No. 23A35

In the Supreme Court of the United States

MOUNTAIN VALLEY PIPELINE, LLC,

Applicant,

v.

THE WILDERNESS SOCIETY, ET AL.,

Respondents.

On Emergency Application to Vacate the Stays of the U.S. Court of Appeals for the Fourth Circuit (Nos. 23-1592, 23-1594, & 23-1384)

BRIEF OF CURRENT MEMBERS OF UNITED STATES CONGRESS, REPRESENTATIVE GUY RESCHENTHALER, SENATOR SHELLEY MOORE CAPITO AND REPRESENTATIVES JEFF DUNCAN, BILL JOHNSON, JOHN JOYCE, MIKE KELLY, DAN MEUSER, CAROL MILLER, AND ALEX MOONEY, AS *AMICI CURIAE* IN SUPPORT OF APPLICANT

Sean W. Moran
Gretchen L. Jankowski
Matthew C. Pilsner
BUCHANAN INGERSOLL & ROONEY PC
501 Grant St., Ste 200
Pittsburgh, PA 15219

Chance Lyman
Counsel of Record
BUCHANAN INGERSOLL & ROONEY PC
401 E. Jackson St., Ste 2400
Tampa, FL 33602
(813) 222-1152
chance.lyman@bipc.com

Natalie N. Peled
BUCHANAN INGERSOLL & ROONEY LLP
600 W. Broadway, Ste 1100
San Diego, CA 92101

Amanda L. Wetzel
BUCHANAN INGERSOLL & ROONEY PC
50 S. 16th St., Ste 3200
Philadelphia, PA 19102

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici are the following nine Members of the United States Congress: Rep. Guy Reschenthaler (R-PA), Sen. Shelley Moore Capito (R-WV), Rep. Jeff Duncan (R-SC), Rep. Bill Johnson (R-OH), Rep. John Joyce (R-PA), Rep. Mike Kelly (R-PA), Rep. Dan Meuser (R-PA), Rep. Carol Miller (R-WV) and Rep. Alex Mooney (R-WV).

Amici have a strong interest in ensuring that the will of the people, championed through elected representatives, is given effect by the courts and carried out to the clear letter of the law. They are committed to defending the Constitution, upholding the rule of law, and improving the lives of Americans throughout the country.

Amici generally were proponents of, and voted for, the legislation at issue in the Emergency Application, and the Mountain Valley Pipeline. Notably, some *Amici* voted against the legislation as a whole but nonetheless supported the specific provisions regarding the Mountain Valley Pipeline. *Amici* either represent jurisdictions through which the Pipeline runs or jurisdictions impacted by the benefits of the Pipeline. Completion of the Pipeline will bring a boon to economies throughout the region and reduced energy costs in neighboring states. As proponents of both the Act and the rule of law in general, their interests are that legislation

[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

properly passed by Congress be enforced, particularly as it pertains to this urgently needed and critical energy project, which Congress expressly found and declared to be "required in the national interest." App'x 66. Restarting and completing construction of the Mountain Valley Pipeline is imperative and will usher in a new era of energy independence for the region.

SUMMARY OF ARGUMENT

The merits of any constitutional challenge to the Act are not now before this Court because they were not properly before the Fourth Circuit below. The Fourth Circuit's stay orders—entered without explanation by a recurring panel of the same three judges of that court routinely assigning themselves to "pipeline cases"—are an *ultra vires* incursion on the will of the people.

Unquestionably, Article I of the Constitution vests Congress with the power to prescribe the jurisdiction of the courts without intruding upon Article III. Congress exercised that power in enacting Section 324 of the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324, 137 Stat. 10, 47-48 (2023) (the "Act"). The Act, passed with bipartisan support, increases the reliability and availability of affordable natural gas and assists the United States in gaining energy independence.

Of the Act's several components, this Brief focuses on section 324(e)(2), which vests "original and exclusive jurisdiction" in the U.S. Court of Appeals for the District of Columbia Circuit over claims challenging the validity of the Act, such as those covered by the Fourth Circuit stays. Congress did not craft this provision aimlessly.

All members voting on the bill understood exactly what was on the table. Neither the meaning of the plain language, nor the Act's intent, is disputable.

Instead, the crux of Respondents' argument appears to be that Congress did not go far enough. Specifically, Congress left a semantic sliver of jurisdiction in the Fourth Circuit that aligns with Respondents' novel interpretation of the Act's clear language. This simply cannot be squared with the Act. The Act provides Respondents with their day in court. But today is not that day, and the Fourth Circuit is not that court. Congress did not preclude judicial review for claims that challenge the Act's validity. Rather, Congress directed that judicial review of those questions should occur in a single forum: the D.C. Circuit.

If the stays remain in place, Congress's authority will be usurped and the harm to the people will be irreparable. Respondents must pursue their claims of invalidity, if at all, in the D.C. Circuit pursuant to the Act. This Court should grant the Emergency Application and vacate the Fourth Circuit stays for lack of jurisdiction.

ARGUMENT

I. Congress acted clearly, decisively, and legitimately in providing for exclusive jurisdiction of Respondents' claims in the D.C. Circuit.

Section 324(e)(2) could not be clearer. It states, in plain language, that "[t]he United States Court of Appeals for the District of Columbia Circuit ***shall*** have original and exclusive jurisdiction over ***any*** claim alleging the invalidity of this section or that

an action is beyond the scope of authority conferred by this section." App'x 67 (emphases added).

The provision is not complicated (and it would not be controversial but for the specter of the three-judge panel of the Fourth Circuit).[2] Congress used unambiguous, mandatory language (*i.e.*, "shall"), which leaves no room for the Fourth Circuit stays challenged in the Emergency Application. *See Maine Cmty. Health Options v. United States*, 140 S.Ct. 1308, 1320 (2020) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016))). If Respondents claim the Act is invalid in any way, then Congress gave Respondents a remedy: bring that claim in the D.C. Circuit.

Undeterred by the congressional command, Respondents abandoned their claims pending in the D.C. Circuit and opted to return (or remain) in the Fourth Circuit. On Respondents' invitation, the same three-judge panel stayed completion

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[2] The same three-judge panel of the Fourth Circuit has routinely heard cases involving the Pipeline. *See, e.g., Sierra Club v. U.S. Army Corps of Eng'rs*, 981 F.3d 251 (4th Cir. 2020); *Wild Virginia v. United States Forest Serv.*, 24 F.4th 915 (4th Cir. 2022); *Appalachian Voices v. United States Dep't of Interior*, 25 F.4th 259 (4th Cir. 2022). Like the stay orders at issue here, the Fourth Circuit also denied Applicant's motions challenging these panel assignments—which materially depart from the Fourth Circuit's own internal operating procedures—without explanation. *See, e.g.*, *Sierra Club v. West Virginia DEP*, Case No. 22-1008 (4th Cir. filed Jan. 3, 2022), ECF No. 66 (single-sentence Order entered by the Clerk of Court denying motion for random panel assignment); *Sierra Club v. State Water Control Board*, Case No. 21-2425 (4th Cir. filed Dec. 22, 2021), ECF No. 82 (same).

of the Pipeline yet again, offering no explanation in its single-sentence orders for the exercise of its assumed legitimate authority.

Respondents now contend that they can avoid the congressional mandate regarding jurisdiction by arguing that the Act does not apply to pending actions, or that their claims do not directly challenge the Act but instead allege violations of other statutes and regulations associated with the completion of the Pipeline.

But the Act—again, quite clearly—approves all authorizations necessary for the construction and initial operation of the Pipeline. App'x 66. On top of that, the Act precludes any court from reviewing "any action taken by the Secretary of the Army, the Federal Energy Regulatory Commission, the Secretary of Agriculture, the Secretary of the Interior, or a State administrative agency acting pursuant to Federal law that grants" any approval necessary for the construction and initial operation of the Pipeline. App'x 66. This can only leave Respondents with their claim that the Act, which is now the principal law blocking their desired outcome, is unconstitutional. But the Fourth Circuit is powerless to hear that claim: the D.C. Circuit has "original ***and*** exclusive" jurisdiction over ***any*** claim challenging the validity of the Act. App'x 67 (emphasis added).

Congress knew how definitive and exclusive a grant of jurisdiction section 324(e)(2) vested in the D.C. Circuit. Addressing section 324(e)(2), Senator Tim Kaine, who opposed the Act, stated that the Act

> is a rebuke of the Fourth Circuit of the U.S. Court of Appeals, which . . . has been the court that has heard cases about the Mountain Valley Pipeline, challenges to agency decisions in the previous administration where the court said: Hey, look, the agency didn't do what they were supposed to do. Go back and do it right this time.
>
> . . .
>
> I lost. I am unhappy. Why don't I get Congress to rewrite the rules of Federal jurisdiction and take this case away from the court that has made me unhappy and put it in another court? Yet that is what this bill will do. It will end further administrative review. It will end judicial review of any permit. And it will say only this: If someone wants to challenge what Congress is doing here, saying it is unlawful or unconstitutional or an overreach, they have to file that challenge in the DC Circuit Court of Appeals. They cannot file it in the Fourth Circuit where this project is being considered.

169 Cong. Rec. S1879-80 (June 1, 2023) (statement of Sen. Kaine); *see also* 169 Cong. Rec. S1890 (June 1, 2023) (statement of Sen. Kaine: "Finally, this bill would strip jurisdiction of a case away from the Fourth Circuit in the middle of the case.").

Again, the issue to be decided here is not whether the Act's jurisdictional mandate is valid—but rather whether the Fourth Circuit has jurisdiction to reach that issue. Clearly, it does not. Since Congress has vested only the D.C. Circuit with jurisdiction, any dispute over validity must occur in the D.C. Circuit. As Senator Joseph Manchin acknowledged in response to Senator Kaine's comments, the Act "has some review processes," (*i.e.*, section 324(e)(2)) and the impetus for the Act was simply that "things that have been done multiple times proceed on." 169 Cong. Rec. S1881 (June 1, 2023) (statement of Sen. Manchin).

Senator Shelley Moore Capito also addressed the importance of the Act's provisions addressing jurisdiction, stating that

> the Mountain Valley Pipeline is a prime example of an important project that has faced senseless delays, mostly as a result of litigation filed by anti-natural gas activists at the U.S. Court of Appeals for the Fourth Circuit.
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> . . .
>
> The Mountain Valley Pipeline is 95 percent complete and would be finished today if it weren't for the rulings by the Fourth Circuit that have stayed or vacated multiple approvals granted by Federal and State environmental regulators. The Fourth Circuit has acted nine times with respect to the Mountain Valley Pipeline. On eight of those nine occasions, the court has either stayed or vacated an approval from a Federal or a State agency.
>
> Only once did the court uphold an approval for this project, and that was when the court upheld water quality certifications from the State of Virginia, under section 401 of the Clean Water Act. But, within days of that opinion, the same Fourth Circuit panel vacated similar 401 water quality certifications from the State of West Virginia.
>
> . . .
>
> We have become all too familiar with the Fourth Circuit's blocking of key projects. The same panel that has rejected nearly all of the State and Federal approvals for the Mountain Valley Pipeline brought before it took similar actions to vacate State and Federal approvals for the now canceled Atlantic Coast Pipeline.
>
> . . .
>
> Activists are using the same playbook at the Fourth Circuit to try to stop the Mountain Valley Pipeline. . . .
>
> Given the project's benefits and given approvals from State and Federal regulators across multiple administrations from both parties, I do not believe that a handful of judges should have the final say.
>
> . . .
>
> This legislation makes it crystal clear that Congress expects the Mountain Valley Pipeline to be completed, consistent with the previously approved environmental documents.

169 Cong. Rec. S1877 (June 1, 2023) (statement of Sen. Capito).

In short, a few Fourth Circuit judges are not supreme rulers, and the lawful enactments of the legislative branch must be followed.

II. Section 324(e)(2) directs legal challenges to the Act's validity to a Circuit with a national reputation and the experience to handle those claims efficiently and thoroughly.

The intent of section 324(e)(2) is not only clear, but it also makes good sense. Vesting exclusive jurisdiction in the D.C. Circuit achieves the efficiency benefits of channeling all challenges to the Act's validity to a uniform forum—one with a unique history and reputation as a national court. Indeed, the D.C. Circuit is largely considered to be the second-most important court in the country. *See* Aaron L. Nielson, *D.C. Circuit Review – Reviewed: The Second Most Important Court?* YALE J. ON REG.: NOTICE & COMMENT (Sept. 4, 2015), *available at* https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-the-second-most-important-court-by-aaron-nielson/, *last accessed* July 18, 2023.

The national character of the D.C. Circuit—a feature of the court since its inception in 1801—has led Congress to think of it as a "natural repository of jurisdiction" for all sorts of legal challenges. *See* John G. Roberts, Jr., Lecture, *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 389 (2006). When Congress has wanted to direct litigation to a particular court of appeals to ensure uniformity, it has vested exclusive jurisdiction in the D.C. Circuit in a variety of legal contexts. *See, e.g.*, 10 U.S.C. § 950g(a) (relating to review of military commission judgments); *see also* Roberts, *supra*, at 385, 389 (noting that Congress first gave the circuit exclusive authority over specific subject matter in 1870, which would serve as a "prototype" for similar decisions that would follow). For the reasons

explained in the Emergency Application, Congress had the authority to do the same here.

The D.C. Circuit's composition reflects its status as a national court. Unlike other jurisdictions, judges that serve on the D.C. Circuit may be nominated from any part of the United States: "[e]xcept in the District of Columbia, each circuit judge shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service." 28 U.S.C. § 44(c); *see also* Roberts, *supra*, at 376 (observing that the "judges on the D.C. Circuit are chosen from beyond the boundaries of the circuit itself," which "is not true of the other circuits"). The fact that the circuit's appointees hail from around the country is "an important feature of the D.C. Circuit's history through the modern age," and has developed its character as a national court. *See* Roberts, *supra*, at 384-85.

In a 2005 speech to Congress, then-Senator Barack Obama repeated the accepted wisdom that the D.C. Circuit Court is "a special court [that] has jurisdiction that other appeals courts do not have" and it tackles a disproportionate share of complicated cases affecting a wide range of important national public policy issues:

> [Under the D.C. Circuit's] jurisdiction fall laws relating to all sorts of Federal agencies and regulations. . . . The judges on this court are entrusted with the power to make decisions affecting the health of the environment, the amount of money we allow in politics, the right of workers to bargain for fair wages and find freedom from discrimination, and the Social Security that our seniors will receive.

Barack Obama, Nomination of Justice Janice Rogers Brown Remarks (June 8, 2005), *available at* http://obamaspeeches.com/021-Nomination-of-Justice-Janice-Rogers-BrownObama-Speech.htm, *last accessed* July 15, 2023.

It is undisputed that the U.S. Court of Appeals for the D.C. Circuit is unique from courts of appeal in other circuits. Due to its distinctive character as a national court—which has prompted Congress's frequent grant of exclusive or concurrent jurisdiction in the D.C. Circuit—and expertise in constitutional law issues that arise in connection with a variety of matters, it is particularly well suited to handle claims "alleging the invalidity of [the Act] or that an action is beyond the scope of authority conferred by [the Act]." App'x 67.

Congress acted within its authority. It also acted sensibly and with bipartisan support. The Fourth Circuit, however, simply disregarded the law. Worse, the court did so without opinion or any articulated rationale. If this is to be a republic of laws and not of men, a recurring three-judge panel of the Fourth Circuit cannot be permitted to override the clear will of the people. Intervention is imperative.

CONCLUSION

Simply put, Respondents must bring their claims of invalidity, if at all, in the D.C. Circuit. This Court should grant the Emergency Application and vacate the Fourth Circuit stays for lack of jurisdiction.

Dated: July 19, 2023

Respectfully submitted,

Sean W. Moran
Gretchen L. Jankowski
Matthew C. Pilsner
BUCHANAN INGERSOLL & ROONEY PC
501 Grant St., Ste 200
Pittsburgh, PA 15219

Chance Lyman
Counsel of Record
BUCHANAN INGERSOLL & ROONEY PC
401 E. Jackson St., Ste 2400
Tampa, FL 33602
(813) 222-1152
chance.lyman@bipc.com

Natalie N. Peled
BUCHANAN INGERSOLL & ROONEY LLP
600 W. Broadway, Ste 1100
San Diego, CA 92101

Amanda L. Wetzel
BUCHANAN INGERSOLL & ROONEY PC
50 S. 16th St., Ste 3200
Philadelphia, PA 19102

Counsel for Amici Curiae