposes the utilitarian use of land, of water, and of timber, as contributing to the wealth of all the people." H.R. Rep. No. 64-700, at 3 (1916).

3. The National Trails System.

The National Trails System Act seeks "to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation." 16 U.S.C. § 1241(a). The Trails Act authorized the creation of a National Trail System comprised of the national historic trails, national recreation trails, and national scenic trails. *Id.* § 1242(a).

The Trails Act designated the Appalachian Trail and the Pacific Crest Trail as the nation's first national

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Richardson, *The Politics of Conservation: Crusades and Controversies 1897-1913*, at 22-46 (1962) (history of formative public policy debates over assignment of departmental authority over federal forest lands).

scenic trails. *Id.* § 1244(a)(1). The Act delegated responsibility to coordinate administration of the Appalachian Trail to the Secretary of the Interior and gave the Secretary of Agriculture equivalent responsibility for the Pacific Crest Trail. Congress did not change the jurisdictional status of the lands over which the trails cross. As Professor Fairfax explained, "[i]rrespective of which Secretary has overall responsibility for a trail [under the Trails Act], the Secretary of the Interior is in charge when a trail crosses Park or Bureau of Land Management lands and the Secretary of Agriculture is responsible for management when a trail crosses Forest Service land."[25]

The Trails Act recognizes that a federal agency other than the agency charged with the overall administration of a *trail* may have authority and responsibility for the administration of the *lands* over which the trail traverses. The latter retains its authority to administer those lands despite the trail's presence. The statute is unambiguous: "Nothing . . . shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System." *See* 16 U.S.C. § 1246(a)(1)(A).

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[25] Fairfax, *Federal-State Cooperation*, *supra* note 13, at 58; *see also* Cong. Research Serv., R43868, *The National Trails System: A Brief Overview* 6-7 (2015).

B. When Congress Transfers Administrative Jurisdiction From The Agriculture Department's Forest Service And The Interior Department's Park Service, It Does So Explicitly.

The structure of the Trails Act consistently reflects Congress's intent that federal agency land management jurisdiction be left undisturbed. The "Secretary charged with the administration of a national scenic . . . trail may relocate segments of a national scenic . . . trail right-of-way," but only "*with the concurrence of the head of the Federal agency having jurisdiction over the lands involved*." 16 U.S.C. § 1246(b) (emphasis added). The Secretary "may issue regulations," but only "*with the concurrence of the heads of any other Federal agencies administering lands through which a . . . national scenic . . . trail passes*." *Id.* § 1246(i) (emphasis added).

Congress elsewhere consistently has been explicit when it intends to transfer jurisdiction from one federal agency to another. On the same day he signed the Trails Act, President Johnson signed legislation establishing North Cascades National Park. That contemporaneous legislation expressly transferred the administrative jurisdiction of lands from the national forest system to the National Park System:

> Federal property within the boundaries of the park and recreation areas is hereby transferred to the administrative jurisdiction of the Secretary [of the Interior] for administration by him as part of the park and recreation

> areas. *The national forest land within such boundaries is hereby eliminated from the national forests within which it was heretofore located.*

Act of Jan. 15, 1968, Pub. L. No. 90-544, 82 Stat. 926 (codified at 16 U.S.C. § 90b(a)) (emphasis added).[26]

Similarly, when establishing Great Basin National Park some years later, Congress specified that "[l]ands and waters . . . within the boundaries of the park which were administered by the Forest Service . . . prior to [the date of enactment of this Act] are hereby transferred to the administrative jurisdiction of the Secretary [of the Interior]." 16 U.S.C. § 410mm-2; *see also* 16 U.S.C. § 192b-9 (boundary adjustments for Rocky Mountain National Park).

Two examples from the Appalachian Trail area further demonstrate that when Congress puts land into a national park system unit, it says so. *See* 16 U.S.C. § 403k-1 ("Subject to valid existing rights, all lands within the boundaries of Great Smoky Mountains National Park . . . hereafter shall be a part of the

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[26] In President Johnson's remarks on signing the Trails Act, he stated that "[o]ur history of wise management of America's national forests has assisted us in designating the initial elements of the National Trails System. . . . : the Appalachian Trail and the Pacific Crest Trail." Presidential Remarks Upon Signing Four Bills Relating to Conservation and Outdoor Recreation, 2 Pub. Papers 1000, 1001 (Oct. 2, 1968). Had the Trails Act involved an extensive jurisdictional transfer of national forest system land to the Park Service for the Appalachian Trail, it would have been unusual for the President to invoke the history of America's *national forest* management as an impetus for designating the Trail.

national park and shall be subject to all laws, rules, and regulations applicable to the national park."); 16 U.S.C. § 403-3 ("Subject to valid existing rights, the lands and interests in lands which comprise section 1-A of the Blue Ridge Parkway . . . are excluded from the parkway, made a part of the Shenandoah National Park, and shall be administered in accordance with the Act of August 25, 1916 (39 Stat. 535; 16 U.S.C. 1-4).").

Such jurisdictional transfer language is conspicuously absent from the Trails Act. Simply put, had Congress intended to convert the Trail corridor lands into lands of the National Park System, it would have said so. Any uncertainty over the significance of the absence of transfer language should have been put to rest by the fact that the Trails Act lacks any of the other organizational provisions that might reasonably be expected to accompany a major change in allocation of executive branch responsibilities across eight national forests in a fourteen-state region. The Trails Act makes no mention of budget authority, personnel and property reassignment, transition schedule or process, reassignment of permits or easements. Indeed, the Trails Act does not mention the Park Service except for the purpose of maintaining a Trail map. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Three other considerations strongly reinforce the conclusion that the circuit court erred in interpreting

the Trails Act. *First*, Congress had rejected at least eight proposals to transfer the national forests to the Interior Department in the years preceding enactment of the Trails Act, and it is highly unlikely that it would have transferred national forest lands *sub silentio*.[27] *Second*, Congress has given significant consideration to the question whether the relevant portions of the George Washington and Jefferson national forests deserved enhanced protection from commercial development and has chosen not to do so, thus strongly indicating that Congress would not have done indirectly by implication what it has declined to do directly.[28] *Third*,

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[27] Ross W. Gorte, Cong. Research Serv., RL34772, *Proposals to Merge the Forest Service and the Bureau of Land Management: Issues and Approaches* CRS-14 (2008) ("Proposals to transfer the FS to DOI or the BLM to USDA, or to merge the FS and BLM (or its predecessor), date back to 1911, and have been made under Presidents Taft, Harding, Hoover, Roosevelt, Truman, Eisenhower, Nixon, Carter, and Clinton. In an attempt to improve administration of the federal lands, President Reagan proposed a substantial exchange (consolidation) of lands and personnel between the agencies, but even this more limited reorganization was prevented by Congress."); U.S. Gov't Accountability Off., GAO-09-223, *Federal Land Management: Observations on a Possible Move of the Forest Service into the Department of the Interior* 56-61 (2009); *see also* T.H. Watkins, *Righteous Pilgrim: The Life and Times of Harold L. Ickes, 1874-1952*, at 556-61, 584-91 (1990) (illustrative discussion of political divisions during President Franklin D. Roosevelt's administration related to potential transfer of national forest jurisdiction away from the Agriculture Department).

[28] Congress has considered the question whether the sections of the Trail corridor at issue here merit special protection by the Forest Service. Congress has designated numerous sections of George Washington and Jefferson national forest lands crossed by the Appalachian Trail as wilderness under the Wilderness Act

numerous major interstate gas pipelines crossed the lands used for the Trail at the time Congress approved the Trails Act.[29] The interstate pipelines were then, as today, subject to federal approval under the provisions of the Natural Gas Act. Had Congress sought to change the federal approval process for gas pipelines intersecting the path of the Trail, it would have said something, especially if the intended change amounted to a prohibition of federal rights-of-way.

II. The Circuit Court's Holding Conflicts With This Court's Decisions On Harmonizing Potentially Conflicting Statutes.

The Fourth Circuit was faced with reconciling the Trails Act with the Weeks Act to determine the applicability of the Mineral Leasing Act. The court mischaracterized the Trails Act in a way that presented an apparent conflict with the Weeks Act, which in turn vitiated the Mineral Leasing Act. The court made no

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of 1964, 16 U.S.C. §§ 1131-1136. *See*, *e.g.*, Act of Oct. 30, 1984, Pub. L. No. 98-586, 98 Stat. 3105 (designating the Thunder Ridge, Mountain Lake, Peters Mountain, Beartown, Little Wilson Creek, Lewis Fork, Priest Wilderness Areas in Virginia). Congress has never found that the national forest lands proposed to be used for the Atlantic or MVP below-grade Trail crossings warrant wilderness protection.

[29] A 1968 map prepared by the Federal Power Commission, FERC's predecessor agency charged with implementation of the Natural Gas Act, shows multiple major gas pipelines in the area of the Trail. That map is included as Attachment A. Attachment B shows the approximate route of the Trail superimposed on the map by *amicus* Mountain Valley using contemporary geographic information system data for the Trail's current route.

effort to interpret the Weeks Act in concert with the Trails Act. By failing to even try to reconcile and harmonize the statutes, the Fourth Circuit transformed "from expounder[] of what the law *is* into policymaker[] choosing what the law *should be*." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018).

When "confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). The project challengers below bore a "heavy burden"—that was never met or even considered by the circuit court—to show that Congress implicitly displaced the controlling national forest-administration statutes through the 1968 Trails Act. *See id*.

The circuit court simply *presumed* that the entire almost 2,200-mile long Trail corridor is land in the "National Park System" because the Trail was generically referenced in the record as a "'unit' of the National Park System." Pet. App. 55a (No. 18-1584). But a shorthand labeling reference, useful to agency staff responding to an internal Interior Department delegation of responsibility to implement the Trails Act, does not itself transfer administration of all lands within the Trail corridor to the Park Service, change the language of the Trails Act, or even modify the Park Service's own longstanding administrative interpretation, application, and understanding of the Trails Act as reflected in the agency's management documents and consistent practice. *See FCC v. Fox TV Stations*,

556 U.S. 502, 513-16 (2009); *see also* Pet. at 24-25 (No. 18-1587); Pet. at 19-21 (No. 18-1584).

The circuit court's approach results in an implausible reading of the Trails Act. Extending the Fourth Circuit's reasoning to other national scenic trails, such as the Continental Divide Trail, where the Trails Act assigns to the Secretary of Agriculture the trail-administration role, *see* 16 U.S.C. § 1244(a)(5), would convert narrow strips of Yellowstone, Glacier, and Rocky Mountain national parks into national forests without any congressional action. The same would hold true for the five other national scenic or historic trails administered by the Forest Service, many of which also traverse national park system lands.[30] Numerous other national scenic and historic trails are administered by the Park Service. The circuit court's decision, if applied and followed nationwide, would elevate all those trails, 42,127 miles in all, to "land in the National Park System."[31]

[30] Pacific Crest National Scenic Trail, Florida National Scenic Trail, Nez Perce National Historic Trail, Arizona National Scenic Trail, and Pacific Northwest National Scenic Trail. 16 U.S.C. § 1244(a)(2), (13), (14), (27), (30).

[31] *National Historic Trails*, Nat'l Park Serv., https://www.nps.gov/subjects/nationaltrailssystem/national-historic-trails.htm (last visited July 18, 2019). These trails range from the Ice Age National Scenic Trail (1,000 miles) to the North Country National Scenic Trail (4,200 miles), California National Historic Trail (5,600 miles), Trail of Tears National Historic Trail (5,045 miles), and many more. *Id.*

CONCLUSION

The Fourth Circuit's decision is inconsistent with the legal framework of the Trails Act, the national forest statutes, and the Mineral Leasing Act. It is inconsistent with the established agency practice of over 50 years recognizing that—as between the Forest Service and Park Service—each agency administers its own lands over which the Trail traverses. If there is to be an alteration of the prior congressional dedication of the management and jurisdiction of those national forests, that is for Congress—and not the courts—to determine.

Left unaddressed, the circuit court's decision will have significant adverse consequences, not only for Atlantic and MVP, but also for future critical infrastructure. Certiorari should be granted to clarify the status of the national forest system lands traversed by the Appalachian National Scenic Trail and to remove the barriers to Trail-crossing authorizations imposed by the Fourth Circuit.

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