

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 THE RUTHERFORD INSTITUTE
AS *AMICUS CURIAE* IN SUPPORT
OF RESPONDENTS**

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QUESTION PRESENTED

Whether the United States Forest Service has statutory authority under the Mineral Leasing Act to grant a gas pipeline right-of-way across the Appalachian National Scenic Trail.

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INTEREST OF *AMICUS CURIAE*¹

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 38-year history, including *Snyder v. Phelps*, 562 U.S. 443 (2011)², and *Safford Uniform School District No. 1 v. Redding*, 557 U.S. 364 (2009). One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the right of citizens to be free from environmental discrimination based on race.

¹ The parties have consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

² See *Snyder*, 562 U.S. at 448 (citing Brief for The Rutherford Institute as *Amicus Curiae*).

SUMMARY OF THE ARGUMENT

While this case presents an important question of statutory construction, *Amicus* writes separately to inform the Court of its concerns with the disparate impact on people of color associated with the construction and operation of the Atlantic Coast Pipeline, as well as the continued systematic discrimination faced by racial minorities in matters of environmental justice. Accordingly, *Amicus* urges the Court to consider these concerns, as well as the concept of environmental justice generally, in this and other cases and provide necessary guidance to lower courts that routinely confront similar cases.

ARGUMENT

I. Racial Minorities Have Historically Been, And Continue To Be, Subject To Environmental Racism

The U.S. Environmental Protection Agency (“EPA”) defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” *Learn About Environmental Justice*, U.S. Environmental Protection Agency, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>. According to the EPA, no one group should “bear a disproportionate share of the negative environmental consequences resulting from the industrial, governmental and commercial operations or policies.” *Id.*

Such laudable goals must be implemented because throughout the nation's history environmental harms have disproportionately been directed onto minority communities. The reason for this is simple: "companies often site high polluting facilities in or near communities of color, furthering the unequal distribution of health impacts." Clean Air Task Force & NAACP, *Fumes Across the Fence-Line* 4 (Nov. 2017) (hereinafter, "*Fumes Across the Fence-Line*"). Indeed, as Justice Douglas pointed out in 1971, "[a]s often happens with interstate highways, the route selected was through the poor area of town, not through the area where the politically powerful people live." *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 502 (1971) (Douglas, J., dissenting).

While such concerns have been present for decades, it was not until 1987 that the "first national report to comprehensively document the presence of hazardous wastes in the racial and ethnic communities throughout the United States . . . examine[d] the relationship between the treatment, storage and disposal of hazardous wastes and the issue of race." Commission for Racial Justice, United Church of Christ, *Toxic Wastes and Race in the United States* ix (1987) (hereinafter, "*Toxic Wastes and Race*"). In that report, the Commission for Racial Justice concluded that "race is a major factor related to the presence of hazardous wastes in residential communities throughout the United States." *Id.* at x. In fact, the report found that "[r]ace proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities" and that this "represented a consistent national pattern." *Id.* at

xiii.³ The Commission for Racial Justice concluded that “[t]he possibility that these patterns resulted by chance is virtually impossible, strongly suggesting that some underlying factor or factors, which are related to race, played a role in the location of commercial hazardous waste facilities.” *Id.* at xv.

In 1994, in response to concerns about discrimination in environmental justice, President Clinton issued Executive Order 12898 (“Federal

³ These (and similar) findings cannot be explained away simply by socio-economic status. See *Toxic Wastes and Race* at xiii (“Although socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant. This remained true after the study controlled for urbanization and regional differences.”). See also Ihab Mikati et al., *Disparities in Distribution of Particular Matter Emission Sources by Race and Poverty Status*, 108 Am. J. Pub. Health Vol. 4, 483 (2018) (“Although those living above the poverty line do experience a lower burden than do those below it within these urban areas, the disparities in emissions are especially pronounced for Blacks—reinforcing the overall finding that racial disparities appear to be markedly higher than are poverty-based disparities.”); Christopher W. Tessum et al., *Inequity in consumption of goods and services adds to racial-ethnic disparities in air pollution exposure*, 116 Proceedings of the Nat’l Acad. of Scis. of the United States of Am. Vol. 13, 6003 (2019) (“analyses have found that when considering only differences in locations of residence, exposure disparities by race are much larger than disparities by income.”).

Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”), which provides that “[t]o the greatest extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.” 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994). In essence, Executive Order 12898 requires all federal agencies to take steps to avoid inequitable environmental outcomes. See *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) (“The principle of environmental justice encourages agencies to consider whether the projects they sanction will have a ‘disproportionately high and adverse’ impact on low-income and predominantly minority communities.”). Environmental justice is therefore intended to account for the fact “that communities of color and the poor are exposed to more pollution, noxious land uses, and environmental risk than are white, wealthier communities,” and “that their cultural spaces and sacred sites are the first to be sacrificed at the altar of runaway development.” Eileen Gauna, *LNG Facility Siting and Environmental (In)Justice: Is it Time for a National Siting Scheme?*, 2 *Envtl. & Energy Law & Pol’y J.* 85, 87 (2007).

Despite the signing of Executive Order 12898 more than twenty-five years ago, racial minorities

continue to suffer environmental injustice. In one recent study, the Clean Air Task Force and NAACP found that “[p]eople of color and low-income communities are disproportionately affected by exposure to air pollution” and that “African Americans are exposed to 38 percent more polluted air than Caucasian Americans, and they are 75 percent more likely to live in fence-line communities than the average American.” *Fumes Across the Fence-Line* at 5-6.⁴ See also Nicky Sheats, *Achieving Emissions Reductions for Environmental Justice Communities Through Climate Change Mitigation Policy*, 41 Wm. & Mary Env’tl. L. & Pol’y Rev. 377, 382 (2017) (“There is evidence that a disproportionate number of environmental hazards, polluting facilities, and other unwanted land uses are located in communities of color and low-income communities.”); Mikati, *Disparities in Distribution of Particular Matter Emission Sources by Race and Poverty Status*, 108 Am. J. Pub. Health Vol. 4, 480 (“an Environmental Protection Agency (EPA) investigation in Flint, Michigan, found a direct link between racial discrimination and the permitting of a power station there, stating, ‘The preponderance of evidence supports a finding of discriminatory treatment of African Americans by [the Department of Environmental Quality] in the public participation process.’” (citations omitted and alteration in original)). It is therefore no surprise that the NAACP and Clean Air Task Force concluded that “[t]he life-

⁴ “Fence-line communities are communities that are next to a company, industrial, or service facility and are directly affected in some way by the facility’s operation (e.g. noise, odor, traffic, and chemical emissions).” *Fumes Across the Fence-Line* at 6.

threatening burdens placed on communities of color near oil and gas facilities are the result of systemic oppression perpetrated by the traditional energy industry, which exposes communities to health, economic, and social hazards.” *Fumes Across the Fence-Line* at 3.

II. The Atlantic Coast Pipeline Will Have a Disparate Impact on Racial Minorities

Against this backdrop of continued environmental injustice, in September 2015, the owners of the Atlantic Coast Pipeline applied to the Federal Energy Regulatory Commission to construct a 604-mile natural gas pipeline from West Virginia to North Carolina. App. 2a.⁵ The proposed route crosses the Appalachian Trail and requires the construction of several compressor stations in various communities.

While this case focuses on whether the United States Forest Service has statutory authority under the Mineral Leasing Act to grant a gas pipeline right-of-way across the Appalachian Trail, there can be no dispute that the construction and operation of the Atlantic Coast Pipeline will have environmental effects on the communities through which it passes. *See Cowpasture River Pres. Ass’n v. Forest Serv.*, 911 F.3d 150, 183 (4th Cir. 2018) (“A thorough review of the record leads to the necessary conclusion that the Forest Service abdicated its responsibility to preserve national forest resources. This conclusion is particularly informed by the Forest Service’s serious environmental concerns that were suddenly,

⁵ Citations to “App. _a” are to the appendix in No. 18-1584.

and mysteriously, assuaged in time to meet a private pipeline company’s deadlines.”).

Amicus has serious concerns that the proposed construction and operation of the Atlantic Coast Pipeline is at odds with Executive Order 12898, applicable state laws concerning environmental impacts (such as Va. Code § 10.1-1307(E)), and the spirit of environmental justice.⁶ In one case study, for example, the Clean Air Task Force and NAACP noted that the proposed route through North Carolina “directly impacts a number of African-American, and other vulnerable communities, in the state. In seven of the eight counties along the proposed route the African American population ranges from 24.3 to 58.4 percent, compared to the 21.3 percent at the state level.” *Fumes Across the Fence-Line* at 7. The constructors of the Atlantic Coast Pipeline also plan to build a compressor station in Northampton County, North Carolina. The Clean Air Task Force and NAACP’s case study found that “Northampton’s African American population is 54.6 percent, and the median household income is \$31,453, nearly \$15,000 below the state average. Almost 32 percent of

⁶ In *Friends of Buckingham v. State Air Pollution Control Board*, No. 19-1152, 2020 WL 63295 (4th Cir. Jan. 7, 2020), both the Virginia State Air Pollution Control Board and the owners of the Atlantic Coast Pipeline “acknowledge[d] that Virginia law – including the Commonwealth Energy Policy and factors outlined in § 10.1-1307(E)(3) – require the Board to consider the potential for disproportionate impacts to minority and low income communities.” *Id.* at *15 (citation omitted).

Northampton residents live in poverty, compared to 17.2 percent statewide.” *Id.*⁷

Likewise, the constructors of the Atlantic Coast Pipeline propose to build a compressor station in Union Hill, Virginia, an historic community with a high population of African Americans whose ancestors established the community in the aftermath of the Civil War. In proposing this location for the compressor station, however, the U.S. Court of Appeals for the Fourth Circuit held that the Virginia State Air Pollution Control Board failed “to make any findings regarding the character of the local population at Union Hill, in the face of conflicting evidence” or “consider the potential degree of injury to the local population independent of NAAQS and state emission standards.” *Friends of Buckingham*, 2020 WL 63295, at *14.⁸

⁷ Another study of the Atlantic Coast Pipeline’s route in North Carolina concluded that “at the 95 percent confidence level, we can conclude that the counties crossed by the proposed ACP route collectively have a significantly higher percentage minority population than the rest of the counties in the state.” Sarah Wraight et al., *Environmental Justice Concerns and the Proposed Atlantic Coast Pipeline Route in North Carolina* 7, RTI Press (Mar. 2018), <https://www.rti.org/rti-press-publication/environmental-justice-ACP>.

⁸ “Because natural gas transported through the Pipeline must remain pressurized, ACP sought to construct three compressor stations in different locations along the Pipeline – one in West Virginia,

The impacts on the Union Hill community cannot be understated. Operation of the compression station will require the use of four gas-fired turbines that would “run 24/7 to produce horsepower equivalent to two hundred NASCAR race cars.” Friends of Buckingham County, *Compressor Station Proposed for Buckingham County*, <http://www.friendsofbuckinghamva.org/friends/learning-center/compressor/>. One study reported as follows: “Imagine 291-2005 (depending on the toxin measured) diesel school buses running 24/7. That’s the toxic result of this incessant, industrial activity.” *Id.* Accordingly, toxic emissions in the area would increase from less than 80 pounds per year to more than one hundred tons annually. Amy Mall, VA *Pipeline Compressor Station Threatens Nearby Community*, Natural Resources Defense Council (Sept. 5, 2018), <https://www.nrdc.org/experts/amy-mall/va-pipeline-compressor-station-threatens-nearby-community>.

There appears to be little doubt that the Atlantic Coast Pipeline is the latest in a long list of projects that have ignored environmental justice. See *Friends of Buckingham*, 2020 WL63295, at *15 (“To begin, Petitioners contend, ‘Despite access to a wealth of information, the Board failed to make any findings regarding the demographics of Union Hill that would have allowed for a meaningful assessment of the likelihood of disproportionate harm.’ . . . We agree.”). See also *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541

one in Virginia . . . and one in North Carolina.” *Friends of Buckingham*, 2020 WL 63295, at *5.

(8th Cir. 2003) (“The purpose of an environmental justice analysis is to determine whether a project will have a disproportionately adverse effect on minority and low income populations.”). Accordingly, *Amicus* submits that because the proposed construction and operation of the Atlantic Coast Pipeline fails to take environmental justice properly into consideration, it represents a continued assault on the environmental justice rights of the minority communities through which it passes.

CONCLUSION

For the foregoing reasons, and those described by Respondents, the Court should uphold the decision of the U.S. Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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