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 Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS, ET AL. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Twenty-one *amici curiae* trade associations on behalf of their thousands of members (collectively "*Amici*") submit this brief in support of both petitioners in this matter, the federal government and Atlantic Coast Pipeline, LLC ("ACP"). *Amici* represent a broad array of manufacturers, businesses (large and small, local and national), fuel producers, pipeline owners and operators, natural gas suppliers, electric companies, and mining companies. *Amici* share a significant interest in domestic energy independence, national security, development of vital infrastructure, and the reliable supply of natural gas, oil, and refined petroleum products provided by U.S. pipelines to the economy. The Appendix lists the interests of each of the *amici*.

SUMMARY OF ARGUMENT

For decades, including in this case, Congress, the U.S. Forest Service, the U.S. Park Service, and the entire federal government uniformly and sensibly recognized the Forest Service's authority to grant rights-of-way within Forest Service lands, including beneath designated surface trails. Yet here the Fourth Circuit upset that equilibrium by erroneously

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[1] In accordance with Rule 37.2(b) of this Court, *amici* have provided counsel of record for both petitioners and respondents timely notice of *amici*'s intent to file this brief and the parties have provided their written consent to do so. Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

substituting its judgment for that of Congress and the Executive Branch. Endorsing respondents' novel arguments designed to stymie critical energy pipeline development, the Fourth Circuit unilaterally divested the Forest Service of jurisdiction to grant rights-of-way through Forest Service lands traversed by the Appalachian Trail. The court of appeals effectively transferred those lands to the Park Service, thereby precluding the Forest Service or any other agency from granting pipeline rights-of-way, and frustrating other rights-of-way as well.

Amici concur in the arguments advanced by both petitioners on a straightforward issue of statutory construction, and urge the Court to reverse. Indeed, no other court has adopted such a novel reading of the Mineral Leasing Act ("MLA") or National Trails System Act ("NTSA"). This *amici* brief further underscores for the Court the legal and practical unworkability of the court of appeals' unprecedented statutory interpretation that threatens the development of critically needed pipelines and other infrastructure crossing lands beneath national trails within national forests. This Court should restore project proponents' long-settled expectations necessary for complex planning, namely that the Forest Service has authority to grant a right-of-way within a national forest.

First, the court of appeals' unprecedented reading of the MLA and NTSA effectively requires, for the first time ever, Congressional approval of each pipeline right-of-way under the Appalachian Trail or other similarly designated trails located within national forests. However, Congress intended for the Forest Service to make such project-by-project decisions about rights-of-way within national forests,

recognizing the impracticality of requiring Congress to legislate routine decisions on individual projects. The decision asserting exclusive Park Service jurisdiction upsets the status quo without any legislative determination or environmental benefit to the Appalachian Trail. The resulting uncertainty and potential loss of beneficial projects falls chiefly upon *amici*'s members and the public who would otherwise gain from reliable and affordable domestic energy. Conversely, reversal by this Court would not imperil the environment or create a regulatory gap, but would instead simply restore the Forest Service's long-recognized authority to decide rights-of-way within national forests subject to environmental review and robust regulatory requirements.

Second, the court of appeals' dispositive statutory ruling that the Forest Service cannot grant rights-of-way through its own jurisdictional lands needlessly threatens U.S. energy security. Given pipelines' importance to transportation of domestic energy production to market, policies encouraging construction of energy pipelines have long been a bipartisan priority. Unless reversed, the court of appeals' ruling will jeopardize existing and future pipeline approvals in an energy resource-rich area of the country, as well as along the 2,000-plus-mile Appalachian Trail and other trails nationwide traversing national forests and other federal lands that Congress similarly did not designate as national park lands.

Third, the ruling has numerous unintended and unaccounted-for consequences by necessarily converting all federal lands underlying the Appalachian Trail into Park Service lands for *all* purposes, thereby impacting non-pipeline projects

requiring rights-of-way through lands traversed by national trails including, but not limited to, roads, bridges, electric transmission lines, telecommunications lines, water facilities, and grazing areas. As no party contests, the Park Service generally has much narrower discretion than the Forest Service to grant rights-of-way due to the Park Service's unique statutory focus on conservation rather than on promoting multiple uses including energy transportation. Thus, the problems with the lands transfer effectuated by the court of appeals extend beyond energy pipeline approvals and necessitate more than simply requiring applicants to seek approval from a different federal agency. Rather, the court of appeals' erroneous statutory interpretation will have serious adverse consequences over a broad array of important actions through lands traversed by the Appalachian Trail and other designated trails. This Court should reverse the court of appeals and provide clear guidance to courts considering challenges to critical infrastructure projects nationwide.

ARGUMENT

I. Congress Did Not Intend to Insert Itself Into Every Pipeline Crossing a Designated Trail.

As the petitioners' briefs explain in detail, Congress' enactment of the national forest management statutes *permanently* vested jurisdiction over national forests in the Forest Service—not the Park Service—and nothing in the MLA or the NTSA clearly altered that Forest Service jurisdiction.

Simply put, the decision to assign administration of the Appalachian Trail and certain other surface trails within national forests to the Park Service did not transfer authority over the underlying lands, including the national forests, to the Park Service. Rather, the Park Service principally administers the Appalachian Trail footpath because Congress determined in the NTSA that the Park Service was best equipped to perform that particular function – but the underlying land through which the ACP project requires a right-of-way remains, as it has been since its creation, a part of the George Washington National Forest. *See* 16 U.S.C. § 1244(a)(1); 16 U.S.C. § 1246(a)(1)(A).

Indeed, designated trails under the NTSA themselves consist of mere "rights-of-way," including "across Federal lands under the jurisdiction of another Federal agency." 16 U.S.C. § 1246(a)(2); *see also United States v. Union Pac. R. Co.*, 353 U.S. 112, 120 (1957) (distinguishing grant of a right-of-way from grant of a fee interest, and finding "[t]here are no precedents which give the mineral rights to the owner of the right of way as against the United States"). Similarly, under the NTSA there exists a "national trails system" but no "national trails system lands." *Id.* § 1242. As this Court has observed, "Congress delegated to the Secretary of the Interior and the Secretary of Agriculture authority to designate recreational trails and to develop and administer the entire trails system." *Preseault v. I.C.C.*, 494 U.S. 1, 5 n.1 (1990). However, nothing in the statute attempts to transfer jurisdiction of lands between agencies. Accordingly, the Forest Service retained right-of-way decision-making authority for the proposed 0.1 miles of the ACP project that would

be installed more than 600 feet underneath the Appalachian Trail within the George Washington National Forest.

The court of appeals' contrary ruling amounts to a massive lands transfer to the Park Service, a gargantuan effect without any such consideration or command by Congress. This result is at odds with the well-established principle that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," or "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001); *see also Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.,* 563 U.S. 776, 792 (2011) ("if Congress had intended such a sea change . . . it would have said so clearly—not obliquely").

The court of appeals identified no clear change in the law divesting the Forest Service of its longstanding jurisdiction. In fact, the court of appeals proceeded from the wrong starting point by wholly ignoring the Forest Service's century-old authority over the George Washington National Forest. *See* 16 U.S.C. § 521 (1911); 40 Stat. 1779 (1918). The court of appeals likewise misapprehended the Forest Service and the Park Service's continuous, mutual understanding that the Forest Service grants rights-of-way within its jurisdictional forest lands. The United States adopts the same position in this case. Thus, this is not even a case where an agency has changed its prior policy under an existing statute. And even in that scenario, an agency must at a minimum "display awareness that it is changing position." *Cf. FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (agency must "display awareness

that it is changing position. An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books."). Here there was simply no legal change other than directly effectuated by the court of appeals' incorrect statutory interpretation.

The Park Service is generally precluded by the MLA from granting rights-of-way for pipelines through Park Service lands. 30 U.S.C. §§ 185(a), (b). Therefore, the court of appeals' decision that all Forest Service land traversed by the Appalachian Trail is now Park Service land—coupled with the linear nature and long distances of pipeline projects—effectively requires Congress to pass legislation approving specific pipeline rights-of-way over such land. Requiring specific new statutory approval of each new pipeline right-of-way is unprecedented, unnecessary, and unwise. And this cumbersome process for approving a small portion of a complex energy pipeline project affords little comfort for applicants who, to justify their multi-year planning and multi-billion-dollar investments for pipeline infrastructure, need more regulatory certainty and predictability than is afforded by a new requirement of Congressional action on individual rights-of-way. Congress provided its preference for Executive agency approvals by giving the Forest Service authority to grant rights-of-way within national forests; Congress did not seek to make such decisions itself on a pipeline-by-pipeline basis.

Nor is Congress making such rights-of-way determinations routinely. *Amici* are aware of only a handful of projects that have received Congressional approval for rights-of-way across undisputed Park

Service lands (not solely a trail crossing within a national forest), and the process added many months of delay and uncertainty. *See* H. Rpt. 114-285, at 3, 5 (2015) ("Since 1990, five natural gas pipelines have received such authorizations—which took eight to 16 months to authorize."). Moreover, even after full environmental review and approval, efforts to enact pipeline-specific substantive legislation could languish in Congress irrespective of the critical need for the proposed project, energy needs by local communities, or time-sensitive project schedules.

Consistent with the fact that Congress already gave the agencies pipeline right-of-way authority, members of Congress also previously deemed unnecessary and rejected a bill, H.R. 2295 (2015), that would have amended the MLA, 30 U.S.C. § 185(b), to allow agencies to grant natural gas pipeline rights-of-way over Park Service lands. In doing so, the House Report stated that: "[c]ontrary to claims at the markup that the Appalachian Trail acts as a 'Great Wall' that blocks pipeline development, there are 63 current pipeline crossings of the Appalachian Trail. According to data from the Congressional Research Service, in only three locations was specific Congressional authorization required, as much of the Appalachian Trail is on land not owned by the National Park Service and therefore does not need that authorization." H. Rpt. 114-285, at 24 (2015). Because reliance on Congress to regularly act in a timely manner on individual rights-of-way for new pipelines and renewal of existing pipelines is not what Congress intended, and is an inappropriate and impractical result of the court of appeals' opinion, the Court should reverse.

Restoration of the Forest Service's longstanding right-of-way authority, without forcing Congress to authorize individual pipeline projects, also is consistent with Congress' goals regarding the Appalachian Trail. As a trails statute, the NTSA is inherently concerned with *surface* resources and uses. *See* 16 U.S.C. § 1241(a) (Congressional purpose to meet "outdoor recreation needs" and promote "open-air, outdoor areas and historic resources of the Nation"); *id.* § 1246(j) (listing allowed trail uses, all consisting of physical or vehicular recreational activities). The NTSA specifies that the Appalachian Trial is a "footpath." 16 U.S.C. § 1244(a)(1). Moreover, notwithstanding that word's omission in the subsequently enacted NTSA provisions for other trails, each designated trail likewise serves that same function as a surface "route" created for the same types of uses. 16 U.S.C. § 1244. The court of appeals identified no benefit to the Appalachian Trail from stripping the Forest Service's authority to grant a right-of-way located hundreds of feet below the surface, and following robust environmental reviews and other agency permitting requirements. And Congress has made no legislative determination of any incompatibility between energy pipelines and land far underneath designated surface trails. The court of appeals' contrary determination in this case is without statutory basis and should not stand.

II. The Forest Service's Ability to Permit Pipeline Infrastructure Is Critical to U.S. Energy Security.

U.S. energy production relies upon a fully-functioning pipeline system, and pipeline transportation of domestic natural gas and oil

products is essential to manufacturing, electricity generation, economic development, and job creation. By precluding Forest Service approvals of pipeline rights-of-way crossing the Appalachian Trail within national forests, the court of appeals' decision introduces new and considerable uncertainty to complex pipeline projects, upsets settled expectations and a consistent Executive Branch approach, and jeopardizes critical domestic energy development.

The ACP project's construction will result in $2.7 billion in economic activity and 17,000 construction jobs, and its operation over a 20-year period will yield $377 million in annual consumer energy cost savings and over 2,000 long-term jobs. *See* ACP, *Powering the Future, Driving Change Through Clean Energy*, at 2, 8, https://atlanticcoastpipeline.com/resources/docs/resources/acp-factbookversion2.pdf; ICF (for Dominion Transmission, Inc.), *The Economic Impacts of the Atlantic Coast Pipeline*, at 5, 11-12 (2015), https://atlanticcoastpipeline.com/resources/docs/resources/acp-icf-study (1).pdf. And while these benefits are significant standing alone, the need for oil and natural gas infrastructure and the potentially foregone benefits of energy pipelines extend beyond the ACP project or even the Appalachian Trail.

As detailed in Attachment 1, *amici*'s members are responsible for or rely upon thousands of miles of pipelines serving millions of customers that create millions of high-paying jobs. Pipeline transportation is especially important in Fourth Circuit states like West Virginia, which is home to abundant energy resources including the Marcellus and Utica Shale formations. Even temporary delays can upset years

of careful project planning and compromise the significant benefits conveyed by pipeline development. Worse still, the court of appeals' misreading of the MLA and NTSA could foreclose projects altogether and result in lasting adverse economic effects.

The benefits of the shale revolution have made the United States the world's top producer of natural gas since 2009, and the world's top producer of crude oil as of the summer of 2018, surpassing both Saudi Arabia and Russia. *See* EIA, "Today in Energy – United States remains the world's top producer of petroleum and natural gas hydrocarbons" (May 21, 2018), https://www.eia.gov/todayinenergy/detail.php?id=36292; EIA, "Today in Energy – The United States is now the largest global crude oil producer" (Sept. 12, 2018), https://www.eia.gov/todayinenergy/detail.php?id=37053. This technological revolution simply would not have occurred if pipelines were not available to transport product to market. And this new phenomenon is a national security benefit, moving the United States toward energy independence and away from relying on other countries to fuel essential development and satisfy public needs.

The need for more pipelines to accommodate growing domestic production is substantial. A recent study estimated that the need for capital expenditures (CAPEX) for new North American oil and gas infrastructure development, including pipelines, totals $791 billion from 2018 through 2035. ICF (for INGAA Foundation), *North America Midstream Infrastructure through 2035* (2018), at 2, https://www.ingaa.org/File.aspx?id=34703. This level

of investment equates to an average annual CAPEX of $44 billion throughout the projection period. Such expenditures will go to building approximately 41,000 miles of pipeline, along with other infrastructure. *Id.* That investment in infrastructure will contribute $1.3 trillion to U.S. and Canadian Gross Domestic Products over the projection period, or approximately $70 billion annually, and infrastructure development will result in employment of 725,000 U.S. workers annually. *Id.* Significant employment opportunities will be created not only within states where infrastructure development occurs, but across all states because of indirect and induced labor impacts. *Id.*

The ACP project, like other energy pipelines, offers additional benefits for local communities and energy resource development. Energy demand includes consumers that currently are remote from existing infrastructure; these customers would be served by delivery of natural gas via the ACP project. Moreover, the ACP project would create greater energy reliability by facilitating use of geographically closer energy sources and reducing energy cost spikes through added capacity. The ACP project also supports the deployment of renewable energy generation by backing up the intermittent electricity supply from wind or solar energy facilities. ICF, *The Economic Impacts of the Atlantic Coast Pipeline*, at 3, 8, 15.

While the failure to approve and construct a planned pipeline project deprives the nation of a plethora of benefits – including supporting the deployment of renewable energy – delays also cause real economic harm. These costs include

remobilization costs, time value of money costs (for items already purchased), and general inflation (for those items that will be purchased at a later date, and potentially with less advance notice, when the project is ready to proceed). The price of delay may be many millions of dollars.

It has long been federal policy, under both Democrat-led and Republican-led Congresses and administrations, to promote energy pipelines given their importance to the U.S. economy. For example, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA") has recognized that pipelines "literally fue[l] our economy and way of life." PHMSA, General Pipeline FAQs, https://www.phmsa.dot.gov/faqs/general-pipeline-faqs. The oil and natural gas volumes carried by the more than 2.6 million miles of pipelines "are well beyond the capacity of other forms of transportation." *Id.* A modest-sized oil pipeline moves the daily equivalent of 750 tank trucks, loading up every two minutes, 24 hours a day. *See id.* Moreover, forcing the transfer of oil by truck or rail, while subject to their own safeguards, poses potential environmental effects not addressed by the court of appeals' decision.

For two decades, facilitating energy pipelines has been a bipartisan priority. In 2015, Congress enacted the "FAST Act," which includes pipelines among the "covered projects" that benefit from more coordinated and efficient permitting timetables. Pub. L. No. 114-94, 129 Stat. 1312 (2015); 42 U.S.C. § 4370m(6)(A). The ACP project is a "covered project" under Title 41 of the FAST Act and was permitted under that program. Three years earlier, President Obama

called for "expedited review" of pipelines, and for agencies to "utilize and incorporate information from prior environmental reviews and studies conducted in connection with previous applications for similar or overlapping infrastructure projects so as to avoid duplicating effort." Presidential Memorandum, Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects (Mar. 22, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/03/22/presidential-memorandum-expediting-review-pipeline-projects-cushing-okla. President Obama recognized that "we must make pipeline infrastructure a priority, ensuring the health, safety, and security of communities and the environment while supporting projects that can contribute to economic growth and a secure energy future." *Id.* Similarly, President Trump called for, and various federal agencies agreed to, a "One Federal Decision" framework to facilitate pipeline and other infrastructure project decisions. *See* Executive Order 13,807 (Aug. 15, 2017); Memorandum of Understanding Implementing One Federal Decision, https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf (Apr. 9, 2018). None of these measures, however, contemplated a need for Congressional actions to approve a right-of-way each time an individual project crosses a designated trail administered by the Park Service within federal lands controlled by another federal agency.

The court of appeals' decision disregards the importance of pipeline infrastructure and has needlessly threatened U.S. energy security. The court of appeals' novel statutory ruling depriving the Forest

Service of its right-of-way authority upsets settled rules and creates substantial uncertainties and disruptions for the affected regional and national energy markets and the businesses and consumers who depend on them. If the Forest Service cannot grant rights-of-way within its jurisdictional lands, critical pipelines may not be built, and energy resources may not be transported to where they are needed most.

The court of appeals' statutory interpretation could have substantial national ramifications as well. The MLA applies broadly to natural gas pipelines like the ACP project, as well as to oil, natural gas liquids, and refined petroleum products pipelines. *See* 30 U.S.C. § 185(a). Under the court of appeals' rationale, at a minimum, all new pipelines seeking access underneath the Appalachian Trail within hundreds of miles of national forests would not be able to move forward without an act of Congress.

Moreover, the court of appeals' decision potentially jeopardizes existing pipelines crossing the Appalachian Trail within a national forest. As specified by petitioners, there are more than 50 existing pipeline rights-of-way that cross the Appalachian Trail. These are in addition to the myriad approvals of other rights-of-way (*see infra* Section III). But federal rights-of-way are not granted in perpetuity; rather, existing approvals typically require renewals. *See* 30 U.S.C. § 185(n). The MLA makes clear that it applies to and exclusively governs the grant or renewal of all pipeline rights-of-way for transporting "oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom." *Id.* §§ 185(a) & (q). Rights-of-way pre-

dating the MLA must be modified to comply with the MLA. *Id.* § 185(t). Among other things, existing rights-of-way and renewals must adhere to the MLA's implementing regulations, environmental requirements, and 30-year maximum duration term. *Id.* §§ 185(f), (h), & (n). By calling into question the Forest Service's administrative authority to grant renewals for the many long-operating pipelines crossing the Appalachian Trail, the court of appeals' decision may likewise subject existing critical infrastructure projects to undue legal challenge in jurisdictions across the United States.

The court of appeals' decision's potential impacts on future or existing pipelines are not limited to Appalachian Trail crossings. As depicted below in Figures 1, 2, and 3, the National Trails System spans the country, as does the vast network of existing energy pipelines.

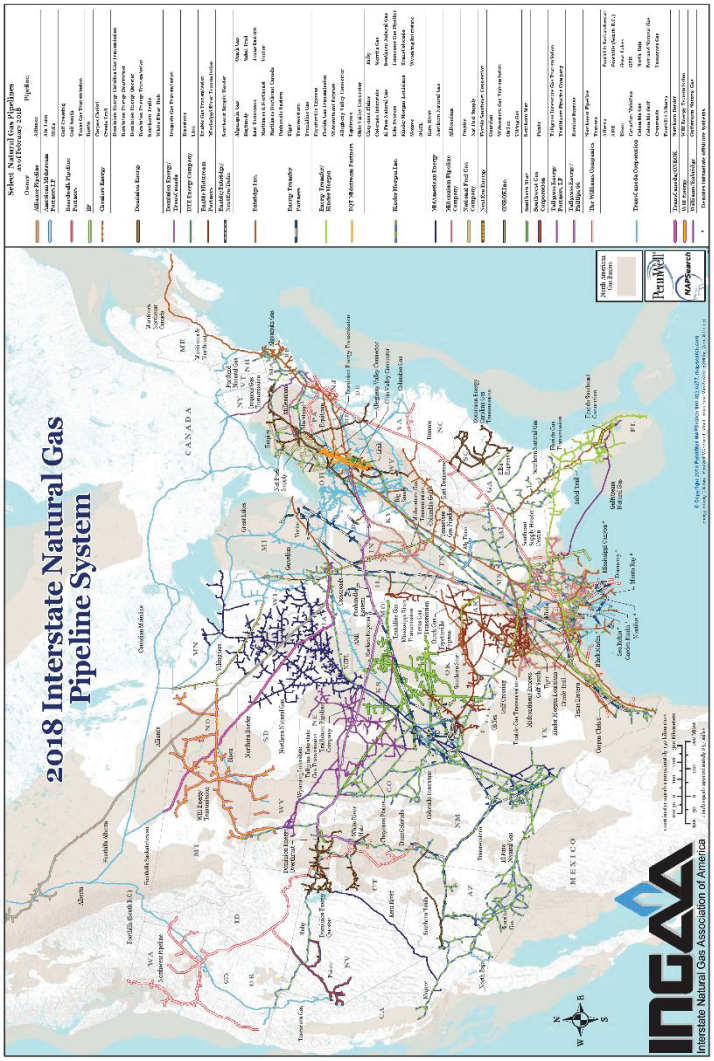
Figure 1

National Park Service National Trails System Map

Source: NPS, https://www.nps.gov/gis/storymaps/mapjournal/v2/index.html?appid=0fd54ceaad1a4d418e140e6e2021bb5b

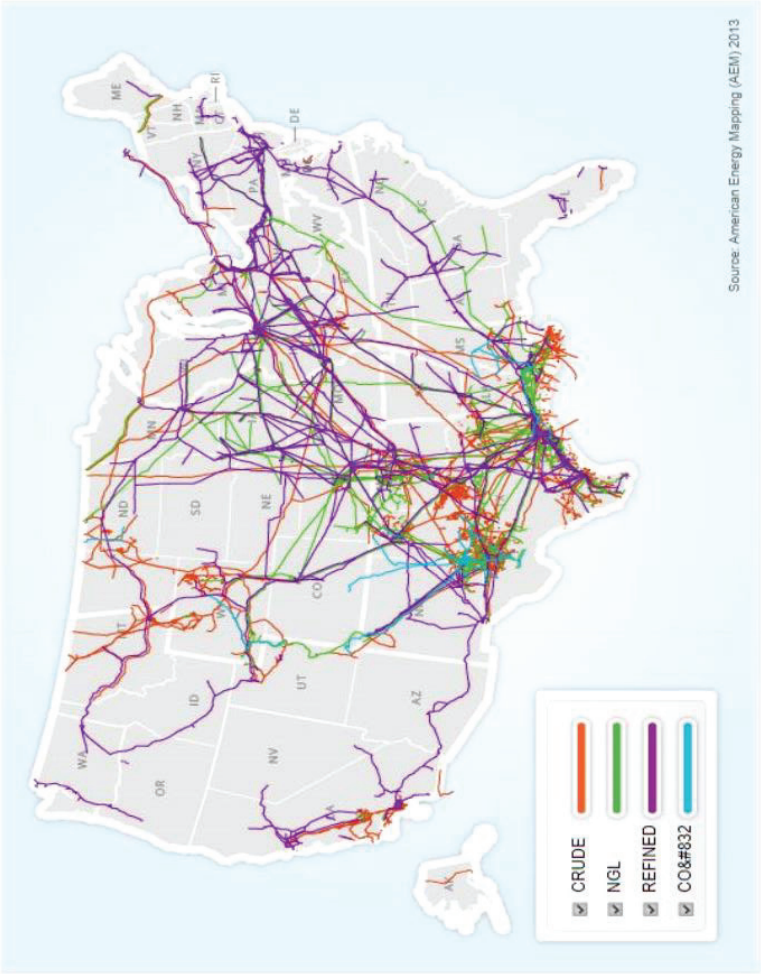
Figure 2

INGAA, 2018 Interstate Natural Gas Pipeline System Map



Source: Interstate Natural Gas Association of America, https://www.ingaa.org

Figure 3
AOPL-API Oil Liquids Pipeline Map



Source: AOPL/API, https://pipeline101.org/Where-Are-Pipelines-Located.

See also U.S. Dept. of Energy, Electricity Transmission, Pipelines, and National Trails, https://publications.anl.gov/anlpubs/2016/11/131478.pdf (Mar. 25, 2014).

Importantly, many of these trails are designated by the NTSA as being "administered by" the Department of the Interior, a designation the court of appeals held does not authorize the Forest Service to grant a right-of-way where Interior in turn delegated trail administration to the Park Service. *See* 16 U.S.C. § 1244(a). Like the over 1,000 miles of the Appalachian Trail within national forests, many of these other trails cross substantial tracts of federal lands. An example is the North Country National Scenic Trail, stretching 4,600 miles from the Appalachian Trail in Vermont to North Dakota, including nine national forests. If this Court preserves the court of appeals' rationale, all pipeline trail crossings within national forests or other federal lands (that would now be considered Park Service lands) could be called into question, thereby impeding the transmission of critical U.S. energy resources.

III. Conversion of Trails to Park Service Lands Threatens Rights-of-Way for Other Critical Infrastructure.

The application of the court of appeals' decision is not limited to energy pipelines. The court of appeals did not consider that if the NTSA's designation of the Park Service as administrator of a national trail is all that is required to convey the underlying lands to the Park Service, then those lands necessarily are Park Service lands for *all* purposes. This does not simply mean that proponents of other types of projects crossing national trails must seek a right-of-way from

the Park Service instead of the Forest Service. Rather, rights-of-way will become more difficult to obtain, and retain, due to the Park Service's chiefly conservation mandate and consequently narrower statutory authority to approve productive uses of Park Service lands.

National forest lands and national park lands are not the same. Under the National Forest Management Act and the Multiple-Use Sustained-Yield Act, Congress requires that national forest lands be managed pursuant to the "multiple use and sustained yield" standard. 16 U.S.C. §§ 1600(5), 1604(e), 1607. In short, this management standard entails promoting a wide variety of uses to best utilize the land while ensuring perpetual output of its renewable resources and avoiding "impairment of the productivity of the land." *See* 16 U.S.C. § 531. The Forest Service must determine whether a project requiring a right-of-way is consistent with that standard, and specifically with the applicable management plan for the affected national forest.

By contrast, Congress prescribed management of national park lands principally for conservation.[2] Congress defined the "fundamental purpose" of national park lands in its Organic Act governing the Park Service: "to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and

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[2] Congress recently recodified the National Park Service Organic Act from 16 U.S.C. § 1 *et seq*. to 54 U.S.C. § 100101 *et seq*. Pub. L. No. 113-287, 128 Stat. 3096 (2014).

by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a). Accordingly, "authorization of activities" by the Park Service "shall be construed and the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress." *Id.* § 100101(b)(2).

Courts have construed these provisions narrowly in reviewing actions of the Park Service. *See United States v. Stephenson*, 29 F.3d 162, 165 (4th Cir. 1994) (similarly interpreting former statutory provision); *Nat'l Rifle Ass'n of Am. v. Potter*, 628 F. Supp. 903, 909 (D.D.C. 1986) ("In the Organic Act Congress speaks of but a single purpose, namely, conservation[.]"). Courts also have found that the Park Service and the Forest Service have different core missions for their jurisdictional lands. In *Michigan United Conservation Clubs v. Lujan*, the Sixth Circuit affirmed the Park Service's denial of animal trapping even in "nontraditional" park areas under Park Service jurisdiction because, "unlike national forests, Congress did not regard the National Park System to be compatible with consumptive uses." 949 F.2d 202, 204, 207 (6th Cir. 1991). Likewise, in a separate decision, the same Fourth Circuit panel found that "unlike other Federal lands, such as the national forests, the National Park System's sole mission is conservation." *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 292 (4th Cir. 2018).

The court of appeals' undue expansion of Park Service jurisdiction to lands underlying Park Service-administered trails heightens risks to realization of various types of projects. If upheld, the court of appeals' decision will unjustifiably subject roads, bridges, electric transmission lines, water facilities, and other non-pipeline project approvals to potential judicial application of a more restrictive standard whenever they may intersect national trails administered by the Park Service on lands managed by other federal agencies. Moreover, the Park Service will bear a higher burden to explain why such rights-of-way over the court of appeals' newly-created Park Service lands are not in derogation of the conservation mission for Park Service lands. These additional hurdles facing Park Service lands will subject such projects to undue costs, delays, and litigation risks.[3]

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[3] For example, the court of appeals considered and vacated the Park Service's permitted right-of-way for the ACP project beneath the Blue Ridge Parkway ("Parkway") surface. *Sierra Club*, 899 F.3d at 294. Championing the Park Service's "conservation mission," the court of appeals held that the Park Service "must determine that its right-of-way permit is not in 'derogation' of the National Park System's conservation mission." *Sierra Club*, 899 F.3d at 291-92. In holding that the Park Service failed to make this determination, the court of appeals concluded that the Park Service's "decision to grant ACP a right-of-way was arbitrary and capricious for failing to explain the pipeline's consistency with the purposes of the Blue Ridge Parkway and the National Park System." *Id.* at 294. While Congress expressly established that the Parkway is subject to the National Park Service Organic Act, Congress has not made such a pronouncement for national trails under the NTSA. *See* 16 U.S.C. § 460a-2.

CONCLUSION

By unlawfully converting Forest Service lands into Park Service lands, and thereby prohibiting the Forest Service from granting pipeline rights-of-way to cross lands underlying the Appalachian Trail, the opinion below threatens not only the ACP project but also other critical infrastructure projects nationwide, at a time when the domestic need for such infrastructure could not be greater. The opinion is a clear misinterpretation of the law, disregards the Executive Branch's historical process, and puts at risk domestic energy production, economic growth, and national security. *Amici*'s members comprise the companies that plan, finance, build, operate, and rely upon this infrastructure and literally fuel the nation and economy, all the while protecting the environment. *Amici* are united in their dedication to the rule of law and environmental safeguards. If, however, the opinion below is allowed to stand, the nation will suffer, and project opponents will employ the opinion as a potent weapon to stymie development of energy resources and other key infrastructure, both within and beyond the Fourth Circuit. The Court thus should reverse.

December 9, 2019

Respectfully submitted,

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