No. _____

In the
Supreme Court of the United States

CLETUS WOODROW BOHON, BEVERLY ANN BOHON, WENDELL WRAY FLORA, MARY MCNEIL FLORA, ROBERT MATTHEW HAMM AND AIMEE CHASE HAMM,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION AND MOUNTAIN VALLEY PIPELINE, LLC,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Non-Delegation Doctrine is a staple of the separation of powers. Private property, despite its erosion in *Kelo*, remains the safeguard of liberty. But during the New Deal era, America witnessed a massive expansion of the administrative state. After *Schechter Poultry in* 1935, federal courts began applying the "intelligible principle test"—a lax standard detached from traditional separation of powers principles. For 90 years, unelected agencies have wielded illegitimate legislative powers delegated to them by Congress to accomplish controversial goals (like seizing Cletus's *private* property for *private* gain) while avoiding political accountability. This case seeks to re-establish those constitutional boundaries. But the D.C. Circuit has twice denied Landowners their day in court for "lack of jurisdiction," even *after* this Court remanded this case in *Bohon v. FERC*, 143 S. Ct. 1779 (2023). Despite this Court's 9-0 ruling in *Axon* and *Cochran*, the D.C. Circuit reinstated its vacated decision.

The questions presented are:

Whether this Non-Delegation Doctrine challenge to the constitutional authority of an agency was properly filed in district court, or whether an agency order extinguishes district court jurisdiction?

Whether non-party plaintiffs are precluded from raising constitutional challenges because the district court loses jurisdiction the minute a *different* plaintiff files a *different* case with the agency?

Whether §324 of the Fiscal Responsibility Act, enacted to bypass environmental cases in the Fourth

Circuit, strips jurisdiction over this constitutional case, too, even though this Court has *never* allowed Congress to strip courts of jurisdiction to police its constitutional violations? *If* the inquiry does not end there, whether §324 is unconstitutional?

LIST OF PARTIES

Petitioners are private landowners, Cletus Woodrow Bohon and Beverly Ann Bohon ("the Bohons"), Wendell Wray Flora and Mary McNeil Flora ("the Floras"), and Robert Matthew Hamm and Aimee Chase Hamm ("the Hamms") (hereinafter collectively "Petitioners" or "Landowners") and were appellants in the court below. Respondents are the Federal Energy Regulatory Commission ("FERC") and Mountain Valley Pipeline, LLC ("MVP") and were appellees in the court below.

CORPORATE DISCLOSURE

This Petition is not filed on behalf of a corporation.

STATEMENT OF RELATED PROCEEDINGS

Bohon v. FERC, 143 S. Ct. 1779 (2023) (hereinafter "Bohon I"), cert. granted April 24, 2023, vacating *Bohon v. FERC*, 37 F.4th 663 (D.C. Cir. 2022). An application for writ of injunction in *Bohon v. FERC*, No. 23A485, was denied Dec. 5, 2023, but not referred to the Court.

Axon Enter. v. FTC, 143 S. Ct. 890 (2023), decided April 14, 2023, reversed and remanded *Axon Enter. v. FTC*, 986 F.3d 1173 (9th Cir. 2021).

SEC v. Cochran, 142 S. Ct. 2707 (2022), consolidated with *Axon*, affirmed and remanded *Cochran v. United States SEC*, 20 F.4th 194 (5th Cir. 2021).

SEC v. Jarkesy, No. 22-859, cert. granted June 30, 2023, oral argument held Nov. 29, 2023, decision pending.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit (hereinafter the "D.C. Circuit") in this case.

OPINIONS BELOW

The D.C. Circuit's February 13, 2024, opinion is reported at 92 F.4th 1121, 2024 U.S. App. LEXIS 3366, and is reproduced in the appendix hereto ("App.") at 1. The opinion of the United States District Court for the District of Columbia is reported at 2020 U.S. Dist. LEXIS 79639, and is reproduced in the appendix at 21.

JURISDICTION

On remand, the judgment of the D.C. Circuit was entered on February 13, 2024. App. 8. The D.C. Circuit had jurisdiction under 28 U.S.C. § 1291 and the district court had original jurisdiction under 28 U.S.C. § 1331. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Vesting Clauses:

Article I, Section 1 of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."

Article II, Section 1, Clause 1 provides that "[t]he executive Power shall be vested in a President of the United States of America."

Article III, Section 1 provides 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."

Pertinent provisions of the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq*. are referenced below and reproduced in the appendix. App. 68.

28 U.S.C. § 1331 provides that, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

§324 of the Fiscal Responsibility Act of 2023 ("FRA," Public Law 118-5) ("the Debt Bill") is reproduced in the appendix. App. 70.

INTRODUCTION

What independent *constitutional* authority does an unelected agency have to seize private property? None. So how does an executive-branch agency get that power? From Congress. Congress created the agency and gave it massive legislative power to decide when and where private land will be seized. Worse yet, Congress put no restrictions on that delegation. Instead, it gave the agency a blank check. Armed with this "unfettered discretion," that unaccountable agency has roamed free for nearly 100 years, seizing private land against its owners' will. But the days of this 'delegation running riot' are numbered. The agency's structure is unsound. Its authority is constitutionally infirm and has been since its inception. *That* is the "nature of this claim." Like all other separation of powers challenges, this case belongs in district court,[1] which is why this Court vacated the D.C. Circuit's decision in *Bohon I*.

This Non-Delegation Doctrine case is *not* about an agency order; it presents a challenge to the constitutional *authority* of an unelected agency wielding illegitimate power to take private land from American citizens. Across the country, the authority of the SEC, the EPA, the FTC, and the NLRB is subjected to increasing constitutional scrutiny under the separation of powers. But Cletus's structural challenge to FERC's illegitimate power to forcibly seize *private* land and transfer it to a (wealthier)

[1] This Court answered "yes" every time this jurisdiction question was presented in *Axon*, *Cochran*, and *PennEast*. A related question is presented in *SEC v. Jarkesy,* No. 22-859, cert. granted June 30, 2023, argument held Nov. 29, 2023.

private party has yet to be heard. The D.C. Circuit's decision is plainly wrong and should be reversed. The Constitution is designed to protect the individual—Cletus—from government overreach. And this agency's authority is subject to the same constitutional scrutiny all other agencies endure. FERC wields a legislative power far more dangerous to the republic: the power to seize private property, the safeguard of individual liberty.

STATEMENT OF THE CASE

A. Legal Framework: The Non-Delegation Doctrine.

Articles I, II, and III of the Constitution of the United States vest power in three branches of government: legislative, executive, and judicial. The "separation of powers" doctrine is derived from these Articles, i.e., the Vesting Clauses. This doctrine forbids any branch from delegating its vested powers to another branch. That prohibition is known as the "Non-Delegation Doctrine."

The Non-Delegation Doctrine is an important structural mechanism for ensuring "democratic accountability" for unpopular decisions, i.e., seizing private land in rural Virginia for private gain. *See National Federation of Independent Business v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) ("The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials.").

In 1938, Congress passed the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et seq*. In 1947, Congress

amended the NGA to enable the Federal Power Commission—the predecessor to today's Federal Energy Regulatory Commission ("FERC")—to issue a "certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas." 15 U.S.C. § 717f. Under the NGA, the recipient of such a certificate acquires the power of eminent domain to condemn and take private property. FERC is an agency within the executive branch led by commissioners appointed by the President.

By enacting the NGA, Congress delegated expansive legislative authority to FERC to determine when eminent domain power should be conveyed to a private party without drafting any definite standards—"intelligible principles"—to guide FERC in carrying out Congress's will. Instead, Congress allowed FERC to *unilaterally* create and impose its own rules to determine when a private, *for-profit* entity can exercise the government's power of eminent domain to seize private property from landowners unwilling to sell.

B. Factual Background.

Petitioners own private property along a pipeline route. When Petitioners refused to sell their property to the pipeline company ("MVP"), MVP filed condemnation actions seeking to exercise its unlawfully delegated eminent domain power to seize Petitioners' property against their will.

On January 2, 2020, Petitioners filed this structural Non-Delegation Doctrine challenge to the enabling legislation and constitutional *authority* of the

agency to wield this unchecked legislative power. Petitioners alleged three structural counts arising under Articles I, II, and III of the U.S. Constitution.

Count I invokes the federal Non-Delegation Doctrine to challenge Congress's overly broad transfer of legislative power to the executive branch (FERC). This challenge seeks to re-examine the "intelligible principle" standard, and is identical to that raised in *A. L. A. Schechter Poultry Corp. v. United States* where Congress's overly broad delegation of code-making power to the executive branch was deemed a "delegation running riot." 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

Count II challenges FERC's sub-delegation of power to private entities *See J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 405-06 (1928) ("*Delegata potestas non potest delegari*," meaning power cannot be subdelegated).

Count III invokes the private Non-Delegation Doctrine to challenge Congress's transfer of eminent domain power to a private entity. *See DOT v. Association of American Railroads*, 575 U.S. 43, 62 (2015) (Alito, J., concurring) ("When it comes to [delegations of power to] private entities, however, there is not even a fig leaf of constitutional justification."). The delegation in *Amtrak* would have been unconstitutional had Amtrak been purely private, like MVP, not "quasi-governmental." Because eminent domain is legislative power, Congress cannot delegate it to a *private* actor. *See, e.g.,* I William Blackstone, Commentaries on the Laws of England, *135.

C. Procedural Background.

i. Bohon I: pre-remand.

On May 6, 2020, the district court erroneously held it lacked jurisdiction to hear Petitioners' Non-Delegation Doctrine challenge and dismissed the case.

On July 6, 2020, Petitioners filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit. Before this case was argued, FERC moved the D.C. Circuit to hold this case in abeyance pending this Court's decision on an almost identical jurisdiction issue in *PennEast Pipeline Co. v. New Jersey,* 141 S. Ct. 2244 (2021).

On June 29, 2021, this Court held in *PennEast* that New Jersey's Non-Delegation challenge to Congress's decision to delegate eminent domain power to a private party—one of the same questions presented here—had been properly filed in district court.

On June 21, 2022, the D.C. Circuit ignored this Court's jurisdictional holding and explicit language in *PennEast* regarding the type of delegation[2] at issue

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[2] In *Bohon I*, the D.C. Circuit erroneously differentiated this challenge from New Jersey's challenge in *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021) by ignoring explicit language from this Court stating that the delegation at issue in *PennEast* was not delegation of the power to abrogate Eleventh Amendment immunity but, rather, "whether the United States can delegate its eminent domain power to private parties." *PennEast*, 141 S. Ct. at 2262. That is the exact question Landowners raise in Count III of their complaint. Note that *PennEast* did not address Landowners' Counts I and II, which are unique claims because they invoke the Vesting Clauses to revisit the intelligible principle standard, challenging the overly broad delegation as in *Schechter Poultry*.

there and erroneously affirmed dismissal of Petitioners' nondelegation challenge.

On September 15, 2022, Landowners filed a petition for writ of certiorari in this Court. *See* Case No. 22-256, *Bohon v. FERC*, 143 S. Ct. 1779 (2023) ("Bohon I"), cert. granted Apr. 24, 2023. On December 2, 2022, Landowners filed an emergency motion to defer consideration of their Non-Delegation Doctrine case pending the decision in *Axon Enter. v. FTC*, 143 S. Ct. 890 (2023). *Axon* was consolidated with another separation of powers case from the Fifth Circuit, *SEC v. Cochran,* 142 S. Ct. 2707 (May 2022). *Axon* challenged the authority of the FTC; *Cochran* challenged the authority of the SEC.

When requesting the hold, Landowners argued that both *Axon* and *Cochran* dealt with the same issue: whether the district court retains jurisdiction over a structural separation of powers claim to the agency's authority, notwithstanding the existence of an agency order or proceeding. FERC and MVP vehemently opposed the hold, arguing that (1) *Axon* and *Cochran* were entirely "unrelated" to this separation of powers case; (2) the nature of the claim does not matter because (3) the existence of an agency order controls the jurisdictional inquiry.

On January 6, 2023, this Court granted Landowners' motion—over the agency's and MVP's unsound objections that the cases were "unrelated"—and held this separation of powers case pending the decision in *Axon*.

On April 14, 2023, this Court issued a **unanimous 9-0 decision in *Axon* upholding district court**

jurisdiction over structural separation of powers challenges to an agency's authority. The unanimous holding confirmed the same position Landowners advanced in their briefing before this Court: that the jurisdictional inquiry requires considering the nature of the claim, not the status of an agency order. [3]

On April 17, 2023, in light of *Axon*, Landowners asked this Court to lift the hold and grant summary disposition. Once again, FERC and MVP vehemently opposed, again erroneously arguing that (1) *Axon* has no impact on this case; (2) the status of an agency order controls the jurisdictional inquiry; and (3) the district court has no jurisdiction to hear this Non-Delegation Doctrine case.

But, on April 24, 2023, this Court granted Landowners' Petition for Writ of Certiorari, lifted the hold, and granted summary disposition to Landowners. In so doing, this Court once again rejected the agency's lengthy—but flawed—arguments that the separation of powers cases were "unrelated" and that § 1331 jurisdiction depends on the status of an agency order.

ii. Bohon II: post-remand.

On May 26, 2023, this Court issued its mandate *granting* Landowners' petition, *vacating* the

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[3] *Compare Axon*, 143 S. Ct. at 905 (explaining that the jurisdictional inquiry "requires considering the ***nature of the claim, not the status*** (pending or not) ***of an agency proceeding***") with *Bohon I,* 143 S. Ct. 1779 (2023), Brief for Petitioners at 11 (Landowners arguing, "It is the ***nature of the claim, not the procedural posture*** or identity of the property owner, that determines the district court's original jurisdiction.") (emphasis added).

judgment, awarding costs,[4] and *remanding* this Non-Delegation Doctrine case for further proceedings, *specifically* instructing the D.C. Circuit to re-examine this separation of powers case in light of the unanimous jurisdictional holding in *Axon*.

One week later, on June 3, 2023, Congress enacted and the President signed into law the Fiscal Responsibility Act of 2023 ("FRA," Public Law 118-5) (hereinafter "the Debt Bill"), which lifted the limit on the federal debt to avoid default. Included in the Debt Bill was section 324, an unrelated provision designed to bypass environmental permitting cases—which were *statutory* claims—in the Fourth Circuit. The law strips jurisdiction over those environmental (statutory) challenges, and reserves jurisdiction for challenges *to the Debt Bill* for the D.C. Circuit.

When *Axon's* 9-0 decision sunk its case on jurisdiction over this Non-Delegation Doctrine case, MVP panicked, switched gears, and soon sought to weaponize this brand new statute against Landowners, claiming that the D.C. Circuit should not even reach *Axon* because §324 stripped jurisdiction over *constitutional* cases, too.

Landowners countered that these new arguments surrounding §324 were stall tactics because §324 plainly does not—and could not—strip jurisdiction over a structural *constitutional* challenge to the agency's enabling legislation. Landowners noted that this Court has <u>never</u> permitted Congress to strip

[4] MVP has still not paid those costs, in violation of this Court's April 24, 2023, judgment awarding them. App. 10-11.

jurisdiction over *constitutional* claims, and that §324 would be unconstitutional if so applied.

But from May 2023 to February 2024, while Cletus's land was being irreparably harmed, this Non-Delegation Doctrine case was delayed four times as follows: **July 10, 2023** (delaying briefing, at MVP's request); **August 7, 2023** (at MVP's request, expanding briefing on §324 of the Fiscal Responsibility Act); **October 11, 2023** (adding another round of briefing on §324, at MVP's request); **November 13, 2023** (adding another 30-day extension at FERC's request).

Each time, Landowners opposed the delay. Each time, the D.C. Circuit granted the extension requesting additional briefing on §324 despite the daily escalation of irreparable injury to the land.

On October 16, 2023, Landowners filed an emergency motion for injunctive relief to halt irreparable injury on Landowners' three parcels pending adjudication of this constitutional case. Without explanation, the D.C. Circuit denied the request. From November 2023 to February 2024, no decision was issued while construction on the land proceeded full steam ahead.

On November 26, 2023, Landowners filed an emergency application for writ of injunction to this Court, citing the escalating irreparable harm to Cletus's land during the delays in the D.C. Circuit. *See* No. 23A485. On December 5, 2023, the application was denied by The Chief Justice, but not referred to the Court.

After 10 months of delays, the D.C. Circuit issued a short opinion on February 13, 2024, ignoring §324 and reinstating the same erroneous reasoning from its vacated decision.[5] Despite this Court's remand on April 24, 2023, the D.C. Circuit again disregarded the nature of the constitutional claim and erroneously hinged jurisdiction on the status of an agency order.

For a second time, the D.C. Circuit dismissed this Non-Delegation Doctrine challenge, erroneously concluding that district courts have no jurisdiction to hear such constitutional claims.

REASONS FOR ALLOWANCE OF THE WRIT

I. The D.C. Circuit's Decision Is (Again) In Direct Conflict With Controlling Supreme Court Precedent.

A. This Court has unanimously held that an agency order does <u>not</u> insulate an agency from district court review of its constitutional authority.

The D.C. Circuit's decision again defies controlling Supreme Court precedent. Instead of applying the 'nature of the claim' test this Court enunciated in *Axon*, the court below reinstates its vacated opinion. Its entire jurisdictional inquiry, once again, focuses on the existence of an agency order. But the D.C. Circuit misconstrues the issue as one of "*jurisdiction* ***over the***

[5] The February 13, 2024, opinion also lists the wrong counsel from the vacated decision. John R. Thomas was *not* signed on any briefs while the case was on appeal before this Court or after it was remanded to the D.C. Circuit in *Bohon I;* Christopher E. Collins *was* signed on *all* briefs in the D.C. Circuit post-remand but is not listed in the opinion.

certificate injuring the Bohons." *Bohon v. FERC*, 2024 U.S. App. LEXIS 3366 *3, 92 F.4th 1121 (D.C. Cir. 2024). It proclaims the NGA "strips district courts of *jurisdiction* ***to review a FERC certificate."*** And it concludes jurisdiction initially appears but then disappears "after a court of appeals receives the record in a suit ***challenging that certificate***." *Id.* This is the same error the D.C. Circuit made before remand.

This Non-Delegation Doctrine case is not about a particular certificate. It challenges the agency's enabling legislation and its *authority* to issue certificates *at all*. Setting aside the certificate affecting Petitioners' land would not cure the structural constitutional defects in the Commission's enabling legislation. *See Axon*, 143 S. Ct. at 903 ("**The court could of course vacate the FTC's order. But Axon's separation-of-powers claim is not about that order**.") (emphasis added). The issue, therefore, is not jurisdiction "over that certificate;" the issue is jurisdiction over a structural Non-Delegation Doctrine challenge to the Commission's constitutional authority. And that question is settled decisively in Landowners' favor.

B. The decision below rejects this Court's test in favor of *peekaboo* jurisdiction, a flawed inquiry that rests on an "order/no order" dichotomy.

The decision below would allow an executive-branch agency to deprive an Article III court of jurisdiction merely by *acting*. The D.C. Circuit reinstates the same pre-*Axon* "order/no order" dichotomy it erroneously applied before remand. That dichotomy has been rejected many times, by this Court

and other Courts of Appeals.[6] As Justice Kagan explained, the jurisdictional inquiry "requires considering the **nature of the claim, not the status** (pending or not) **of an agency proceeding**." *Axon*, 143 S. Ct. at 905 (emphasis added). Even before *Axon*, Landowners advanced the very same test in *Bohon I,* arguing, "It is the nature of the claim, not the procedural posture or identity of the property owner, that determines the district court's original jurisdiction." *Bohon v. FERC*, 143 S. Ct. 1779 (2023), No. 22-256, Brief for Petitioners at 11.

But the D.C. Circuit ignores the nature of the claim and holds that jurisdiction is a disappearing act that comes and goes with the status of an agency order. Like *Houdini*, jurisdiction is here one minute but gone the next. Before remand, the D.C. Circuit claimed the mere *existence* of an agency order extinguishes jurisdiction over a separation of powers case. After remand, the D.C. Circuit claims the *status,* i.e., timing, of an agency order extinguishes jurisdiction. For the D.C. Circuit, jurisdiction exists only until the agency issues an order affecting your land, at which time it disappears only to reappear again in a court of appeals following a futile agency proceeding that results in the agency not answering the constitutional question. So, Cletus *can* challenge the constitutional authority of an agency to act until the agency *acts,* at which point the district court loses jurisdiction over Cletus's claim that

[6] It was raised by FERC and MVP in *Bohon I* when they asked this Court not to remand this Non-Delegation Doctrine case. It was also raised in the Fifth and Ninth Circuits before this Court's unanimous decision in *Axon* rebuked the wonky idea that the status of an "agency order" controls jurisdiction over a separation of powers claim.

the agency never had constitutional authority to act at all. As the Fifth Circuit explained, this approach to jurisdiction makes very little sense. *Cochran v. United States SEC*, 20 F.4th 194, 231 (5th Cir. 2021) (en banc) (Oldham, J., concurring).

As a threshold matter, Cletus lacks standing[7] to file a Non-Delegation Doctrine challenge until he learns *his* land will be seized. But according to the D.C. Circuit, the minute he learns his land will be seized (and thus gains standing to file a constitutional claim), the district court loses jurisdiction. So, while the court *has* jurisdiction, Cletus lacks standing. But the second he gains standing, the court loses jurisdiction. The result is *quantum* jurisdiction: it is not possible to have both standing and jurisdiction at the same time.[8] So when *can* Cletus file a Non-Delegation Doctrine challenge to the agency's power? Never, according to the D.C. Circuit's unsound logic. If your land is *not* affected, you have no standing to bring a constitutional claim. But if your land *is* affected, the court no longer has jurisdiction. And what is the D.C. Circuit's solution? Cletus should, apparently, file his

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[7] To bring a constitutional claim, a plaintiff must have standing. That "irreducible constitutional minimum" requires a concrete and particularized "injury-in-fact." *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560-61 (1992). A plaintiff without standing cannot even raise a constitutional claim. There is no "taxpayer standing," and a "generalized interest in the proper application of the law" is "not enough." *Kan. Corp. Comm'n v. FERC,* 881 F.3d 924, 929 (D.C. Cir. 2018).

[8] Under Heisenberg's Uncertainty Principle, it is not possible to *simultaneously* know both the precise momentum and the position of a subatomic particle; you can only measure one at any given time. Likewise, under the court's holding, it is not possible to have both standing and jurisdiction at the same time.

constitutional challenge with the agency whose very authority he is challenging, a question the agency has openly admitted it cannot answer.

Judge Oldham on the Fifth Circuit detailed how "this peekaboo approach to constitutional claims makes very little sense." *Cochran*, 20 F.4th at 231 (en banc) (Oldham, J., concurring) (explaining that the dissent's investigation-enforcement distinction is "illogical" because the claim would remain "illusory" until after the agency concludes its proceedings at which point the claim suddenly "reappears"). To hinge jurisdiction on this disappearing magic act is to defy this Court's controlling precedent. The district court either *has* jurisdiction or it does *not*. And we know from *Axon*, *Cochran*, *PennEast*, and *Jarkesy* that, in structural separation of powers cases, it does.

C. Agency review schemes do not apply to constitutional cases that question Congress's action because the agency cannot answer those questions.

Whether a review scheme is *explicit* or *implicit* does not alter the nature of the claim. An agency cannot adjudicate the constitutionality of its own existence. For that reason, structural separation of powers attacks on an agency's enabling legislation belong in district court.

FERC's admission that it will not—and cannot—answer Landowners' constitutional questions further bolsters this position. Like the agency in *Johnson v. Robison*, which "expressly disclaimed authority to decide constitutional questions," 415 U.S. at 367-68, FERC has likewise expressly disclaimed authority to

answer the questions presented. 161 FERC ¶ 61,043 (2017) (Certificate Order to MVP) **("[S]uch a question is <u>beyond our jurisdiction</u>: only the Courts can determine whether Congress' action in passing section 7(h) of the NGA conflicts with the Constitution"**) (emphasis added). Thus, an exclusive review scheme is only "exclusive" ***if*** the litigants are challenging *agency* action, i.e., things the agency can fix such as an environmental or safety issue, a fine, a permit, or the location of the pipeline. Because Landowners are challenging the constitutional *authority* of the agency to act at all, the review scheme is inapplicable because the agency has neither authority nor expertise to address such constitutional questions to its enabling legislation. *See Axon*, 598 U.S. at 905 (2023) (rejecting the government's false claims of "expertise" to evaluate separation of powers challenges, noting "**The Commission knows a good deal about competition policy, but nothing special about the separation of powers**.") (emphasis added).

Even before *Axon*, it was well-settled that **"[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."** *Johnson v. Robison*, 415 U.S. 361, 367-68 (1974) (holding that "[t]he questions of law presented in these proceedings **arise under the Constitution, not under the statute whose validity is challenged.")** (emphasis added); *Public Utilities Commission of State of Cal. v. U.S.*, 355 U.S. 534, 539 (1958) ("[W]here the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency

may be defied and **judicial relief sought as the only effective way of protecting the asserted constitutional right**.") (emphasis added); *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 (2010) (concluding that **"constitutional claims are also outside the Commission's competence and expertise");** *Cirko on behalf of Cirko v. Commissioner of Social Security,* 948 F.3d 148, 153 (3d Cir. 2020) ("[E]xhaustion is generally inappropriate where a claim serves to vindicate **structural constitutional claims** like Appointments Clause challenges, which implicate both **individual constitutional rights and the structural imperative of separation of powers**.") (emphasis added).

In *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021), this Court likewise held that district courts retain jurisdiction over constitutional challenges *in the precise context of* a delegation challenge[9] relating to the Natural Gas Act. In *Axon* and *Cochran*, this Court issued a unanimous 9-0 decision again confirming Landowners' position that district courts retain jurisdiction to adjudicate separation of powers challenges to an agency's enabling legislation, notwithstanding the agency's exclusive review scheme. 143 S. Ct. 890 (2023). *See also Jarkesy v. SEC,* 34 F.4th 446 (5th Cir. 2022).

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[9] *PennEast* only touched upon Count III in Landowners' Complaint, not Counts I or II. But the jurisdiction principle is the same as in *Axon*.

D. The D.C. Circuit conflates jurisdiction with preclusion.

The D.C. Circuit concludes that *Appalachian Voices*, a different case involving different plaintiffs, precludes *jurisdiction* here. The court reasons that the district court loses jurisdiction over all constitutional cases as soon as "the record" in a *different* case challenging *an agency order* reaches the court of appeals. Again, Landowners are not challenging "an agency order." And jurisdiction and preclusion are separate issues. Preclusion cannot even be adjudicated unless there *is* jurisdiction. To the extent the D.C Circuit *is* adjudicating preclusion, it is admitting jurisdiction exists. But res judicata is not a jurisdictional inquiry. Even if it were, there would be no preclusive effect from *Appalachian Voices v. FERC*, No. 17-1271, 2019 U.S. App. LEXIS 4803, 2019 WL 847199, at *1-2 (D.C. Cir. Feb. 19, 2019). Landowners were not parties to *Appalachian Voices*, nor is there any duty to intervene. And it is long settled that a failure to intervene in a prior suit does not create preclusive effect on a non-party plaintiff in a future suit. *See Martin v. Wilks*, 490 U.S. 755, 765 (1989) (no preclusive effect attributed to firefighters' failure to intervene in a prior suit because there is no duty to intervene even if a non-party knew of a prior suit or had similar interests) (superseded by statute on other grounds, 1991 Civil Rights Act); *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 813 (D.C. Cir. 2002) (res judicata did not bar the Trustees' action) ("Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are [subjected to the jurisdiction of

the court and] bound by a judgment or decree.") (quoting *Wilks*, 490 U.S. at 765).

Despite that, the D.C. Circuit erroneously concludes that *Appalachian Voices*—a different case involving different plaintiffs—deprives the district court of *jurisdiction* here. It reasons that once *anyone* appeals *anything* via the agency review scheme, the district court suddenly loses *jurisdiction* over *all* claims brought by *all* other litigants, even constitutional cases filed by non-parties that challenge the constitutional authority of the agency, not any aspect of a particular order affecting them. But the court again misconstrues the issues: the issue on remand is *jurisdiction*, not preclusion. And even if preclusion *were* at issue, this Court has already rejected the D.C. Circuit's flawed approach.

Justice Ginsburg in *Taylor v. Sturgell,* 553 U.S. 880 (2008) reiterated that the preclusion doctrine is defined by "crisp rules with sharp corners;" it is not a "round-about doctrine of opaque standards." (internal citations omitted). "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor*, 553 U.S. at 884 (citing *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). "This rule is part of our 'deep-rooted historic tradition that **everyone should have his own day in court**.'" *Richards v. Jefferson County,* 517 U.S. 793, 798 (1996) (citing 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)); *Martin v. Wilks,* 490 U.S. 755, 761-762 (1989). The only conceivable exception is if a

nonparty is in "privity." But there is no privity here. This Court in *Richards* and *Taylor* emphasized the strict constitutional limits on the "privity" exception. *Taylor*, 553 U.S. at 892-93 ("**A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit**."); *Richards*, 517 U.S. at 798 ("[A] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.") (internal quotations omitted). As Justice Ginsburg concluded, there is "no support in our [Supreme Court] precedents" for the D.C. Circuit's "lax approach to nonparty preclusion." *Taylor,* 553 U.S. at 900.

There is not even a semblance of preclusive effect here. As the D.C. Circuit acknowledged in *Hurd v. District of Columbia*, "[p]reclusion is designed to limit a plaintiff to ***one bite at the apple***, ***not to prevent even that single bite.***" 864 F.3d 671, 679 (D.C. Cir. 2017) (emphasis added).

II. The D.C. Circuit's Decision Resurrects The Pre-*Axon* Circuit Split With *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) and *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021).

Prior to *Axon*, the question was which Circuit was correct: the D.C. Circuit, whose jurisdictional inquiry focuses on an agency order, or the Fifth Circuit, which examines the nature of the claim and sends separation of powers challenges to district court. In *Axon*, this Court confirmed the Fifth Circuit was correct, and reversed the Ninth Circuit on the same issue.

But for a second time, the D.C. Circuit's decision conflicts with the Fifth Circuit's decisions in *Jarkesy v. SEC,* 34 F.4th 446 (5th Cir. 2022) and *Cochran v. United States SEC*, 20 F.4th 194 (5th Cir. 2021), *affirmed and remanded* by *Axon*. The D.C. Circuit is still erroneously directing separation of powers cases to agency proceedings. In *Bohon I,* the D.C. Circuit relied on dicta in *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015) to erroneously conclude that a district court would not have jurisdiction over Jarkesy's nondelegation challenge *even if* Jarkesy had properly raised it.[10] But, in 2022, the Fifth Circuit held the opposite, concluding that the D.C. Circuit should never have routed Jarkesy to agency proceedings at all, and wrongly denied him his day in court. *Jarkesy*, 34 F.4th at 455 ("*Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power*") (emphasis added). The Fifth Circuit held that the agency was not the proper forum for Jarkesy's nondelegation challenges and that his constitutional claims belonged in district court, not with the SEC. The Fifth Circuit thus reached the exact opposite conclusion on the issue of jurisdiction the D.C. Circuit had reached in the same, predecessor case

[10] The plaintiff in *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015) did not properly raise his facial nondelegation challenge and only mentioned it later, in passing. Thus the D.C. Circuit's comments in 2015 on whether the district court *would have had* jurisdiction *assuming* the plaintiff had properly raised the nondelegation issue was dicta. However, the D.C. Circuit in the case at bar relied on this dicta from its *Jarkesy* decision in 2015 to hold in *Bohon I* that the district court has no jurisdiction over facial nondelegation challenges – a decision that conflicts with the Fifth Circuit's holding.

seven years prior. Indeed, a portion of that same case is presently before this Court, in *SEC v. Jarkesy, et al.*, Case No. 22-859, cert. granted June 30, 2023, oral argument held Nov. 29, 2023. By reinstating its vacated decision, the D.C. Circuit is reinstating the same error and reopening the same Circuit Split.

Likewise, the Third Circuit in *Cirko v. Commissioner of Social Security,* 948 F.3d 148 (3d Cir. 2020) held that deference to agency expertise in constitutional challenges was "rendered irrelevant" on account of the "well-worn maxim" that constitutional questions, such as Appointments Clause challenges, are "outside the [agency's] competence and expertise." *Cirko*, 948 F.3d at 158 (internal citation omitted). Because the challenge arose under the Constitution, there was "no legitimate basis" to send that question to the agency. *Id*. Nor could the agency correct the constitutional error because the administrative judges could not "cure the constitutionality of their own appointments." *Id*. at 158.

Agencies cannot adjudicate (or cure) the unconstitutionality of their own power. The Fifth Circuit in *Jarkesy* and *Cochran* knew that. The Third Circuit in *Cirko* knew that. The Ninth Circuit in *Axon* now knows it, too. But the D.C. Circuit is still erroneously focusing on an agency order and applying the wrong jurisdictional test, even after *Axon*.

III. This Case Provides An Important Vehicle To Dispel The Dangerous Idea That Congress Can Strip Courts Of Jurisdiction To Police Its Constitutional Violations.

The Founders dispersed power into *three* branches of government to defend the individual—Cletus—against tyranny by preventing any one branch from accumulating too much power. For that reason, the Supreme Court has never allowed Congress to strip courts of the power to review *constitutional* challenges to congressional enactments. Yet that is precisely what MVP and FERC propose §324 of the Fiscal Responsibility Act ("FRA" or "Debt Bill") has done: stripped the court's jurisdiction to review this Non-Delegation Doctrine challenge. But if §324 truly does what the agency and MVP propose, there is a gaping hole in the fabric of this republic that must be mended.

This separation of powers issue is of exceptional importance for the stability of the republic and should be addressed to deter agencies, lower courts, special interest groups, lobbyists, and especially Congress, from continuing down this dangerous road. This case provides an important vehicle for the Court to dispel that dangerous idea, lest its inaction encourage Congress to pursue similar unlawful avenues to bypass the Constitution.

A. The D.C. Circuit ignores §324 after 10 months of delay.

Curiously, after numerous delays and months of additional briefing on §324, the D.C. Circuit now holds it need not address §324 at all. It can address

jurisdiction in any order it wishes. And the court chooses to ignore §324. While that principle is *generally* true, a statute that purportedly strips jurisdiction seems to present a threshold question that presumably should be answered before the court continues with further adjudication. If §324 truly does what MVP says—if it strips both the district court and the appellate court of jurisdiction—how would the D.C. Circuit have jurisdiction to read and interpret the text of the NGA in the first place? In fact, MVP asked the D.C. Circuit to disregard this Court's mandate to revisit in light of *Axon* and dismiss the case *solely* on the basis of §324, without reaching *Axon* or the NGA. When the D.C. Circuit instead picked up the NGA and adjudicated its text to render this erroneous decision, its action suggested §324 did not deprive it of jurisdiction to do so. Thus, §324 does not bar constitutional challenges and is not a backup basis for a third dismissal on jurisdiction.

B. This Court has consistently held that Congress cannot preclude judicial review of *constitutional* challenges to government authority.

i. The plain text and legislative history show §324 does not bar this Non-Delegation Doctrine case.

The plain text and legislative history of §324 confirm it was specifically drafted to target environmental permitting cases alleging various *statutory* claims in the Fourth Circuit. It has nothing to do with this *constitutional* Non-Delegation Doctrine case in the D.C. Circuit, nor could it.

The history is informative. Since 2018, the Fourth Circuit has repeatedly ruled in favor of environmental groups challenging permits MVP needed to complete construction. In May 2022, MVP—upset over those losses—asked the Fourth Circuit to appoint a different panel to hear the myriad of environmental cases filed in that court. When that effort failed, MVP went forum shopping. Its champion, Sen. Joe Manchin, extracted a promise as part of the 2022 Climate Bill to streamline permit approvals and route environmental cases (which are statutory claims) exclusively to the D.C. Circuit. That promise proved elusive and the Fourth Circuit continued ruling against MVP. Sen. Manchin called the Fourth Circuit's decisions "infuriating."

On May 20, 2023, Sen. Manchin, issued a statement titled "Permitting Reform Necessary For America's Future" that bemoaned "[o]ur inability to permit projects in West Virginia and across the country on a timely basis ...." *See* App. 73. He highlighted his efforts to "address our nation's broken *permitting* system" and secure "comprehensive *permitting* reforms." *Id*. (emphasis added). Sen. Manchin recounted how he "secur[ed] a commitment to get *permitting* reform done" in 2022 and referred to his proposed legislation as "the only comprehensive Senate *permitting* bill to have bipartisan support ...." *Id*. (emphasis added). Sen. Manchin cited various forms of the word "permit" **21 times** in this two-page statement. *See* App. 73-77. Days later, Sen. Manchin successfully lobbied his colleagues to add language to the FRA to eliminate environmental roadblocks to MVP. That provision requires agencies to grant all types of *environmental permits* needed to complete

and operate MVP and strips the Fourth Circuit of jurisdiction to review agency action surrounding those permits. FRA §324(c-d).

When *Axon* sunk its argument on jurisdiction, MVP panicked and sought to weaponize §324 against Landowners here, claiming that §324 bars constitutional challenges, too.

But the plain text[11] of §324 deprives courts of jurisdiction to review actions ***taken by state or federal agencies***, not action taken by Congress. Here, Landowners are challenging action ***taken by Congress*** in 1938, when it created FERC. That claim arises under the Constitution, not under any statutes passed by Congress.

Nothing in §324 "cures" those constitutional defects in the NGA. Just as a father cannot authorize his son's unlawful act by giving his blessing, neither can Congress make an unlawful transfer of legislative power constitutional. An underage minor who takes his father's car out for a joyride breaks the law with or without his father's blessing. The father cannot condone the underage driver's acts merely because he owns the car. So too here. Congress cannot abdicate its responsibilities by handing out its legislative powers and "blessing" unconstitutional delegations. The delegation is *still* unlawful under the Constitution, with or without Congress's blessing. Section 324 does nothing to cure that constitutional defect in the

[11] Section 324 does not even identify Landowners' parcels. Unlike in *Patchak v. Zinke*, 583 U.S. 244 (2018), where the statute specifically identified the Bradley property owned by the tribe, there is no description anywhere in §324 relating to "the Bohon property," "the Hamm property," or "the Flora property."

agency's enabling legislation. FERC continues exercising unfettered discretion and MVP (not Congress) continues exercising the legislative power of eminent domain to seize this land. The same constitutional violations and injuries remain, before and after §324.

The plain text and legislative history show §324 does not (and was never intended to) bar this constitutional case.

ii. Section 324 would be unconstitutional if applied to bar this Non-Delegation Doctrine case.

Section 324 does *not* bar constitutional cases but would be unconstitutional even if so applied. Congress cannot pass one unconstitutional law, then enact another to bar review of the constitutionality of the first. In *Patchak v. Zinke*, 583 U.S. 244, 138 S. Ct. 897, (2018), this Court expressly held that its holding would **not** apply to constitutional claims.

Justice Thomas reasoned Congress could strip courts of jurisdiction only "[**s]o long as Congress does not violate other constitutional provisions**." *Patchak*, 583 U.S. at 252 (emphasis added). Because Patchak's underlying claim did not allege a *constitutional* violation but a *statutory* one, Congress could alter the court's jurisdiction only because it was exempting review of its own laws (not the Constitution). Again, the "nature of the claim" is what distinguished *United States v. Klein,* 80 U.S. 128 (1871) from *Patchak*: *Klein* raised a constitutional challenge whereas Patchak's underlying claim was statutory, invoking the Administrative Procedure Act

and the Indian Reorganization Act—laws created by Congress—alleging the Secretary lacked *statutory* authority to take the Bradley Property into trust, not that he lacked *constitutional* authority.

Justice Breyer observed the same distinction between statutory and constitutional claims. *Id.* at 912 (Breyer, J., concurring) ("Here Congress has used its jurisdictional power to supplement, without altering, action that **no one has challenged as unconstitutional**") (emphasis added). *Accord Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001) (holding the Coalition "poses no constitutional objection," only statutory ones). By contrast, Landowners have challenged the NGA as *unconstitutional* under the Vesting Clauses. Because Congress is "powerless to prescribe," alter, ratify, condone, or strip review of *unconstitutional* action, Landowners easily prevail here under the majority view in *Patchak*.[12]

The D.C. Circuit has previously observed the same distinction. *See Bartlett v. Bowen*, 816 F.2d 695, 707 (D.C. Cir. 1987) ("**The Supreme Court has never upheld such an enactment, and we will not do so here**."). The *Bartlett* court explained, "It is critically important to recall that the Secretary has no authority to rule on a constitutional challenge to the Act that enables him." *Id.* at 702. The "delicate balance implicit

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[12] Expressing "great skepticism," Justice Sotomayor agreed with the dissent's rationale and only joined the plurality's holding because Congress was not violating the *Constitution* but merely altering its *own* statute. *Patchak*, 583 U.S. at 265 (Sotomayor, J., concurring).

in the doctrine of separation of powers would be destroyed if Congress were allowed not only to legislate, but also to judge the constitutionality of its own actions." *Id*. at 707. *See Johnson v. Robison*, 415 U.S. 361 (1974) (holding that the questions presented arise under the Constitution, "not under the statute whose validity is challenged."); *Free Enterprise Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010). Applying *Klein*, the *Bartlett* court reasoned the "constitutional guarantee of an independent judiciary" prevents Congress from stripping jurisdiction over constitutional claims. *Id*. at 705. To strip jurisdiction over Landowners' constitutional claims would thus violate their Fifth Amendment due process right to have an independent judiciary review Congress's constitutional violations.

C. Section 324 is unconstitutional on its face.

This Court's precedent in *Klein* and *Patchak* does not allow Congress to bar review of *constitutional* challenges. The inquiry can end there because Landowners win under *Patchak*. Assuming it goes further, several Justices have refused to uphold jurisdiction-stripping provisions even where the underlying claims are *statutory* violations as opposed to constitutional challenges. *Patchak*, 583 U.S. at 266-80 (Roberts, C.J., dissenting, joined by Kennedy, J., and Justice Gorsuch).

The Founders did not recognize arbitrary decrees as laws. John Locke observed, "[F]reedom of men under government is, to have a standing rule to live by, **common to every one of that society**, and made

by the legislative power erected in it … and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man." J. Locke, Second Treatise of Civil Government §22, p. 13 (J. Gough ed. 1947). William Blackstone echoed this principle, noting law is *only* law if it is generally applicable. *See* William Blackstone, 1 Commentaries 44, 129, 134, 137-138; *see also* The Federalist No. 51, at 321. *Bartlett*, 816 F.2d at 710 ("**Judicial review has been with us since *Marbury v. Madison*, and no one has ever before suggested that it is discretionary on Congress' part**."); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803); *DOT* v. *Ass'n of Am. R.R.*, 575 U.S. 43, 74 (2015).

Justice Thomas observed in *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 116 (2015) how the Constitution's separation of powers was informed by "centuries" of political thought. Fearing the "dangers of tyrannical government," a clear separation was drawn. *Perez*, 575 U.S. at 116-17 (citing The Royalist's Defence 80 (1648) and M. Vile, Constitutionalism and the Separation of Powers 38, 168-169 (2d ed. 1998) (Vile)). As Montesquieu warned, "power should be a check to power" lest the legislature . . . "soon destroy all the other powers." *Id.* (citing Montesquieu, Spirit of the Laws, at 150, 157).

The Framers learned this lesson from history and separated power into three branches at the Convention. This "structure represented the 'great security' for liberty in the Constitution." *Id.* at 118 (citing The Federalist No. 51, p. 321 (C. Rossiter ed. 1961)). The rule of law was so important the Founders added additional protections, including prohibitions

on titles of nobility, *ex post facto* laws, and bills of attainder. U.S. Const. art. I, §§ 9-10. The Federalist Nos. 39 and 84. That principle was complemented by the Fifth Amendment's Due Process Clause and Fourteenth Amendment's Equal Protection Clause.

The rule of law prevents Congress from bestowing titles of nobility or passing laws that are not generally applicable. If Congress wants to change its own laws (i.e., statutes), it *can*. But it must change them for everyone. Congress has not done that here. It has changed the rules for MVP, but not for any of MVP's market competitors.[13] The authority of all other agencies is being challenged but FERC claims only its authority is exempt from constitutional scrutiny.

This Court has recognized the legislature's power "to prescribe general rules for the government of society," but "the application of those rules to individuals in society" is the "duty" of the Judiciary. *Patchak*, 583 U.S. at 268 (Roberts, C.J., dissenting) (citing *Fletcher v. Peck*, 10 U.S. 87 (1810)). Congress *can* change the law only if there is "some measure of generality" or "preservation of an adjudicative role for the courts." *Id.* at 920. Here, there is none. MVP claims no court can hear ***any*** claim—constitutional or otherwise. The king has proclaimed FERC and MVP exempt from the rule of law governing all others and

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[13] Curiously, MVP's most vocal supporters in Congress received well-timed campaign donations from MVP's investors. *See The New Republic* https://newrepublic.com/article/167869/mountain-valley-pipeline-nextera-schumer-manchin (revealing NextEra energy donated hundreds of thousands of dollars to Senate Majority Leader Schumer's campaign just before §324 was hastily rammed through Congress) (last visited Mar. 22, 2024).

no court anywhere can entertain any challenges to this royal proclamation. *See* An Act that Proclamations Made by the King Shall be Obeyed, 31 Hen. VIII, ch. 8, in Eng. Stat. at Large 263 (1539)).

While Congress *could* direct courts to apply a new legal standard, §324 does not provide one; it does not change any environmental laws for MVP's competitors (which distorts the free market), and it certainly does not amend or cure the constitutional defects in the NGA. Even today, Cletus's private property is *still* being seized pursuant to the unconstitutional delegation of legislative power in the NGA, not §324. Section 324 is merely a royal proclamation from the king attempting to bypass the rule of law.

France did that when it exempted nobles from a tax known as the *taille*.[14] Privileges were also bestowed upon influential government officials and many bourgeois, who enjoyed special treatment. Only "peasants" had to follow the law, such as drawing lots for militia service.[15] Louis XIV, known as the Sun King, created a new privileged class, the *noblesse de robe*, by selling titles of nobility in exchange for money or political support.

But America does not suffer titles of nobility or royal proclamations. We are a constitutional republic, not a monarchy. Here, the rule of law matters. And

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[14] Georges Lefebvre, *The Aristocratic Revolution from The Coming of the French Revolution* at 8, Princeton University Press (1971) (explaining that rank and money bought the nobility both 'honorific' and 'useful' privileges like tax exemptions) https://assets.press.princeton.edu/chapters/s8032.pdf (last visited Mar. 22, 2024).

[15] *Id*. at 10.

that means law is only law if it applies equally. "Changing the law" means changing it for everyone. Section 324 does not. It strips challengers of their right to an independent judiciary and strips the judiciary of its Art III power. Such a fate the Framers decried. *See* The Federalist No. 78, at 470. Fortunately, they foresaw this threat and created the judiciary for such a time as this.

While the Court can, it need not, reach the constitutionality of §324 because that provision does not bar this constitutional case and would be unconstitutional even if so applied.

CONCLUSION

Landowners' petition should once again be granted because: (1) the D.C. Circuit's decision is plainly wrong and defies this Court's controlling precedent mandating that district courts *retain* jurisdiction over separation of powers challenges; (2) the D.C. Circuit's decision allows an executive-branch agency to deprive an Article III court of jurisdiction simply by *acting* and thus reopens the same Circuit Split that existed pre-*Axon*; (3) the D.C. Circuit's decision precludes non-party plaintiffs from filing constitutional challenges in district court the minute a *different* plaintiff in a *different* case files any type of claim with the agency.

Landowners should get their day in court, even if it comes four years late.

Respectfully submitted,

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