

No. 18-561

IN THE
Supreme Court of the United States

ORUS ASHBY BERKLEY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

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

**BRIEF IN OPPOSITION OF RESPONDENT
MOUNTAIN VALLEY PIPELINE, LLC**

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December 19, 2018

QUESTION PRESENTED

Under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), designated courts of appeals have “exclusive” jurisdiction to review orders of the Federal Energy Regulatory Commission involving projects for interstate natural gas pipelines. The question presented is whether Section 19(b), which has been consistently interpreted by the courts, was correctly applied to dismiss the action that the landowner petitioners filed in district court to block the project.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent Mountain Valley Pipeline, LLC makes the following disclosure:

a. MVP Holdco, LLC is a member of Mountain Valley Pipeline, LLC that owns more than 10% of the interest in Mountain Valley Pipeline, LLC and is a subsidiary of EQM Midstream Partners, LP (f/k/a EQT Midstream Partners, LP). EQM Midstream Partners, LP is a publicly traded limited partnership, more than 10% of which is owned by EQGP Holdings, LP (f/k/a EQT GP Holdings, LP), another publicly traded limited partnership, which is owned by at least 10% by Equitrans Gathering Holdings, LLC (f/k/a EQT Gathering Holdings, LLC) and Equitrans Midstream Holdings, LLC (f/k/a EQT Midstream Holdings, LLC), each of which is an indirect subsidiary of Equitrans Midstream Corporation, a publicly traded company.

b. US Marcellus Gas Infrastructure, LLC, is a member of Mountain Valley Pipeline, LLC that owns more than 10% of the interest in Mountain Valley Pipeline, LLC, and is an indirect subsidiary of NextEra Energy, Inc., a publicly traded company.

c. Con Edison Gas Midstream, LLC is a member of Mountain Valley Pipeline, LLC that owns more than 10% of the interest in Mountain Valley Pipeline, LLC, and is a subsidiary of Consolidation Edison, Inc., a publicly traded company.

d. WGL Midstream, Inc. is a member of Mountain Valley Pipeline, LLC that owns 10% of the interest in Mountain Valley Pipeline, LLC and is a subsidiary of WGL Holdings, Inc. WGL Holdings, Inc. is a subsidiary of Alta Mesa, Ltd., a publicly traded company.

e. Vega NPI IV, LLC, a subsidiary of Vega Energy Partners, Ltd., a privately held company, owns less than 10% of the interest in Mountain Valley Pipeline, LLC, but has a financial interest in the outcome of this litigation.

f. RGC Midstream, LLC, a subsidiary of RGC Resources, Inc., a publicly traded company, owns less than 10% of the interest in Mountain Valley Pipeline, LLC, but has a financial interest in the outcome of this litigation.

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**BRIEF IN OPPOSITION OF RESPONDENT
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INTRODUCTION

In the Natural Gas Act, 15 U.S.C. §§ 717-717z, Congress declared “that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest” and that federal regulation of the transportation of natural gas in interstate commerce “is necessary in the public interest.” *Id.* § 717(a). Under the Act, the Federal Energy Regulatory Commission (FERC) is authorized to determine what interstate natural gas pipelines should be built, where they should be built, and what

terms and conditions should apply to their construction. *Id.* § 717f. A proposed new pipeline may proceed only if FERC finds the pipeline is required by a “public convenience and necessity.” *Id.* § 717f(e).

Section 19 of the Act describes the procedure for review of FERC orders. *Id.* § 717r. An aggrieved party must first apply to FERC for rehearing and set forth the grounds upon which the application is based. *Id.* § 717r(a). Following rehearing, a party who remains aggrieved may seek review in one of two designated courts of appeals. *Id.* § 717r(b). The court of appeals where review is sought has “exclusive” jurisdiction to affirm, modify, or set aside the order. *Id.*

Seeking to bypass this procedure, the petitioner landowners filed this action in the United States District Court for the Western District of Virginia against MVP and FERC to prevent what they called “a government-sanctioned land grab.” Pet. App. 54. According to the landowners, FERC lacks sufficient standards to guide its actions, and, as a result, the agency has “run wild” in issuing certificates for pipelines. *Id.* 53. The landowners alleged that FERC’s policy statement governing the issuance of certificates “fail[s] to pass constitutional muster.” *Id.* 79. In particular, the landowners claimed that there is no public use in allowing “a private natural gas company to ship its affiliate-owned fracked natural gas.” *Id.* 81. The landowners asserted: “FERC should no longer be permitted to exceed its unlawfully delegated authority or to apply an unconstitutional standard” in issuing certificates. *Id.* 61. The landowners further stated: “The Commission’s interpretation and application of the Natural Gas Act’s eminent domain provisions, 15 U.S.C. § 717f(h), are facially unconstitutional and unconstitutional as applied to the MVP project.” *Id.*

With their complaint, the landowners also sought:

1. A preliminary injunction prohibiting FERC from granting MVP the power of eminent domain under 15 U.S.C. § 717f(h) via issuance of a Certificate of Public Convenience and Necessity.

2. A preliminary injunction prohibiting MVP from claiming or exercising any power of eminent domain under 15 U.S.C. § 717f(h), whether to enter any landowner's property without consent to conduct any activities at all.

Motion for a Preliminary Injunction at 2, *Berkley v. Mountain Valley Pipeline, LLC*, No. 7:17-cv-0357 (W.D. Va. July 27, 2017), ECF No. 4.

The district court saw the case for what it was: an end run on the exclusive review procedure in Section 19 of the Act. The district court therefore dismissed the action for lack of subject-matter jurisdiction. Pet. App. 24. The Court of Appeals for the Fourth Circuit affirmed. *Id.* 17.

The decisions of the district court and the court of appeals are in full accord with the decisions of this Court recognizing the authority of Congress to establish the jurisdiction of the lower federal courts. The decisions of the district court and the court of appeals are also in full accord with the decisions of other federal courts applying Section 19 of the Act. There is no conflict in the circuits on the interpretation of Section 19. The petitioner landowners simply disagree with the application of Section 19 to the facts of their case. Because that disagreement is not a sufficient reason for the Court to hear the case, the petition should be denied.

JURISDICTION

The district court dismissed petitioners' complaint for lack of subject-matter jurisdiction. Pet. App. 24. The court of appeals affirmed. *Id.* 17. This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).

STATEMENT

1. The MVP project involves the construction of a 303.5-mile natural gas pipeline, three compressor stations, and associated facilities along a route from Wetzel County, West Virginia, to Pittsylvania County, Virginia. *Mountain Valley, LLC*, 161 F.E.R.C. ¶ 61,043, ¶ 7 (2017). The project is fully subscribed under long-term contracts with shippers that have committed to keep the pipeline transporting gas at full capacity for a period of 20 years, and it will help meet the growing demand for gas in the Northeast, Mid-Atlantic, and Southeast regions of the country. *Id.* at ¶¶ 9, 10, 41.

Prior to applying for a FERC certificate, MVP engaged in FERC's pre-filing environmental review process for nearly a year. FERC Docket No. PF15-3, No. 20141027-5136 (Oct. 27, 2014). MVP submitted detailed environmental resources reports and responded to numerous comments from FERC, other governmental entities, and the public. *Id.* No. 20141027-5073 (Oct. 27, 2014). In April 2015, FERC issued a notice of intent to prepare an environmental impact statement (EIS), which informed affected landowners that their property could be condemned if FERC approved the project and that they had a right to comment and intervene. *Id.* No. 20150417-3022 (Apr. 17, 2017).

In October 2015, MVP filed its certificate application. FERC Docket No. CP16-10, No. 20151023-5035

(Oct. 23, 2015). In addition to transportation agreements and extensive engineering, design, cost, rate, tariff, financing, and other required information, MVP's application included comprehensive environmental resource reports covering water use and quality; fish, wildlife, and vegetation; cultural resources; socioeconomics; geological resources; soils; land use, recreation, and aesthetics; air quality and noise; alternatives; reliability and safety; and engineering and design. *Id.*

In November 2015, FERC issued a notice of MVP's application. *Id.* No. 20151105-3025 (Nov. 5, 2015). The notice was published in the Federal Register on November 13, 2015. *Mountain Valley, LLC*, 161 F.E.R.C. ¶ 61,043, at ¶ 21.

In September 2016, FERC issued a draft EIS, which assessed the project's "potential environmental effects" and concluded that any adverse environmental impacts would be reduced by MVP's and FERC's proposed mitigation measures. FERC Docket No. CP16-10, No. 20160916-3014 (Sept. 16, 2016). The draft EIS was mailed to affected landowners and a notice of the draft was published in the Federal Register. 81 Fed. Reg. 66268-02 (Sept. 27, 2016). In response to the various notices that MVP provided, numerous landowners intervened and filed objections and comments. *Mountain Valley Pipeline, LLC*, 161 F.E.R.C. ¶ 61,043, at ¶ 127, Apps. A-B.

In June 2017, FERC issued its final EIS with final recommendations on proposed measures to mitigate the project's environmental effects. FERC Docket No. CP16-10, No. 20170623-4000 (June 23, 2017). In doing so, FERC considered oral comments by over 260 speakers at 7 public comment sessions and 1,237 written comments. *Mountain Valley Pipeline, LLC*, 161 F.E.R.C. ¶ 61,043, at ¶ 127.

Ten of the seventeen landowners who filed this case intervened or filed comments in the FERC proceeding. *Id.* at ¶ 310(P), Apps. A-B (listing Becky Crabtree, Roger Crabtree, George Lee Jones, James Chandler, and Orus Ashby Berkley as timely intervenors, and Michael E. Slayton (for Margret McGraw Slayton Living Trust), and Thomas W. Triplett as untimely intervenors, and granting motions for untimely intervention); FERC Docket No. CP16-10, No. 20170804-5066 (July 21, 2017) (comments of Bonnie B. Triplett); FERC Docket No. PF15-3, No. 20161017-31 (Oct. 17, 2016) (comments of Dawn E. Cisek); *Id.* No. 20141124-72 (Nov. 24, 2014) (comments of Constantine Chlepas).

On October 13, 2017, after nearly three years of comprehensive review, FERC issued a certificate order authorizing construction of the project. *Mountain Valley Pipeline, LLC*, 161 F.E.R.C. ¶ 61,043. FERC found that “the public at large will benefit from increased reliability of natural gas supplies” and that “upstream natural gas producers will benefit from the project by being able to access additional markets for their product.” *Id.* at ¶ 62. The agency further found that the “benefits that the MVP Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and landowners or surrounding communities.” *Id.* at ¶ 64. FERC concluded that the project is “required by the public convenience and necessity” and authorized MVP to construct and operate the project upon satisfying certain environmental conditions. *Id.* at ¶¶ 62, 310(C)(3).

Numerous landowners, including two of the petitioners, applied to FERC for rehearing. *See, e.g.*, FERC Docket No. CP16-10, Nos. 20171113-5125, 20171113-5366, 20171113-5375 (Nov. 13, 2017). On

June 15, 2018, 2018, FERC denied the applications for rehearing. *Mountain Valley Pipeline, LLC*, 163 F.E.R.C. ¶ 61,197 (2018).

Various advocacy groups have petitioned the D.C. Circuit for review of the certificate under Section 19(b). *Blue Ridge Envtl. Defense League v. FERC*, No. 18-1002 (D.C. Cir. Jan. 3, 2018); *Appalachian Voices v. FERC*, No. 17-1271 (D.C. Cir. Dec. 22, 2017). Briefing is underway in the D.C. Circuit.

2. This case was one of two preemptive actions filed to stop FERC from issuing a certificate to MVP.¹ The complaint in this case contained four counts. Count One alleged that the issuance of a certificate to MVP would violate the Fifth Amendment because the proposed project does not constitute a public use. Pet. App. 86. Count Two alleged that the delegation of authority to FERC is overly broad and lacks an “intelligible principle.”² *Id.* 87. Count Three alleged that because the delegation to FERC is overly broad

¹ In the other preemptive action, *Bold Alliance v. FERC*, No. 1:17-cv-01822 (D.D.C. Sept. 5, 2017), the plaintiffs likewise sought an injunction prohibiting MVP from exercising the power of eminent domain. On September 28, 2018, the district court dismissed the case for lack of subject-matter jurisdiction. 2018 WL 4681004. Plaintiffs are appealing to the D.C. Circuit. No. 18-5322.

² The landowners made this contention even though the Act allows FERC to issue a certificate only if it finds that the project is required by the “public convenience and necessity.” 15 U.S.C. 717f(e). The Court has held that similar delegations satisfy the intelligible-principle standard. *National Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding delegation to agency to determine “public interest, convenience or necessity”); *New York Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24-25 (1932) (upholding delegation to agency to determine “public interest”).

FERC “cannot lawfully delegate the power of eminent domain to MVP.” *Id.* 88. Count Four, which was voluntarily dismissed, alleged that the precondemnation surveys conducted by MVP constituted a taking in violation of the Fifth Amendment. *Id.* Based on these claims, plaintiffs moved for a preliminary injunction prohibiting FERC from issuing a certificate and MVP from exercising the power of eminent domain under a certificate. Motion for a Preliminary Injunction at 2, *Berkley v. Mountain Valley Pipeline, LLC*, No. 7:17-cv-0357 (W.D. Va. July 27, 2017), ECF No. 4.

MVP and FERC moved to dismiss the claims on grounds that Section 19 confers exclusive jurisdiction on FERC and the courts of appeals. Pet. App. 202-09; Memorandum in Support of Federal Defendants’ Motion to Dismiss Complaint for Lack of Subject Matter Jurisdiction, *Berkley v. Mountain Valley Pipeline, LLC*, No. 7:17-cv-0357 (W.D. Va. Aug. 31, 2017), ECF No. 20. While the motions were pending, FERC issued its certificate order. *Mountain Valley Pipeline, LLC*, 161 F.E.R.C. ¶ 61,043.

In considering the motions to dismiss, the district court observed that the complaint makes clear that the landowners “are concerned not with some abstract constitutional violation, but with the fact that their land will be affected by MVP’s proposed pipeline.” Pet. App. 32. The court also noted the landowners’ concession that, if their claims prevail, the certificate order will no longer convey eminent domain authority. *Id.* 40. Consequently, the court found that the claims directly involve the certificate order and fall within the scope of Section 19. *Id.* 32-34. The district court further held that it would have no jurisdiction under the analysis in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and subsequent cases, *Free Enterprise*

Fund v. Public Co. Accounting Oversight Board, 561 U.S. 477 (2010), and *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012). *Id.* 34-42.

3. The Fourth Circuit affirmed. Pet. App. 4. Applying the *Thunder Basin* analysis, the court of appeals found that Congress’s intent to preclude district court jurisdiction is “fairly discernible” from the Natural Gas Act. *Id.* 8-9. The court of appeals further found that plaintiffs’ claims were “the type Congress intended to be reviewed” under the Act. *Id.* 9-16. In this regard, the Fourth Circuit noted that the Act does not foreclose “all meaningful review,” but expressly provides for review by both FERC and a court of appeals. *Id.* 10-14. The Fourth Circuit concluded that the landowners’ claims were not “wholly collateral” to the Act’s review scheme. *Id.* 14-15. To the contrary, the landowners’ claims, including their constitutional claims, were the means by which plaintiffs sought to vacate the certificate for the project. *Id.* Finally, the Fourth Circuit concluded that “agency expertise could be brought to bear” on the issues. *Id.* 15-16.

REASONS FOR DENYING THE PETITION

I. Congress May Define the Jurisdiction of the Lower Federal Courts

The landowners spend most of their petition arguing that district courts should have jurisdiction to hear their constitutional claims. Pet. 11-28. The landowners fail to recognize, however, that Congress is authorized to establish and define the jurisdiction of the lower federal courts.

Article III, Section 1 of the Constitution, states that “[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior

Courts as the Congress may from time to time ordain and establish.” Under this provision, “[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.” *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). The power includes investing those courts “with jurisdiction either limited, concurrent, or exclusive and . . . withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.” *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (quoting *Cary v. Curtis*, 44 U.S. 236, 245 (1845)). While the jurisdiction of this Court derives directly from the Constitution, the jurisdiction of other federal courts derives “wholly from the authority of Congress.” *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922).

As a result, the jurisdictional issue in this case is determined by the Natural Gas Act, not by the policy arguments of the landowners. Under Section 19 of the Act, Congress allocated jurisdiction to FERC and courts of appeals, not to district courts. Therefore, the landowners’ action in district court was properly dismissed.

II. Under the Natural Gas Act, FERC and Courts of Appeals Have Exclusive Jurisdiction Over the Claims of the Landowners

Under the Natural Gas Act, FERC is the agency that decides whether interstate natural gas pipelines should be built. 15 U.S.C. § 717f(c). And decisions of FERC may only be reviewed by the court of appeals where the natural gas company is located or has its principal place of business or by the United States Court of Appeals for the District of Columbia Circuit. *Id.* § 717r(b). Upon filing the record, the receiving

court of appeals acquires “exclusive” jurisdiction to decide the case. *Id.*

In *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), the Court addressed a corresponding jurisdictional provision in the Federal Power Act. After observing that the power of Congress to enact such a jurisdictional provision “can hardly be doubted,” the Court held that the provision provided the “exclusive mode for judicial review of Commission orders.” *Id.* at 336. The Court further held that the Act also precluded review of “all issues inhering in the controversy” and “all other modes of judicial review.” *Id.*; see also *Maine Council of the Atl. Salmon Fed’n v. National Marine Fisheries Serv.*, 858 F.3d 690, 693 (1st Cir. 2017) (Souter, J.) (“The Supreme Court has made it clear that the jurisdiction provided by [the Federal Power Act] is ‘exclusive,’ not only to review the terms of the specific FERC order, but over any issue ‘inhering in the controversy.’”) As the Tenth Circuit has said of *City of Tacoma*, “We would be hard pressed to formulate a doctrine with a more expansive scope.” *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989) (analyzing jurisdiction under Natural Gas Act).³

The courts of appeals have consistently ruled that exclusive means exclusive, and that the Natural Gas Act “nowhere permits an aggrieved party otherwise to pursue collateral review of a FERC certificate in state court or federal district court.” *American Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602,

³ In its opinion, the district court relied upon both *City of Tacoma* and *Thunder Basin* in support of its decision to dismiss petitioners’ action for lack of subject-matter jurisdiction. Pet. App. 29, 34. In affirming, the Fourth Circuit only relied upon *Thunder Basin*. *Id.* 8, 17 n.5.

605 (6th Cir. 2010). The courts have also consistently interpreted and applied Section 19 to preclude “preemptive strike[s]” on anticipated FERC decisions. *Williams*, 890 F.2d at 264. As the Fourth Circuit stated in an earlier case, “there is no area of review, whether relating to final or preliminary orders, available in the district court[s].” *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 957 (4th Cir. 1979).

The statute and the cases, which the landowners never discuss, make clear that challenges to proposed certificates must first be presented to FERC and then to an appropriate court of appeals. Landowners or other opponents of a project may not launch preemptive or collateral attacks in district courts.

III. The Analysis in *Thunder Basin* Supports Exclusive Jurisdiction

In the district court and court of appeals, the landowners argued that the analysis in *Thunder Basin* applied and that under that analysis the district court had jurisdiction. Pet. App. 272-96; Transcript of Motions Hearing at 45-50, *Berkley v. Mountain Valley Pipeline, LLC*, No. 7:17-cv-0357 (W.D. Va. Nov. 3, 2017), ECF No. 43. In their petition, however, the landowners mention *Thunder Basin* one time, and then only in passing. Pet. 35. The reason may be that the Fourth Circuit thoroughly analyzed the landowners’ claims under *Thunder Basin* and concluded that the review procedures under the Natural Gas Act are exclusive. Pet. App. 7-16.

As the Fourth Circuit’s opinion explains, under the Natural Gas Act, the intent to preclude district court jurisdiction is “fairly discernible in the statutory scheme.” Pet. App. 8-9. The language, structure, and purpose of the Act all make this clear. *Id.* Section

19(a) requires aggrieved parties to present their claims to the agency in the first instance. 15 U.S.C. § 717r(a). Section 19(b) then gives aggrieved parties their choice of two courts of appeals for judicial review. *Id.* § 717r(b). Once the record is filed in one of those courts, the jurisdiction of that court is exclusive. *Id.*

In the Act, Congress assigned the district courts jurisdiction for some cases, but not those seeking review of certificates issued by FERC. District courts are authorized to hear cases to enforce orders of FERC, but district courts are not authorized to set aside those orders. 15 U.S.C. § 717u. District courts are also authorized to hear condemnation cases involving the project. *Id.* § 717f(h). As the Fourth Circuit concluded, “the Natural Gas Act indicates that Congress knew how to allow for district court jurisdiction, yet it chose not to do so when it came to issues related to review of a Certificate.” Pet. App. 9.

The Fourth Circuit also found that the landowners’ claims are the type that Congress intended to be covered by the review procedure. Pet. App. 9-16. The court of appeals concluded that the statute did not deprive the landowners of meaningful review, that the landowners’ claims were not wholly collateral to the review procedure, and that FERC’s expertise could be brought to bear on the questions presented. *Id.*

In their petition, the landowners do not challenge any of these conclusions. Instead, the landowners simply ignore the *Thunder Basin* analysis, which they relied upon below.

Although they no longer advance the *Thunder Basin* analysis, the landowners complain about having to present constitutional claims to an administrative agency that they contend lacks the expertise to decide

those claims. Pet. 3-4, 13, 22-25. The landowners fail to acknowledge, however, that FERC considers and decides many “threshold questions that may accompany a constitutional claim.” *Elgin*, 567 U.S. at 22. These include the nature and purpose of the project and whether it serves a public convenience and necessity. The landowners also fail to acknowledge that the court of appeals is fully capable of hearing and deciding constitutional issues.

IV. There Is No Conflict in the Circuits

The landowners contend that there is a conflict in the circuits because numerous cases allow nondelegation claims to be heard in district courts. Pet. 25-26. The fact is, however, that none of the cases cited by the landowners involved the Natural Gas Act or any other statute establishing exclusive jurisdiction. A nondelegation claim may fall under the general federal question statute, 28 U.S.C. § 1331, if no jurisdictional limitation applies. In this case, however, Section 19 of the Natural Gas Act specifies a path for review. The landowners identify no conflict in the cases on the meaning of Section 19. In fact, they do not discuss Natural Gas Act cases at all.

In their effort to create the appearance of a conflict, petitioners contend that the Fourth Circuit “held that a Landowner alleging that Congress violated the Constitution cannot file his action in the District Court.” Pet. 3. Actually, the court of appeals simply applied the provisions of the Natural Gas Act to the facts of the case, as other courts routinely do in similar circumstances.

V. Section 19 Is Constitutional

The landowners also argue that Section 19 itself is unconstitutional as violating the separation-of-powers principle. Pet. 33. The district court and court of appeals did not address this argument because it was never made to them. The only question presented in the lower courts was whether Section 19 applied, not whether it was constitutional. Because this argument was not presented below, it cannot be considered here. *E.g.*, *Byrd v. United States*, 584 U.S. ___, 138 S. Ct. 1518, 1526-27 (2018); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

In any event, any contention that Section 19 is unconstitutional is plainly wrong. Congress is authorized to establish the jurisdiction of the lower federal courts, and it has done so in the Natural Gas Act. *Kline*, 260 U.S. at 234.

Contrary to the landowners' suggestion, the Natural Gas Act does not deny them a forum for their constitutional claims. The Act simply requires that all claims be submitted first to FERC and then to the court of appeals. Whether or not FERC decides constitutional issues, the courts of appeals certainly do.

One has only to look at the docket in the D.C. Circuit to see the range of issues presented by landowners and landowner groups in their petitions for review. Following Section 19(b), the petitioners in those cases challenge the certificate issued by MVP on an array of statutory and constitutional grounds. *Blue Ridge Envtl. Defense League*, No. 18-1002; *Appalachian Voices*, No. 17-1271. The truth is, all of the arguments presented by the landowners in this case could have been presented to FERC and the D.C. Circuit.

VI. The Due Process Arguments of the *Amicus* Are for Other Cases

In its *amicus* brief, The Rutherford Institute argues that the procedures for granting a certificate and instituting condemnation proceedings violate due process. Brief 2. The Institute does not address the jurisdictional issue that controls this case. It does not discuss the power of Congress to determine the jurisdiction of lower federal courts. It does not discuss Section 19 of the Natural Gas Act or any of the cases applying it. And it does not address—or even cite—*Thunder Basin* and the cases following it. Instead, the Institute “writes separately” to argue that due process requires a hearing on any constitutional objections before property is taken. *Id.*

Although there is no requirement for a pre-deprivation hearing in eminent domain cases, *e.g.*, *Bailey v. Anderson*, 326 U.S. 203, 205 (1945); *Presley v. City of Charlottesville*, 464 F.3d 480, 489-90 (4th Cir. 2006); *Montgomery v. Carter County*, 226 F.3d 758, 768-69 (6th Cir. 2000); *United States v. 131.68 Acres*, 695 F.2d 872, 876 (5th Cir. 1983), the argument for one can be—and is being—raised in proceedings in the D.C. Circuit seeking review of the FERC certificate. Petitioners’ Joint Opening Brief at 45-46, *Appalachian Voices*, No. 17-1271 (D.C. Cir. Sept. 4, 2018). Under Section 19 of the Natural Gas Act, the D.C. Circuit has exclusive jurisdiction to hear this challenge to the certificate. 15 U.S.C. § 717r(b).

The Institute also complains about the orders granting possession in the condemnation cases, calling them a “quick-take.” Brief 6. The district courts did not authorize a quick take of the property needed for the pipeline. *Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate & Maintain a 42-inch Gas*

Transmission Line, No. 2:17-cv-04214, 2018 WL 1004745, at *6-7 (S.D.W. Va. Feb. 21, 2018); *Mountain Valley Pipeline, LLC v. Simmons*, 307 F. Supp. 3d 506, 522-23 (N.D.W. Va. 2018); *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate & Maintain a Nat. Gas Pipeline*, No. 7:17-cv-00492, 2018 WL 648376, at *11 (W.D. Va. Jan. 31, 2018). Instead, they considered and ultimately granted motions for partial summary judgment on the right to condemn and then considered and ultimately granted motions for preliminary injunctions authorizing possession pending completion of the condemnation proceedings. 2018 WL 1004745, at *3-11; 307 F. Supp. 3d at 516-32; 2018 WL 648376, at *8-19. The district courts did so after preliminary discovery and full evidentiary hearings. 2018 WL 1004745, at *2; 307 F. Supp. 3d at 513-14; 2018 WL 648376, at *2.

This procedure has been consistently upheld by the courts of appeals. *Transcontinental Gas Pipe Line Co. v. 6.04 Acres*, No. 16-17503, 2018 WL 6367239, at *10 (11th Cir. Dec. 6, 2018); *Transcontinental Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres*, 907 F.3d 725, 733-40 (3d Cir. 2018); *Alliance Pipeline L.P. v. 4.360 Acres*, 746 F.3d 362, 368-69 (8th Cir. 2014); *Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770, 778 (9th Cir. 2008); *East Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir.), *cert. denied*, 543 U.S. 978 (2004). To the extent that landowners have objections to the orders of the district courts in the condemnation cases, those orders can be appealed, and various landowners have done so. Opening Brief of Defendants-Appellants, *Mountain Valley Pipeline, LLC v. 6.56 Acres*, No. 18-1159 (4th Cir. Apr. 16, 2018).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 19, 2018