No. 18-1584 & 18-1587

In the
Supreme Court of the United States

ATLANTIC COAST PIPELINE, LLC,

Petitioner,

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION; HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT; SHENANDOAH VALLEY BATTLEFIELDS FOUNDATION; SHENANDOAH VALLEY NETWORK; SIERRA CLUB; VIRGINIA WILDERNESS COMMITTEE; WILD VIRGINIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The decision below converts federal lands long understood to be Forest Service lands into lands in the National Park System. In so doing, the Fourth Circuit not only imperiled petitioner's pipeline, but erected a 2,200-mile barrier separating resources in the interior from consumers on the Atlantic Coast. Faced with the daunting task of defending this unprecedented decision, respondents prefer instead to dismiss it as advisory and of limited practical import. But there is nothing advisory about the decision below, which definitively holds that the Forest Service can no longer authorize a pipeline to cross the Appalachian Trail on lands that heretofore had always been understood as Forest Service lands. And amicus briefs filed by 16 States and 33 organizations, including several labor unions, testify to the decision's importance to this pipeline, other pipelines, non-pipeline rights-of-way, States and workers.

When respondents finally address the merits, their efforts fall flat. They suggest that the decision applies only to federal lands, but nothing in the decision or respondents' arguments is so limited. There are only two logical ways to address who controls the power to grant rights-of-way across the underlying lands traversed by the Appalachian Trail. What matters is either who owns those lands (in which case the Forest Service, States, and private parties all retain ownership and the ability to grant rights-of-way) or who administers the footpath (in which case exclusive authority to allow rights-of-way across or under the entire footpath was somehow transferred to the Park Service). But the former reasoning cannot control for

non-federal lands with the latter kicking in only for federal lands. After all, the Park Service administers the entire Trail without regard to whether it traverses federal or non-federal land and treats the whole trail as a "unit." The right answer for federal and non-federal lands alike is that the Trails Act granted the Park Service administrative authority over the entire footpath, but did not grant it ownership of all lands underlying the Trail. The Fourth Circuit's contrary ruling is profoundly wrong and enormously consequential; it fully justifies plenary review.

I. The Trails Act Does Not Transfer Land Between Agencies.

A. The Statutory Text Belies the Fourth Circuit's Interpretation.

The MLA prohibits federal agencies from granting rights-of-way for pipelines across, *inter alia*, "lands in the National Park System." 30 U.S.C. §185(b)(1). According to the Fourth Circuit, because the Park Service has been given authority under the Trails Act to "administer[]" the Appalachian Trail, Pet.App.57a (citing 16 U.S.C. §1244(a)(1)), and because, under the Park Service Act, the "System" includes "any area of land and water administered by the Secretary," 54 U.S.C. §100501, all land through which the Trail runs becomes "land in the National Park System" under which no pipeline right-of-way may be granted, Pet.App.57a. That interpretation conflates administrative responsibilities with ownership and cannot be squared with the text of the Weeks Act, the Trails Act, or the MLA.

First, the Weeks Act leaves no doubt regarding who owns the 16 noncontiguous miles of the George

Washington National Forest across which the Forest Service granted a right-of-way. More than a century ago, Congress declared that this land "shall be permanently reserved, held, and administered as national forest lands." 16 U.S.C. §521. Thus, the Forest Service Chief is the "appropriate agency head" under the MLA to grant the right-of-way here. 30 U.S.C. §185(a).

Nothing in the Trails Act expressly or impliedly repeals that permanent reservation of these lands "as national forest lands." Although the Trails Act provides that the "Appalachian 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), and empowers the Interior Secretary to obtain "rights-of-way" for the footpath over "Federal lands under the jurisdiction of another Federal agency," *id.* §1246(a)(2), it does not purport to divest those other agencies of their ownership and jurisdiction over the underlying lands. In fact, the Act prescribes the opposite, admonishing that "[n]othing contained in this chapter 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." *Id.* §1246(a)(1)(A).

That stands in stark contrast to other statutes that reallocate land ownership between agencies. When Congress takes that step, it does so explicitly, as it did in the 1968 Wild and Scenic Rivers Act, enacted the same day as the Trails Act. *See also, e.g.*, Pub. L. 89-

446, 80 Stat. 199 (1966); Pub. L. 89-72, §7, 79 Stat. 213, 217 (1965); Pub. L 88-415, 78 Stat. 388 (1964).

Respondents cannot contest the fundamental difference in approach between the Trails Act and the simultaneously enacted Rivers Act, but they counter that "Congress was no less explicit … when it amended the Organic Act to incorporate 'any area of land and water … administered' by the Park Service into one Park System." Opp.34 (quoting 54 U.S.C. §100501). But not everything the Park Service administers is Park Service land. And what the Park Service administers under the Trails Act is a footpath that traverses land owned by manifold different entities, state and federal, governmental and private. As to the footpath, all the Trails Act transfers, unlike the Rivers Act, is *administrative* responsibilities. It says nothing about land ownership. Given that silence, the Trails Act cannot be deemed to impliedly repeal Congress' clear determination in the Weeks Act that the lands at issue here are permanently reserved "as national forest lands."

The two cases respondents invoke do not suggest otherwise. The first, *Brown v. U.S. Dep't of Interior*, held that the Park Service could prevent mining in the Buffalo River because it was part of the "National Park System." 679 F.2d 747, 749-51 (8th Cir. 1982). But that holding just underscores the fundamental differences between the Rivers Act and the Trails Act, for the Buffalo River is obviously governed by the former. *See id.* at 749. *Daingerfield Island Protective Soc'y v. Babbitt*, 823 F. Supp. 954 (D.D.C. 1993), concerned the George Washington Memorial Parkway—land unquestionably *owned* by the Park

Service. *See* Exec. Order No. 6166 (June 10, 1933). Those cases thus only underscore the importance of land ownership, not just administrative authority, in determining which agency may grant rights-of-way.

Respondents insist that the Park Service's designation of the Appalachian Trail as a "unit" of the Park System is somehow dispositive as to ownership of lands or the application of the MLA. That claim is erroneous. The Park Service's designation of the Trail as a "unit" of the Park System for administrative purposes says nothing about the land underlying the footpath, which remains in the possession of whatever entity—federal, state, or private—retains title. Indeed, to the extent the Park System treats the Trail as an administrative "unit," it treats the whole Trail that way, including where it traverses state and private land. Yet not even respondents can bring themselves to argue that either the Trails Act or the Park Service's "unit" designation converted those non-federal lands into Park Service lands. In reality, system "units" often include land not owned by the federal government, *see* 54 U.S.C. §102901(b)(1), as evidenced by, *inter alia,* Congress' empowerment of the Park Service to "accept title to any non-Federal property or interest in property within a System unit or related area," *id.*; *see also id.* §200306(a)(2)(A). Those authorizations would be nonsensical if "System units" were coterminous with "lands in the National Park System."

The Park Service has not even been entirely consistent in its designation of the Trail, listing the Trail as *both* a "unit" and a "related area," *i.e.*, an area merely "administered in connection with the System,"

54 U.S.C. §100801(3)(A), (C). *See* Park Service, "National Park System," *available at* https://www.nps.gov/aboutus/national-park-system.htm. Such imprecision would be troubling if questions of land ownership and MLA authority turned on the designation. In reality, neither question, nor whether the Trails Act impliedly repealed the Weeks Act, turns on whether the Park Service views the Trail as a unit or a related area. Indeed, the Park Service—along with the rest of the federal government—*disagrees* with respondents' views about the significance of the "unit" designation, the interpretation of the Trails Act, and the status of the right-of-way granted by the Forest Service.

In sum, the MLA concerns land *ownership*; the Trails Act, by contrast, concerns *administration*. While the Park Service may be responsible for the "overall administration" of the footpath (on land public and private; state and federal), 16 U.S.C. §1246(a)(1)(A), the ownership of the underlying lands is unaffected. The lands at issue here thus remain what the Weeks Act declared them a century ago: Forest Service lands. As such, the Forest Service retains authority under the MLA to authorize rights-of-way through its land.

B. Respondents Cannot Defend the Inevitable Consequences of the Fourth Circuit's Interpretation.

The Fourth Circuit's decision produces bizarre outcomes that highlight its error. For example, if the determinative consideration is not which agency has ownership and jurisdiction over lands, but rather which agency has administrative oversight for the

footpath that traverses them, then it necessarily follows that the Forest Service is empowered to grant rights-of-way for pipelines across national parks like Yosemite and Sequoia, because Congress designated the Pacific Crest National Scenic Trail, which runs through them, to be "administered by the Secretary of Agriculture." 16 U.S.C. §1244(a)(2). Although respondents baldly declare that this is "incorrect," they fail to explain their *ipse dixit*. Opp.31 n.25. It is, of course, theoretically possible that Congress intended to transfer ownership of miles of national park land to the Forest Service in the west, while transferring ownership of miles of forest service land to the Park Service in the east. But the far more likely explanation is that Congress merely divvied up administrative authority over the first two trails under the Trails Act, with one going to Agriculture and the other to Interior, without intending to transfer any land ownership.

Respondents fail to confront the fact that, under their reading, the Forest Service would have the power to grant a right-of-way under Forest Service land all the way up to the theoretical barrier imposed by the footpath 700 feet above. Thus, for non-pipeline rights-of-way, the Fourth Circuit and respondents would require two rights-of-way—one from the Forest Service for all the land not traversed by the Trail and another from the Park Service. As for pipelines, respondents would preclude any right-of-way under the footpath, even though they concede the Forest Service's authority as to everything but that narrow stretch under the footpath. Again, Congress could create such a perverse regime, but there is no indication, textual or otherwise, that it did.

Respondents likewise fail to address Congress' treatment of the Blue Ridge Parkway. To ensure that the 469-mile-long Parkway would not be a 469-mile-long barrier to pipeline rights-of-way, Congress expressly granted the Park Service authority to approve rights-of-way crossing the Parkway. 16 U.S.C. §460a-3. But having ensured that the Parkway would not be a barrier separating resources from consumers, it would be unfathomable for Congress to create just such a barrier in the form of the Appalachian Trail, which parallels the Parkway for nearly all of the Parkway's length.

Perhaps the greatest anomaly is the implication of the Fourth Circuit's decision and respondents' own arguments for non-federal lands. The Appalachian Trail crosses privately owned land, in addition to 60 state-owned game lands, forests, and parks. JA1778. If the entirety of the Trail is a "unit" of the Park Service and thus "land in the National Park System," Pet.App.57a, then all these non-federal property owners have been divested of their property rights.

To be sure, respondents deny that the Fourth Circuit's decision has implications for non-federal lands. According to respondents, crossing state or private parcels "does not require any authorization under the MLA" because that statute "applies only to lands 'owned' by the federal government." Opp.15 (quoting 30 U.S.C. §185(b)(1)). But respondents' observation just begs the question of land ownership. And respondents' own arguments for why the portion of the George Washington National Forest over which the Trail runs is "National Park System land" apply to the whole Trail. The Park Service has administrative

authority over the whole Trail, not just those portions that cross federal lands. And to the extent the Park Service treats the Trail as a "unit" of the Park Service, the whole Trail, whether traversing private, state, or federal land, is part of the unit.

At bottom, there are only two logical ways to address ownership of lands traversed by the Appalachian Trail under the statutory scheme. Either what matters is who owns those lands, or what matters is who administers the Trail. The dispositive consideration cannot be the former when it comes to non-federal lands and the latter when it comes to federal lands. There is thus simply no escaping that the logic of respondents' own arguments would treat the entirety of the Trail as a regulatory barrier to pipelines and construe the Trails Act as taking right-of-way authority not just from the Forest Service but from myriad States and private owners.

II. This Case Is Exceptionally Important And Warrants Review Now.

Respondents claim that the impact of the decision below will be only negligible, affecting just this pipeline and only where, not whether, it crosses the Trail. In fact, the decision threatens dozens of pipelines (proposed and existing), hundreds of rights-of-ways, thousands of workers, and millions of consumers who depend on natural gas to meet their energy needs. Sixteen States and 33 organizations—including trade associations and labor unions—filed amicus briefs because the decision's impact is far from negligible. As the union brief explains, the decision threatens the construction of a pipeline anticipated to generate 17,240 construction jobs, $1.8 billion in

wages and benefits, and $2.7 billion in economic activity, which will yield $25 million in tax revenue from construction alone. *See* Br. of United Assoc. of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry, *et al.*, 13-14, 16-17.

Invoking comments Atlantic made to investors suggesting that it would pursue every available strategy for ensuring the pipeline's completion in spite of the decision, Opp.18-19, respondents make the extraordinary claim that the decision below will not significantly impede *this* pipeline's construction. In fact, the decision already has significantly delayed the pipeline. Moreover, as noted, the logic of respondents' arguments would extend to all lands crossed by the Trail, not simply federal lands. More important is what respondents have not said—namely, that they or like-minded environmental groups would not challenge any action short of an Act of Congress as ultra vires or inconsistent with the decision below. Finally, even if it were somehow possible to divert the pipeline to permissibly cross the Trail on State or private land, that diversion would involve additional unnecessary cost, cause needless delay, and make no sense. Rerouting and extending the pipeline would only increase its environmental impact, and given the federal preference for consolidating ownership of land underlying the Trail, diversions for private crossings are neither a long-term solution nor what Congress intended (let alone mandated) in the Trails Act.

Respondents' effort to limit the decision's impact to this pipeline is equally unavailing. The Mountain Valley Pipeline amicus brief attests to the decision's impact on that pipeline. And, despite respondent's

contrary claim, the Forest Service has approved rights-of-way under the Trail for other pipelines. *See, e.g.*, FERC, Giles Cty. Project Envtl. Assessment, Dkt. No. CP13-125-000 (Nov. 2013), at *5. (noting that Giles County Project pipeline "would involve two crossings of the Appalachian Trail" on Forest Service land). The decision below also imperils numerous existing pipelines that cross the Trail on federal land. Respondents suggest those pre-existing pipelines are safe because they never require reauthorization. But that is mistaken. *See, e.g.*, S.Rep. No. 107-72, at 5 (2001) (statement of Hon. Jeff Bingaman, Chairman, Comm. on Energy and Nat. Res.) (discussing the "need for an authorization for existing natural gas pipelines" in the Great Smoky Mountains National Park). Finally, respondents note that the MLA does not preclude the Park Service from granting non-pipeline rights-of-way, but that does nothing to address the problem that the decision below means that countless rights-of-way were granted by the "wrong" agency and may not be renewed because, by statute, the Park Service has a more restrictive attitude toward development than other agencies such as the Forest Service. *See* Pet.34.

In the face of all that, respondents' plea for delay falls flat. According to respondents, petitioners and the United States seek only an advisory opinion. In reality, the decision below is a statutory impediment to a pipeline right-of-way on federal land. No further proceedings will permit a right-of-way on Forest Service land. There is thus nothing advisory about the determination petitioners seek on the MLA and the Trails Act. By contrast, the administrative proceedings respondents envision would be entirely

advisory. There is no reason why Atlantic or multiple federal agencies should be forced to undertake costly and time-consuming proceedings that, under the decision below, are a fool's errand. It is not even clear what the Fourth Circuit would make of those proceedings on review when circuit law and law of the case make clear beyond cavil that a pipeline right-of-way cannot cross the Trail on Forest Service land no matter how many engineering studies accompany the request.

Respondents' proposed course of action is particularly disingenuous given the Fourth Circuit's apparent discomfort with pipelines. *See* Pet.12-14. It is understandable that respondents, who do not want this pipeline completed, would prefer another round of administrative proceedings followed by appellate fly-specking. But if there is a statutory impediment that renders those further administrative proceedings pointless, the time to determine that is now, before billions of dollars in investments are stranded, workers' lives are put on hold, and consumers lose cost-savings. The decision below is profoundly wrong, entirely definitive, and imposes enormous real-world costs. The time for this Court's review is now.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

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