

Nos. 18-1584 & 18-1587

IN THE
Supreme Court of the United States

U.S. 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 THE UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY OF THE
UNITED STATES AND CANADA, AFL-CIO;
INTERNATIONAL UNION OF OPERATING
ENGINEERS; LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA; INTERNATIONAL
BROTHERHOOD OF TEAMSTERS; AND PIPE LINE
CONTRACTORS ASSOCIATION AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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STATEMENT OF INTEREST

The following parties respectfully submit this brief as *amici curiae*.¹

The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (“UA”), is an international labor organization representing over 350,000 plumbers, pipefitters, sprinkler fitters, service technicians, and welders. The UA’s membership includes 10,000–11,000 workers who perform welding, pipefitting, and hydrostatic testing on pipelines. UA pipeliners have worked on every major pipeline project in the United States.

The International Union of Operating Engineers (“IUOE”) is a diversified trade union that primarily represents operating engineers, who work as heavy equipment operators, mechanics, and surveyors in the construction and pipeline industries; as well as stationary engineers, who work in operations and maintenance in building and industrial complexes, and in the service and petrochemical industries. The IUOE has approximately 400,000 members and 110 local unions in the U.S. and Canada. Operating engineers operate, maintain and repair all manner of heavy equipment on pipeline projects.

The Laborers’ International Union of North America (“LIUNA”) began as a union of construction workers, founded in 1903 by a group of hod carriers and related

¹ No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

construction tradesmen who came together to secure better livelihoods for themselves and their families. Today, LIUNA represents roughly 500,000 members throughout the U.S. and Canada across multiple industries in the private sector, from construction to energy to manufacturing, and in the public sector.

Founded in 1903, the International Brotherhood of Teamsters (“Teamsters”) represents more than 1.4 million hardworking men and women across the U.S., Canada, and Puerto Rico. Teamster members work in a wide variety of industries, including the construction industry. Approximately 3,000 Teamster members nationwide regularly work on pipeline projects.

The Pipe Line Contractors Association (“PLCA”) is a trade association founded in 1948 representing employers engaged in the construction and maintenance of mainline oil and gas pipelines throughout the U.S. as well as service providers and suppliers that support such work. On behalf of its members, the PLCA negotiates and administers national labor agreements with the UA, IUOE, LIUNA, and Teamsters. These collective bargaining agreements are considered industry-wide agreements covering all mainline pipeline construction work. The PLCA currently has approximately 200 member companies, including numerous companies that are expected to perform significant work on the Atlantic Coast Pipeline (“ACP”).

The UA, IUOE, LIUNA, and Teamsters (“Pipeline Crafts”) collectively represent the approximately 7,000 workers who would perform all aspects of pipeline construction on ACP, as they have on countless pipeline projects in the past, while the PLCA represents the pipeline contractors who would employ them. Workers represented by the Pipeline Crafts would perform this work pursuant to Project Labor Agreements that have

already been executed. These Agreements provide for wages that allow union workers to have a high standard of living, health benefits for themselves and their families, and pension contributions for all hours worked. Employers also make hourly contributions to training funds jointly run by the Pipeline Crafts and signatory contractors, which ensure that experienced workers are trained on the skills necessary to build the safest pipelines and allow new workers entering the trade to develop these skills. In return, *Amici* and the workers they represent and employ ensure that the U.S. pipeline infrastructure is built and maintained according to the most up-to-date, safe, and efficient standards—at a significant benefit to the public at large.

The Fourth Circuit’s erroneous interpretation and application of the Mineral Leasing Act creates a significant barrier to permitting of ACP and potentially many other infrastructure projects seeking rights-of-way across the Appalachian and other National Trails. *Amici* submit this brief to provide the Court with information about the importance of accessible and efficient pipeline permitting and the damage that the Fourth Circuit’s decision would inflict on many thousands of American workers, State and local communities, and U.S. energy infrastructure, in the short and long term. We urge the Court to reverse the Fourth Circuit’s decision to ensure that federal agency approval of pipelines remains accessible and efficient to avoid these harmful consequences.

SUMMARY OF ARGUMENT

The Fourth Circuit’s decision incorrectly interprets the federal statutes on which it is based. It is also an unprecedented, unnecessary, and unwarranted departure from decades of administrative cooperation between the U.S. Forest Service (“Forest Service”) and

the National Park Service (“Park Service”), who, for decades, have agreed to a procedure to permit pipelines running underneath the Appalachian Trail within land under the jurisdiction of the Forest Service. This procedure is consistent with federal law and has enabled pipeline permitting to follow a predictable course with defined steps. By contrast, the Fourth Circuit’s decision forecloses any pipeline permitting under the Appalachian Trail, a result which conflicts with federal law and policy.

Unpredictable and unreliable pipeline permitting harms more than just the bottom lines of companies that build them. Uncertainty in pipeline permitting denies workers quality, skilled jobs; deprives governments of much needed tax revenue; burdens vulnerable communities and consumers with increased energy costs; and increases dependence on the aging pipeline infrastructure.

ARGUMENT

I. THIS COURT SHOULD OVERTURN THE FOURTH CIRCUIT’S INCORRECT INTERPRETATION OF THE MINERAL LEASING ACT AND NATIONAL TRAILS SYSTEM ACT.

As both the Petitioner and Solicitor General demonstrate, this Court should reverse the Fourth Circuit’s conclusion that the land underneath the Appalachian National Scenic Trail (“Appalachian Trail” or “Trail”) qualifies as “lands in the National Park System” where pipeline rights-of-way cannot be permitted under the Mineral Leasing Act (“MLA”), 30 U.S.C. § 181 *et seq.* This holding is irreconcilable with federal law and is contrary to the way in which the federal agencies tasked with administering the Trail and the National Forest

lands it crosses have interpreted their respective powers and duties for decades.

A. The Fourth Circuit’s Decision Is Inconsistent with Relevant Federal Law.

There is no dispute that the 0.1-mile portion of the Appalachian Trail at issue in this case lies within the George Washington National Forest, which falls under the jurisdiction of the Forest Service. Pursuant to the Weeks Act, the Forest Service is responsible for administering and protecting “all lands of the United States within the exterior boundaries of national forests . . . substantially in accordance with national forest regulations, policies, and procedures” 16 U.S.C. § 521a. *See also* 16 U.S.C. § 1609 (declaring that the National Forest System “consists of units of federally owned forest, range, and related lands throughout the United States”).

The Mineral Leasing Act, in turn, authorizes the “appropriate agency head,” meaning the “head of any Federal department[,] . . . office or agency . . . which has jurisdiction over Federal lands” to grant pipeline rights-of-way across those federal lands. 30 U.S.C. § 185(a), (b). The MLA defines “Federal lands” to exclude “lands in the National Park System,” but does not elaborate further about which lands qualify as “lands in the National Park System.” *Id.* § 185(b)(1). In the decision below, however, the Fourth Circuit concluded that the National Trails System Act (“Trails Act”), 16 U.S.C. § 1241 *et seq.*, which designates the Appalachian Trail as a National Scenic Trail, essentially transforms lands within the George Washington National Forest that are crossed by the Trail into “lands in the National Park System” through which no agency can issue a pipeline right-of-way pursuant to the MLA. *Cowpasture River Preservation Ass’n v.*

Forest Service, 911 F.3d 150, 180-81 (4th Cir. 2018). On this point, the Fourth Circuit’s decision is a novel and incorrect interpretation and application of the Trails Act.

The Trails Act delegates administration of the Appalachian Trail, “primarily as a footpath,” to the “Secretary of the Interior, in consultation with the Secretary of Agriculture.” 16 U.S.C. § 1244(a)(1). The Trails Act expressly delegates administration of other National Scenic and National Historic Trails to the “Secretary of the Interior, in consultation with the Secretary of Agriculture,” to the “Secretary of Agriculture, in consultation with the Secretary of the Interior,” and still others to the Secretary of the Interior and the Secretary of Agriculture individually without requiring consultation with the other. 16 U.S.C. § 1244(a).

Although it assigns trail administration to these agencies or combinations of agencies, the Trails Act expressly does not disturb the jurisdiction of other federal agencies having authority over the lands over which the trails cross. The Trails Act states that its delegation of trail administration 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.” 16 U.S.C. § 1246(a)(1)(A). The Trails Act further characterizes the Appalachian Trail as a “right-of-way,” which may cross “Federal lands under the jurisdiction of another Federal agency,” State land, and/or private land. 16 U.S.C. § 1246(a)(2) (emphasis added).² Therefore, although

² The Fourth Circuit’s view of the Appalachian Trail “right-of-way,” see 16 U.S.C. § 1246(a)(2), as granting exclusive control to the Park Service is also inconsistent with the way rights-of-way are typically granted. For example, the Forest Service’s special

the Trails Act delegates administration of the Appalachian Trail to the Secretary of the Interior/Park Service, it goes out of its way to preserve the authority of the Forest Service when it comes to the Forest Service's administration of "all lands . . . within the exterior boundaries of national forests" including the George Washington National Forest, under the Weeks Act. 16 U.S.C. § 521a.

This express language of the Trails Act is consistent with the way it describes National Trails being administered. For example, at various points, the Trails Act differentiates between the "the Secretary charged with the administration of each respective trail" and other agencies "administering land through which the trail passes," in multiple places requiring the former to collaborate with and defer to the latter. *See, e.g.*, 16 U.S.C. § 1246(i) (mandating the concurrence of "the heads of any other Federal agencies administering land through which [the] trail passes" before "[t]he Secretary charged with the administration of each respective trail" can issue regulations governing a trail designated by the Trails Act); 16 U.S.C. § 1246(d) (requiring "[t]he Secretary charged with the administra-

use permit granting a right-of-way to ACP underneath the Trail is clear that it did not give the pipeline "exclusive" use or occupancy of the land. U.S. Dep't. of Agric., Special Use Permit for Atlantic Coast Pipeline, at 3 (Jan. 2018). The permit further reserved the right of the Forest Service to access, inspect, and monitor the land for any legal purpose and to allow others to use the land in any way not inconsistent with ACP's permit. *Id.* Read according to these principles, the best interpretation of the Trails Act is that it grants a non-exclusive right-of-way through Forest Service land, where applicable, limited to the operation of a footpath. It does not prohibit the Forest Service from authorizing other, compatible uses of the land, which is exactly how it has been interpreted and administered by the Park Service and the Forest Service for decades.

tion of each respective trail” to establish an advisory council including “the head of each Federal department . . . administering lands through which the trail route passes”).

B. The Fourth Circuit’s Decision Invalidates Efficient Administrative Procedures Crafted by the Park Service and Forest Service in Accordance with Federal Law.

Since the Appalachian Trail was established by the Trails Act, the Park Service and the Forest Service have administered it cooperatively and harmoniously. Recognizing the fact that “significant portions of the [Appalachian Trail] traverse lands under the separate administrative jurisdictions of [the Park Service] and the Forest Service,” the two agencies executed a Memorandum of Agreement in 1970. *See* U.S. Dep’t of Agric., Forest Service Manual § 1531.32a, at 9 (effective June 1, 1990). The Agreement provides for cooperation between the Park Service and the Forest Service in administering the segments of the Trail under their separate jurisdictions, “enforcement of which will be carried out by the agency administering the lands through which the Trail passes.” *Id.* at 11.³ The agencies’ Memorandum of Agreement thus embodies the Trail Act’s mandate that the Park Service administer the Trail as a footpath while the Forest Service retains its jurisdiction over National Forest lands.

³ In the Final Environmental Impact Statement it prepared for ACP, the Federal Energy Regulatory Commission (“FERC”) recognized that the Memorandum of Agreement vests the Forest Service with exclusive jurisdiction over the decision of whether to grant a right-of-way for ACP across the Trail. *See* FERC, Office of Energy Projects, Atlantic Coast Pipeline and Supply Header Project Final Environmental Impact Statement, I-9 (July 2017).

A decade later, Congress issued a directive that each Secretary responsible for a national scenic trail submit “a comprehensive plan for the acquisition, management, development, and use of the trail . . . after full consultation with affected Federal land managing agencies.” National Parks and Recreation Act of 1978, Pub. L. No. 95-625, Title V(B), § 551(15), 92 Stat. 3515. The resulting Comprehensive Plan for the Appalachian Trail, signed by the heads of the Park Service and the Forest Service, again recognized that the Park Service has “responsibility for overall Trail administration” but that “land-managing agencies,” including the Forest Service, “retain their authority on lands under their jurisdiction.” Park Serv., *Appalachian Trail Comprehensive Plan*, 12-13 (Sept. 1981).⁴ This arrangement between the Park Service and the Forest Service tracks the Trails Act exactly: it delegates Trail administration to the Park Service, 16 U.S.C. § 1244(a)(1), but recognizes that the Park Service’s administration of the Trail under the Trails Act does not, in the words of the statute, “transfer among [the Park Service and the Forest Service] 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), i.e., the Weeks Act.

Congress, too, has recognized that the Trail remains Forest Service land. Only days after enacting the Trails Act, Congress specifically referred to “portions of the Appalachian Trail . . . upon national forest lands” in separate legislation authorizing an extension of the Blue Ridge Parkway. 16 U.S.C. § 460a-7. Congress has continued to recognize that

⁴ Available at https://www.nps.gov/appa/learn/management/upload/CompPlan_web.pdf.

the Trail is largely outside the jurisdiction of the Park Service for purposes of pipeline permitting. Recently, an amendment to the MLA to allow agencies to grant natural gas pipeline rights-of-way on federal lands failed to reach the House floor. *See Summary*, H.R. Rep. 2295 – National Energy Security Corridors Act.⁵ Part of the rationale against the amendment was that it was unnecessary because only a small portion of the Trail is on land owned exclusively by the Park Service. *See* H.R. Rep. No. 285, 114th Cong., 1st Sess. at 24 (2015) (observing that 63 pipelines already cross the Trail, for which Congressional authorization had only been required in three locations because “much of the . . . Trail is on land not owned by [the Park Service]”). Thus, even while specifically considering the MLA, Congress has recognized that the MLA’s exclusion of “lands within the National Park System” does not apply to land crossed by the Trail where that land is subject to another agency’s jurisdiction.

II. THE FOURTH CIRCUIT’S DECISION RENDERS PIPELINE PERMITTING UNRELIABLE AND INEFFICIENT, IN CONFLICT WITH BIPARTISAN FEDERAL POLICY.

The impact of the Fourth Circuit’s decision goes far beyond the academic question of how to interpret the Mineral Leasing Act and the Trails Act. Most importantly, by concluding that the entire Trail qualifies as “lands in the National Park System”—regardless of which agency has jurisdiction over the land—it appears that the appellate court has turned the Appalachian Trail into a 2,200-mile north-south

⁵ Available at <https://www.congress.gov/bill/114th-congress/house-bill/2295>.

barrier from Maine to Georgia, effectively preventing communities on one side from sharing energy resources of the other side.

Moreover, if followed by federal agencies and courts in other jurisdictions, this result would not be confined to Appalachian Trail crossings. Of the country's thirty National Scenic and National Historic Trails, twenty-four, with a total combined length of 34,000 miles, are "administered" under the Trails Act solely or primarily by the Secretary of the Interior, who has delegated trail administration to the Park Service. *See* 16 U.S.C. § 1244(a). Under the Fourth Circuit's conclusion that Congressional delegation of National Trail administration to the Park Service transfers administration of the underlying land to the Park Service, countless current and future rights-of-way across these trails not issued by the Park Service after Congressional approval appear to be in doubt. Thus, if the Fourth Circuit's decision is allowed to stand, in addition to halting construction of ACP across the Appalachian Trail, new and existing rights-of-way across any of the other 30,000-plus miles of National Trails administered by the Park Service may be thrown into regulatory limbo.⁶

For example, the North Country National Scenic Trail ("North Country Trail") spans eight States and 4,600 miles between New York and North Dakota and

⁶ Only permitting actions for rights-of-way sought through lands expressly delegated as National Park Service lands would not rest in limbo, since such permitting is barred by the MLA absent Congressional approval. *See e.g.*, Act of Aug. 21, 2002, Pub. L. 107-223, § 2, 116 Stat. 1338 (authorizing the Secretary of the Interior to issue certain right-of-way permits for natural gas pipelines within the Great Smoky Mountains National Park).

crosses nine National Forests. Park Serv., *North Country National Scenic Trail*.⁷ As with the Appalachian Trail, the Trails Act grants administration of the North Country Trail to the Secretary of the Interior, who has, in turn, delegated administration of it to the Park Service. See S. Rep. No. 125, 114th Cong., 1st Sess. (2015). The 4,600-mile east-to-west trail would now appear, under the Fourth Circuit’s decision, to be off-limits to any pipeline right-of-way absent a specific act of Congress.

The inefficient nature and results of this outcome are on display in this case. As discussed above, since the creation of the Trail, the Park Service and Forest Service have agreed that the Forest Service is responsible for evaluating permit applications for pipeline rights-of-way where National Forest land and the Trail overlap. This review takes into account a pipeline’s potential impact on the Trail. See U.S. Forest Serv., U.S. Dep’t of Agric. *Record of Decision, Atlantic Coast Pipeline Project Special Use Permits/Land and Resource Management Plan Amendments* (Nov. 2017) (“ROD”) at 3, 22, 28, 31, 37-39, 50, 52, 53.⁸ And Forest Service review is only one part of an arduous and complicated right-of-way approval process. The Federal Energy Regulatory Commission identified twenty-six separate federal and over fifty separate State “major environmental permits, licenses, approvals, and consultations” applicable to ACP from sixteen different federal agencies and regional offices and thirty-three different State agencies in the Final Environmental Impact Statement (“FEIS”) it prepared

⁷ Available at <https://www.nps.gov/noco/planyourvisit/maps.htm> (last updated Sept. 12, 2019).

⁸ Available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd564397.pdf.

for ACP. FEIS at Table 1.4-1. Several of these State requirements must be repeated for each county through which ACP passes. *Id.* As Petitioner points out, completing these intensive regulatory reviews took three years. Br. for Pet. at 1.

If the Fourth Circuit's decision is allowed to stand, in the case of a project like ACP, the project would still undergo the same review process, including Forest Service approval, where it crosses the George Washington National Forest on either side of its Trail crossing. But the Fourth Circuit's decision would add an additional hurdle—Congressional approval—simply because ACP crosses a 0.1-mile segment of the Appalachian Trail. If Congressional approval were granted, the Secretary of the Interior would then undertake a full analysis of the right-of-way under the Trail, including any required environmental impact analyses. *See* Denali Nat'l Park Improvement Act, Pub. L. No. 113-33, 127 Stat. 514 (authorizing the Secretary of the Interior to issue a right-of-way permit for a natural gas pipeline within the Denali National Park consistent with normal procedures applicable to utilities rights-of-way and after an analysis under the National Environmental Policy Act of 1969). The Fourth Circuit's decision would thus add the major, time-consuming requirements of Congressional authorization and a separate permitting review by the Secretary of the Interior to the overall approval process, creating an unnecessarily inefficient result.

These added steps transform an efficient permitting process into one that is unpredictable, fragmented, and ultimately inefficient. The new element of Congressional authorization, an inherently political process frequently mired in disruption, would not be subject to set standards or procedures, making it

unpredictable and unreliable. The massive investments made by companies toward energy infrastructure development would become a wager, subject to the vicissitudes of the legislative process. The additional, separate review by the Secretary of the Interior would be redundant of the review the Forest Service already conducts, rendering it highly inefficient in terms of its use of federal agency resources and time.⁹

By casting aside the statutory directives and long-standing practices of the federal agencies involved and imposing additional, inefficient, and costly barriers to pipeline permitting, the Fourth Circuit's decision stands in direct opposition to the bipartisan policy goal of timely and reliable permitting of energy pipelines. Executive Orders of both the Obama and Trump administrations recognize the need to make expediency and efficiency in pipeline infrastructure a national pri-

⁹ The inefficiency of requiring separate approvals by the Forest Service for all land leading up to the Trail crossing and the Park Service for the small portion of the pipeline right-of-way underneath the Trail is magnified when one considers that ACP would be buried at a depth of 700 feet below the Trail, and that its construction would never impact the Trail. While pipelines are traditionally constructed using trenches dug into the ground from the surface, the Horizontal Directional Drilling ("HDD") technique would install the pipeline into the soil horizontally from an entry point 1,400 feet away from the Trail to an exit point 3,400 feet away from the Trail on the other side. FEIS at 4-462. In this way, ACP would have no perceptible effect on the Trail's surface during construction or thereafter. The Forest Service went so far as to make it a condition of the permit it issued to ACP that "[n]o surface-disturbing activity . . . occur on [National Forest] lands as part of the crossing under the [Trail]." Forest Serv. ROD, 14. Therefore, neither construction nor operation of ACP would have any effect on the Trail as a footpath, leaving nothing for the Park Service to administer in relation to the pipeline under the Trails Act.

ority. Obama Exec. Order 13604, 77 Fed. Reg. 18887 (Mar. 22, 2012); Trump Exec. Order 13766, 82 Fed. Reg. 8657 (Jan. 24, 2017); Trump Exec. Order 13807, 82 Fed. Reg. 40463 (Aug. 15, 2017). These Executive Orders all demand that federal agencies coordinate their efforts to ensure that pipeline permitting is as reliable and efficient as possible. *See, e.g.*, Obama Exec. Order 13604 (encouraging federal agencies to “work collaboratively and concurrently to advance reviews and permitting decisions” and to “execute Federal permitting and review processes with maximum efficiency and effectiveness . . . [to] provide a transparent, consistent, and predictable path for both project sponsors and affected communities”); Trump Exec. Order 13807 (calling for “coordinated, consistent, predictable, and timely” pipeline authorization processes “in order to give public and private investors . . . confidence” in new projects). The consequences of the Fourth Circuit’s decision directly conflict with this bipartisan federal policy promoting efficient and collaborative agency permitting of pipelines and create the exact opposite result.

III. UNRELIABLE AND INEFFICIENT PIPELINE PERMITTING HARMS AMERICAN WORKERS, INDUSTRIES, AND COMMUNITIES.

If the Fourth Circuit’s decision is allowed to stand, all pipeline rights-of-way under the Appalachian Trail and possibly many other National Trails will be thrown into question. New permits will become unreliable, unpredictable, and politicized with the added requirement that each one obtain separate Congressional approval before the Park Service can review an application at all. *Amici* represent the union workers and companies that would construct ACP and other such pipelines and reap significant economic and career benefits from do-

ing so, including wages, benefits, and skills training. They are greatly affected by unreliability in permitting. Beyond the disastrous effects to their members' livelihoods, unreliable and unpredictable permitting timelines frustrate the Pipeline Crafts' efforts to plan for an expected rate of work. The Pipeline Crafts must have a reasonable understanding of what work will be available in order to responsibly invest their limited resources toward the training of new members. Local communities are also harmed by unpredictable and inefficient permitting. When a project of this magnitude is halted or stalled, these communities suffer a loss of local spending, tax revenue, business development, and savings on energy costs that reliable pipeline construction and operation can provide.

A. The Decision Below Threatens Numerous Skilled Jobs, and Retirement and Health Benefits.

As discussed above, the Fourth Circuit's decision creates a standstill for pipeline permitting across the Appalachian Trail and potentially many other National Trails in the future. If projects cannot be permitted, the jobs they would normally create—including for the Pipeline Crafts' members—also do not materialize, causing immense harm for American households.

Construction and operation of ACP alone would create approximately 17,240 construction jobs across West Virginia, Virginia, and North Carolina. Forest Serv. ROD at 23.¹⁰ Pursuant to collectively bargained

¹⁰ After construction, the pipeline would continue to support approximately 271 direct, indirect, and induced jobs during the operation of the line, with a total annual payroll of \$41.3 million. Forest Serv. ROD at 23.

Project Labor Agreements, these construction jobs would be filled by skilled pipeline craft workers. *Amici* estimate that up to approximately 725 pipeline workers would be employed on each of ACP's sixteen construction "spreads," or segments, working over 30 million hours in total over two years at an average wage and fringe benefit rate of \$55.49 per hour.

Thus, *Amici* expect that construction of ACP alone would generate a total of over \$1.8 billion in wages and fringe benefit contributions for pipeline workers. Included in this amount is approximately \$1 billion in wages, \$232 million in payments to provide medical and accident benefits for pipeline workers and their families, \$564 million in payments to provide retirement, survivor, and disability benefits, and \$3 million in payments to provide training, education, and safety programs.

These are the exact type of jobs—blue collar jobs for skilled workers that provide good wages, health coverage, and retirement security, and fund their own training, including for new entrants to the industry—that are so badly needed in today's economy. Although pipeline construction jobs are often described as "temporary," the temporary nature of construction jobs is exactly what makes them so important. Every opportunity for construction work that is delayed or denied is devastating because construction workers rely on a steady supply of projects to provide complete incomes and retirement savings for themselves and their families over the course of their careers. Thus, pipeline workers in particular rely on efficient and predictable permitting of projects.

The case of ACP is an example of how harmful disruption to permitting procedures can be to workers' lives. After obtaining all applicable permits in March

2018, construction of ACP commenced. When a separate decision of the Fourth Circuit placed a stay (pending review) on implementation of the Biological Opinion from U.S. Fish and Wildlife Service for ACP in December 2018, construction was halted, leaving thousands of workers who had anticipated two years of employment for 60 hours per week on ACP suddenly jobless and on out-of-work lists waiting to be dispatched to other jobs. The decision below, which was issued within a week after the stay of the Biological Opinion, further exacerbated the situation, leaving workers suddenly in indefinite limbo. Workers who had relocated geographically to work on ACP—a common occurrence in the specialized pipeline workforce—experienced additional disruption as they had to unexpectedly and prematurely undo living and household arrangements, such as leases and enrollment of children in local schools, and reestablish them elsewhere.

The stay on ACP's construction also negatively affected workers' eligibility for critical benefits. As a result of the stay, thousands of workers and their dependents lost eligibility for health insurance which, in the construction trades, typically requires a minimum number of hours worked during set time periods, *e.g.*, monthly or annually. When workers cannot work enough hours at the trade, they lose health benefits for themselves and their families. Similarly, retirement benefits are computed based on length of time and/or hours worked and so workers who experience lapses in employment risk not accumulating sufficient pension benefits to make ends meet during retirement.

Workers affected by the unavailability of pipeline jobs may try to get jobs outside of the industry, but these jobs—especially if they are not covered by a collective bargaining agreement—often do not compare

in terms of wages and benefits to the skilled pipeline construction jobs for which they have trained. Thus, to the extent an unemployed pipeline worker is able to find a replacement job, that job may well command inferior wages and benefits.

With delays and obstruction of permitting becoming more common nationwide, and a corresponding decline in available pipeline jobs, the Pipeline Crafts are less able to accept new members and advance the ones they have. When there is a shortage of jobs or uncertain timelines for permitting, unions cannot accept as many entry-level members as they would otherwise, preventing those workers from receiving the training and other benefits available in the unionized pipeline construction industry.

B. The Decision Below Leaves Companies in the Pipeline Industry at a Standstill, Chills Future Investment, and Ultimately Increases Energy Costs.

Unreliable permitting also greatly affects the contractors, service providers, and suppliers represented by the PLCA. For example, a host of companies ranging from large prime contractors to small, local subcontractors have contractually committed to perform work on ACP. When the Fourth Circuit halted construction of ACP, these companies lost significant construction revenue and their operations were thrown into turmoil. Already committed by contract to the construction of ACP, they essentially have to stand by while they wait to see whether and when work on ACP might resume. Meanwhile, the companies cannot commit resources required to complete ACP's construction to other projects during the suspension of work or during the extended construction schedule that would be required to complete ACP afterwards because they must

be available to resume work on ACP if cleared to do so. It is impossible to develop effective project contingencies for such unpredictable and unforeseeable events.

Moreover, ACP was being constructed in multiple locations spread over 600 miles and was in various stages of completion when construction stopped. Because this partial construction has been exposed to the elements since December 2018, it would likely require a great deal of re-work if construction resumes, with some areas being impacted to a point that the construction work would have to be completely redone.

At a higher level, unpredictable and unreliable permitting renders companies associated with pipeline construction less able to make critical business decisions, commitments towards hiring and retaining key personnel, and major capital investments. Companies must weigh the time, resources, and uncertainty involved in attempting to obtain permits compared to the likely benefits, and may be dissuaded from pursuing large capital projects of ACP's magnitude. Unpredictable permitting similarly discourages future entrepreneurs from launching small business startups related to energy projects. Where construction companies do decide to stay in the pipeline business, they must factor contingencies into their pricing to allow for uncertainty and volatility in permitting, resulting in increased costs for the industry and consumers.

C. The Decision Below Imperils Socioeconomic Benefits for Local Communities.

Roadblocks to permitting of pipeline rights-of-way also negatively impact local communities that would otherwise prosper from the economic surge accompanying pipeline construction. For example, ACP would

generate an estimated \$2.7 billion in total economic activity and \$25 million in total tax revenue to State governments as a result of construction alone. Forest Serv. ROD at 23. Part of this economic activity and tax revenue comes from spending by contractors on goods and services related to construction. Workers on the pipeline also spend earnings locally, including on lodging and other necessities of everyday life.

The economic activity generated by pipeline construction also includes purchasing of goods and services related to construction, such as sand, gravel, lumber, concrete, automotive and equipment repair services, fuel, oil, welding gas, ice, office supplies, and waste removal services, which are typically purchased in the local area, if available. Other supplies like heavy equipment and vehicles are often also rented or purchased locally during pipeline construction. For example, an out-of-State pipeline contractor working in Virginia who needs to replace a pick-up truck or tractor will usually buy that equipment locally rather than ship it from somewhere else because it is faster and cheaper when factoring in lost production time and the cost of shipping equipment.

These sorts of local economic benefits extend beyond the construction period. Operation of ACP in the region would result in a total economic impact of \$69.2 million in spending on labor, equipment maintenance, routine capital expenditure, supplies, and profits, and \$418,443 in income tax revenue to State governments per year. *Id.*

Expanded energy infrastructure, like ACP, also delivers benefits to local communities in terms of energy security and cost savings. In the case of ACP, the Forest Service determined that this infrastructure would be used primarily to supply electricity locally for in-

dustrial, commercial, and residential purposes, translating to approximately \$377 million in net annual savings to natural gas and electricity consumers in Virginia and North Carolina alone between 2019 and 2038. *Id.* By contrast, the Forest Service determined that not building the pipeline would prolong existing energy supply constraints and could lead to exacerbated volatility of natural gas prices in the area, causing higher gas and electric rates in the region and energy shortages during winter peak demand. *Id.* at 43.

These anticipated benefits for local communities generated by ACP's construction and operation are summarized in a recent open letter by six eastern North Carolina mayors. In that letter, the mayors describe their region's "desperate need" for "new infrastructure to attract the industries and jobs of the modern economy." The mayors explain that their communities' existing, aging infrastructure cannot support manufacturing or new industries needed for growth, causing businesses to pass them over in favor of "other regions with more reliable infrastructure and access to natural gas." Roy Bell et al., *Eastern North Carolina Mayors Rally in Support of the Atlantic Coast Pipeline and Urge Project's Completion* (June 26, 2019).¹¹ The mayors' letter goes on to describe how ACP would help to meet these needs:

Ever since the Atlantic Coast Pipeline was proposed, our communities have seen renewed hope in the future. The project promises living wage jobs for thousands of local construction workers and opportunities for many of our residents to learn a new vocation. It's bringing millions of dollars in new

¹¹ Available at https://www.publicradioeast.org/sites/pre/files/201907/nc_mayor_open_letter_-_june_2019_1315_.pdf.

business for local companies, from equipment dealers and construction suppliers to local hotels and restaurants. Local contractors that once traveled hundreds of miles for new business now have opportunity at their doorstep.

The ACP has also allowed us to start recruiting new industries to create local jobs and grow our economy . . . We're seeing renewed interest in our region, with existing businesses thinking about expansion and new economic prospects knocking at our door. We also see the promise of millions in new tax revenue from the pipeline as a way to support our public schools, enhance our community services and lower the tax burden on our citizens.

Id.

The specific counties crossed by ACP's route have an acute need for the benefits associated with ACP. Only two of these twenty-seven counties had median household incomes ("MHI") above their State-wide MHIs in 2017, the most recent year for which data is available. Likewise, only two of the counties crossed by ACP had MHIs higher than the U.S. MHI of \$61,372 in 2017. The median MHI of the twenty-seven counties crossed by ACP was \$43,759 in 2017—29% below the national MHI of \$61,372. *See* State, County, and national data available at <http://www.census.gov>.

All of this is not to say that pipelines should be approved without any scrutiny or even with less scrutiny than the law currently requires. Rather, it is to say that the effects of unnecessary obstruction and inefficiency in permitting compromise an entire industry, including the many thousands of skilled careers it supports, and have real and tangible effects for the American workforce and consumers. Given all the

economic benefits of pipelines and the jobs and opportunities they create both directly and indirectly, it is not surprising that federal policy on both sides of the aisle aims to provide accessible and reliable authorization procedures. By interpreting applicable federal law to erect obstacles to fulfilling this clear policy goal, the Fourth Circuit has done a disservice to American workers, consumers, companies, and communities, which all benefit from having efficient infrastructure permitting procedures in place.

IV. THE DECISION BELOW THREATENS U.S. ENERGY INFRASTRUCTURE DEVELOPMENT AND SAFETY.

As discussed above, the Fourth Circuit’s decision may throw the status of all new and existing pipelines crossing tens of thousands of miles of National Trails—and potentially other land administered by the Secretary of the Interior—into a regulatory standstill. By handicapping the permitting of new pipeline infrastructure, the Fourth Circuit’s decision means that the existing, aging pipeline infrastructure must shoulder the increasing demand for and production of domestic energy resources. The existing infrastructure is inadequate to meet this demand and reliance upon it has been recognized as a threat to public health and safety.

The recent acceleration of domestic energy production places demands on the country’s natural gas pipeline infrastructure. U.S. natural gas production has increased by 50% since 2008. Hearing on PIPES Act of 2016 Implementation Before the Subcomm. on Railroads, Pipelines and Hazardous Materials of the H. Comm. on Transp. & Infrastructure (June 21, 2018) (Statement of Robin Rorick, Am. Petroleum Inst.) (“Rorick Statement”) (citing U.S. Dep’t of Energy, En-

ergy Information Administration monthly statistics).¹² Domestic production of crude oil has also skyrocketed, increasing from approximately 5 million to 11 million barrels per day between 2009 and 2018. *Petroleum & Other Liquids*, U.S. E.I.A. (June 28, 2019).¹³ The Energy Information Administration expects that American natural gas and oil production will continue to increase over the next several years. *See Short-Term Energy Outlook*, U.S. E.I.A. (Nov. 2019).¹⁴

This dramatic increase of domestic production creates energy savings for U.S. households, provides job opportunities for American workers, assists U.S. manufacturing efforts, and enhances national security. *See Rorick Statement*. According to the U.S. Department of Energy's Quadrennial Energy Review from April 2015, the increased availability of affordable natural gas has given U.S.-based manufacturing an advantage over outsourced competitors. U.S. Dep't of Energy, *Quadrennial Energy Review: Energy Transmission, Storage, and Distribution Infrastructure* at 1-6 (Apr. 2015) ("Department of Energy, 2015 Q.E.R.").¹⁵ *See also* U.S. Dep't of Energy, *Valuation of Energy Security for the United States* at 3 (Jan. 2017) (concluding that access to domestic energy sources is essential for securing U.S. energy security).¹⁶

¹² Available at <https://www.eia.org/news-policy-and-issues/testimony-and-speeches/2018/06/21/june-21-2018-rorick-pipeline-safety-testimony>.

¹³ Available at <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS2&f=M>.

¹⁴ Available at https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf.

¹⁵ Available at https://www.energy.gov/sites/prod/files/2015/04/f22/QUER-ALL%20FINAL_0.pdf.

¹⁶ Available at <https://www.energy.gov/sites/prod/files/2017/01/>

This current boom in domestic energy production presents an increased need for transportation of natural gas and oil. One recent study found that the U.S. will need up to \$1.3 trillion in energy infrastructure investment through 2035, of which 22-27% (\$12.3 to \$19 billion annually) is needed for oil and gas pipeline repairs, replacements, and new builds. Kevin Petak et al., *U.S. Oil and Gas Infrastructure Investment through 2035*, ICF at 3 (Apr. 2017).¹⁷ The Department of Energy has observed that the timeline for permitting construction of midstream energy infrastructure—i.e., natural gas transmission pipelines—has failed to keep pace with the permitting of energy generation and production projects. Department of Energy, 2015 Q.E.R. at 9-3. This disconnect between U.S. energy resources and production and the relative lack of infrastructure for its distribution is a threat to U.S. energy security, “leav[ing] the U.S. economy exposed to supply disruptions anywhere in the world and the ensuing global price volatility.” See U.S. Dep’t of Energy, *Valuation of Energy Security for the United States*, at 3 (Jan. 2017).¹⁸ The Department has therefore called for a new “urgency to improve the siting and permitting” of energy infrastructure projects. *Id.* The current pipeline infrastructure in the U.S. is simply insufficient to meet the increased need for transportation of domestic energy resources.

Expansion of the natural gas pipeline infrastructure is the safest way to meet increasing demands on

f34/Valuation%20of%20Energy%20Security%20for%20the%20United%20States%20%28Full%20Report%29_1.pdf.

¹⁷ Available at <https://www.api.org/~media/Files/Policy/Infrastructure/API-Infrastructure-Study-2017.pdf>.

¹⁸ See *supra*, note 15.

the existing infrastructure. Between 2007 and 2016, oil and natural gas pipelines had lower average annual accident rates—at 0.66 and 0.73 per billion ton-miles of oil and gas transported, respectively—than rail (2.20 accidents) and road (7.11 accidents). Charles Hughes, *Why America Needs More Pipelines*, Manhattan Institute, at 4 (July 20, 2017).¹⁹ See also PHMSA, *General Pipeline FAQs* (“Pipeline systems are the safest means to move [natural gas] products.”).²⁰ And currently, even the comparatively more dangerous modes of train and truck transportation are not available to transport natural gas on a large scale, as the gas must be liquefied (requiring storage at -260° Fahrenheit) for efficient transport by rail or truck. Current hazardous material regulations do not generally allow liquefied natural gas (LNG) to be transported in bulk by rail. See *Hazardous Materials: Liquefied Natural Gas By Rail*, 84 Fed. Reg. 56964, 56966 (proposed Oct. 24, 2019).

While pipelines, in general, are inherently one of the safest and most cost-effective ways to transport natural gas and oil, newly-built pipelines are especially safe and reliable. Technological developments in pipeline design and increased safety regulations have made pipelines built today safer than older lines. Modern pipelines, in particular, offer valuable safety features including improved pipe coating that protects against corrosion, more secure welding techniques, and mechanical devices that travel through the pipelines to identify safety risks. See *Pipeline Replacement Up-*

¹⁹ Available at <https://www.manhattan-institute.org/html/america-needs-more-pipelines-10478.html>.

²⁰ Available at <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs> (last updated Feb. 26, 2019).

dates, *By-Decade Inventory*, PHMSA.²¹ See also 49 C.F.R. Part 192. Federal regulations now require that the integrity of new pipeline be tested at the mill before being installed. See 49 C.F.R. Part 192. Older natural gas and oil pipelines, by contrast, are more prone to external corrosion and other weaknesses that threaten their integrity and make them susceptible to ruptures or leaks. See *Call to Action*, PHMSA 2; PHMSA, White Paper on State Pipeline Infrastructure Replacement Programs 4-5 (Dec. 2011) (attached as an enclosure to the *Call to Action*).²² Many of these older lines were installed before the passage of federal pipeline integrity standards. See 49 C.F.R. § 192.619(c).

Due to these features making them comparatively more prone to failure, in 2011, PHMSA issued a “call to action” to State regulators, inviting them to join the Department of Transportation’s efforts to accelerate the repair, rehabilitation, and replacement of older pipelines. *Call to Action*, PHMSA.²³ Since that time, the number of pipelines installed before 1970 that remain in operation has declined, but still comprises approximately 59% of gas transmission pipeline miles. See *Pipeline Replacement Updates*, PHMSA.²⁴

Industry efforts to improve the safety and reliability of aging pipelines are already met with significant regulatory hurdles. For example, for the last several years Enbridge Energy has been in the process of seeking approv-

²¹ Available at <https://www.phmsa.dot.gov/data-and-statistics/pipeline-replacement/decade-inventory> (last updated Sept. 18, 2019).

²² Available at <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/PHMSA%20111011-002%20NARUC.pdf>.

²³ See *id.*

²⁴ See *supra*, note 21.

al to replace its existing Line 3, a pipeline built in the 1960s. Line 3 is currently operating at about half its intended capacity due to age-related integrity risks. Absent replacement, these risks will require approximately 6,250 “integrity digs” to check on the condition of the pipeline and make necessary repairs and replacements over the next fifteen years if it remains in service, even at its current reduced operating capacity. Minn. Pub. Utilities Comm’n, *Order Granting Certificate of Need as Modified and Required Filings*, at 5 (Sept. 5, 2018).²⁵ Similarly, if new pipeline infrastructure cannot be built beneath the Appalachian Trail or other places where the Park Service holds administrative authority, it is likely that pipeline operators will be forced to continue using aging, less reliable pipelines that lack modern safety features in order to meet regional energy needs.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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²⁵ Available at <https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={8077AB65-0000-C610-98DE 18780AEB54E9}&documentTitle=189-146227-01>.

