No. 23A35

In the

Supreme Court of the United States

MOUNTAIN VALLEY PIPELINE, LLC, APPLICANT,

v.

THE WILDERNESS SOCIETY, ET AL.

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 FOR THE U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF EMERGENCY APPLICATION TO CHIEF JUSTICE JOHN G. ROBERTS, JR., TO VACATE THE STAYS OF AGENCY AUTHORIZATIONS PENDING ADJUDICATION OF THE PETITIONS FOR REVIEW

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INTEREST OF *AMICUS CURIAE*[1]

The U.S. House of Representatives (House)[2] has a substantial institutional interest in preserving the full scope of its broad legislative authority under the Constitution. Just last month, as part of the Fiscal Responsibility Act (FRA), Pub. L. No. 118-5, 137 Stat. 10 (2023), Congress determined that "the *timely* completion of construction and operation of the Mountain Valley Pipeline [(Pipeline)] is *required* in the national interest" because, among other things, it "will increase the reliability of natural gas supplies and the availability of natural gas at reasonable prices" as well as "reduce carbon emissions." FRA § 324(b) (emphasis added).

Accordingly, Congress made a number of changes to federal law to expedite the Pipeline's completion. In the FRA, it (1) "ratifie[d] and approve[d]" a wide range of prior federal agency actions "necessary for the construction and initial operation at full capacity of the … Pipeline," (2) directed appropriate federal officials and agencies to "maintain" those agency actions, (3) required the Secretary of the Army to issue within twenty-one days "all permits or verifications necessary to complete the con-

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[1] Consistent with Supreme Court Rule 37.6, the House states that no counsel for a party authored this brief in whole or in part and that no person or entity other than the House or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives has authorized the filing of an *amicus* brief in this matter. The BLAG comprises the Honorable Kevin McCarthy, Speaker of the House, the Honorable Steve Scalise, Majority Leader, the Honorable Tom Emmer, Majority Whip, the Honorable Hakeem Jeffries, Minority Leader, and the Honorable Katherine Clark, Minority Whip, and it "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8(b), Rules of the U.S. House of Representatives, 118th Cong. (2023) (https://perma.cc/DK3P-55K6). The Speaker of the House, the Majority Leader, and the Majority Whip voted to support the filing of this brief; the Minority Leader and Minority Whip did not.

struction" and "allow for the operation and maintenance" of the Pipeline, and (4) superseded "any other provision of law" inconsistent with "any authorization, permit, verification, biological opinion, incidental take statement, or other approval for the … Pipeline." *Id.* § 324(c), (d), (f). Furthermore, Congress removed from any court the jurisdiction to review agency actions "necessary for the construction and initial operation at full capacity of the … Pipeline," and directed that the D.C. Circuit "shall have original and exclusive jurisdiction over any claim" challenging the validity of the FRA provisions involving the Pipeline. *Id.* § 324(e)(1)-(2). In short, Congress exercised its Article I and Article IV powers to make the following policy decision: federal law will facilitate the prompt completion of the Pipeline and commencement of its operation.

Notwithstanding this clear action by Congress on a matter of national importance, the Fourth Circuit has issued, without any explanation, three stays pending review of agency actions necessary for the Pipeline's construction,[3] thus delaying its completion for an indefinite period of time. The Fourth Circuit did not address how, given the FRA, it had any jurisdiction to enter the stays or maintain jurisdiction over the pending petitions for review challenging the agency actions approving the Pipeline. Nor did the Fourth Circuit explain how the underlying claims challenging

[3] Order, *Wilderness Soc'y v. U.S. Forest Serv.*, No. 23-1592 (4th Cir. July 10, 2023); Order, *Wilderness Soc'y v. U.S. Forest Serv.*, No. 23-1594 (4th Cir. July 10, 2023); Order, *Appalachian Voices v. Dep't of Interior*, No. 23-1384 (4th Cir. July 11, 2023).

the agency actions involving the Pipeline have any chance of success on the merits given how the FRA changed relevant federal law.

The House does not lightly weigh in as an *amicus* in front of this Court regarding an emergency application to vacate stays of agency actions. But the stakes are high. The House respectfully submits that the orders below are an affront to the separation of powers that require this Court's intervention. Because of the FRA, the petitions for review filed below lack any merit, and there is no likelihood that they will be granted. And the injunctive relief issued by the Fourth Circuit—with no stated reasoning—is obstructing Congress's exercise of its constitutional power to pursue an objective that the American people's elected representatives have just found to be required in the national interest: the timely completion of the Pipeline.

The House therefore urges the Court to immediately vacate the stays issued by the Fourth Circuit.

SUMMARY OF ARGUMENT

I. Congress lawfully exercised its broad constitutional authority when it changed the law that applies to the Pipeline. Congress modified the law by ratifying and approving the agency actions necessary for the Pipeline's construction and operation. *See* FRA § 324(c)(1). Congress could've stopped there—that change alone gave the Pipeline-related approvals the force of law. But Congress went even further: it expressly stated that its approval applied "[n]otwithstanding any other provision of law," and that these FRA provisions "supersede[] any other provision of law" that is inconsistent with agency actions approving the Pipeline. *See* FRA § 324(c), (f).

Congress used its constitutional powers to pass the statutes the Respondents rely upon to challenge the Pipeline. *See, e.g.*, U.S. Const. art. I, § 8, cl. 3; *id.* art. IV, § 3, cl. 2. And just as Congress holds the power to impose those statutory requirements, it necessarily possesses the complementary power to modify or eliminate them. That authority is not subject to time restraints—Congress may change a law whenever it so chooses, including, as it did here, after an agency action based on that law has been taken and while it is being challenged in court. The Respondents' contrary claim, that a pending lawsuit bars Congress from changing a law that relates to that litigation, reflects a serious misunderstanding of Article I and our constitutional structure more generally.

Beyond the ability to change the law *when* it sees fit, Congress has the same ability to change the law *how* it sees fit. For example, it may repeal all or part of a statute. Or it may opt for a more precise change, as it did here, and exempt a specific project from generally applicable laws.

II. The FRA does not invade the judiciary's Article III power because Congress did not direct courts on how to apply existing law to specific facts; it made new law. This Court has repeatedly held that Congress may, as it did here, "amend the law and make the change applicable to pending cases." *See, e.g.*, *Bank Markazi v. Peterson*, 578 U.S. 212, 215 (2016). In fact, Congress may even amend the law in a way that is "outcome determinative" in a case. *Id.*

So long as Congress changes the law, it acts well within its constitutional authority. It did just that in the FRA. By giving the Pipeline-related approvals the

force of law, and by superseding all inconsistent laws, Congress made new substantive law with the FRA. Any statute that could have provided the basis for a legal challenge to the relevant agency actions now does not.

Far from ordering the courts to decide a specific case in a specific way, the FRA leaves a quintessential role for the judiciary. The FRA provisions pertain only to those actions "necessary for the construction and initial operation at full capacity of the … Pipeline." *See, e.g.*, FRA § 324(c)(1). Courts must apply that standard to the facts before them to see if the FRA applies, which is exactly what Article III contemplates.

Because the FRA creates new law and does not direct courts on how to apply existing law to specific circumstances, the Respondents' reliance below on *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), is inapposite. This Court has made clear that when Congress creates "a new legal standard," as it did here, "*Klein* does not inhibit Congress from 'amend[ing] applicable law'" in pending cases. *See Bank Markazi*, 578 U.S. at 226, 230 (alteration in original) (citation omitted).

III. Congress did not merely change the law relating to the Pipeline; it did so in a way that dooms the Respondents' claims. They argue that certain agency actions regarding the Pipeline violate various federal statutes. But the FRA "ratifies and approves" those agency actions "[n]otwithstanding any other provision of law." § 324(c)(1). Even if the Respondents' arguments were correct and the agency actions previously violated federal law, they no longer do. Congress ratified and approved

the actions, and those approvals "supersede[]" any inconsistent law. *Id.* § 324(f). The Respondents' claims are now moot and lack any merit.

IV. This Court's recent decisions have emphasized that it is Congress that should make important policy decisions. Congress did so in the FRA. It found that the "timely completion of construction and operation of the … Pipeline is required in the national interest," *see* FRA § 324(b), and took a number of steps to ensure that would happen. But with the Pipeline's construction on hold for an indefinite period of time because of the Fourth Circuit's unexplained stays, the Pipeline's construction and operation will not be timely completed. This means that Congress's policy decision on a matter of national importance will not be realized, and its constitutional authority will be undermined, unless this Court steps in and vacates the stays.

ARGUMENT

The House agrees with the Applicant that the Fourth Circuit lacks subject matter jurisdiction over the Respondents' petitions for review because they challenge agency actions "necessary for the construction and initial operation at full capacity of the … Pipeline." *See id.* § 324(e)(1) (providing that courts lack jurisdiction over "any lawsuit pending in a court as of the date of enactment of this section" when the statutory trigger is met); Emergency Appl. 13-14.[4] The House likewise agrees that the Fourth Circuit lacks subject matter jurisdiction over the Respondents' claims that

[4] Thus, the Court could decide that Congress reinstated sovereign immunity in the FRA, and it could decide to vacate the stays on that ground as well. *Cf. Patchak v. Zinke*, 138 S. Ct. 897, 912 (2018) (Ginsburg, J., concurring) ("Congress' authority to reinstate sovereign immunity, this Court has recognized, extends to pending litigation.").

dispute the FRA's validity; such challenges can be brought only in the D.C. Circuit. *See* FRA § 324(e)(2); Emergency Appl. 14-17.

While those are independent reasons why the Court should vacate the stays issued by the Fourth Circuit, this brief focuses on a third reason: Congress permissibly changed the substantive law that relates to the Pipeline. The legal effect of those changes is that the Respondents' claims are now moot and completely without merit.

I. The FRA Permissibly Created New Law Related to the Pipeline

A. When Congress passed the FRA, it created new substantive law related to the Pipeline. *See generally* FRA § 324 (section titled "Expediting Completion of the Mountain Valley Pipeline"). Congress expressly put its stamp of approval on the Pipeline project and made clear that any regulatory action necessary to its construction was henceforth consistent with federal law.

First, Congress "ratifie[d] and approve[d] all … approvals or orders issued pursuant to Federal law necessary for the construction and initial operation at full capacity of the … Pipeline." *Id.* § 324(c)(1). *Second*, Congress "direct[ed]" the relevant agencies "to continue to maintain" these agency actions and decisions. *Id.* § 324(c)(2). *Third*, Congress mandated that the Secretary of the Army, within twenty-one days of enactment, "issue all permits or verifications necessary" to complete the Pipeline's construction across U.S. waters and allow for its operation, the last remaining regulatory barrier to finishing the project. *See id.* § 324(d).

Critically, these changes—the ratification, approval, and direction to the agencies—are "[n]otwithstanding any other provision of law," *id.* § 324(c), (d), meaning

they apply *despite* any other federal statute, *see Notwithstanding*, Black's Law Dictionary (11th ed. 2019). Congress's intent was unambiguous: it expressly provided that the changes "supersede[] *any other provision of law* … inconsistent with the issuance of [any] … approval for the … Pipeline." *See id.* § 324(f) (emphasis added); *Supersede*, Black's Law Dictionary (11th ed. 2019) ("To annul, make void, or repeal by taking the place of …."). In short, to the extent that any such approval had been inconsistent with any federal statute, that is no longer the case after the FRA.

B. Congress properly exercised its broad legislative authority when it created new substantive law related to the Pipeline. Throughout the lengthy litigation involving the Pipeline, the Respondents have never suggested that Congress lacked the authority to impose the statutory requirements forming the basis of their claims. Indeed, their court challenges to the Pipeline implicitly depend upon Congressional authority to regulate through laws such as the Endangered Species Act (ESA). But those regulatory requirements that Congress has the power to adopt, it also has the power to remove or modify.

1. It's worth putting this litigation in context. These are administrative law cases. The Respondents are challenging agency decisions issued only because Congress delegated to those agencies the authority to take these actions. *See, e.g.*, *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act … unless and until Congress confers power upon it."); 15 U.S.C. § 717f (empowering the agency to take actions and grant approvals related to natural gas transportation). To file their petitions for review, the Respondents relied on a statute

where Congress gave the courts of appeals jurisdiction to hear challenges to agency decisions. *See* 15 U.S.C. § 717r(d)(1). And the Respondents' claims for relief rely on statutes passed by Congress: they allege that agency actions violate the Mineral Leasing Act, the National Forest Management Act, the National Environmental Policy Act, the ESA, and the Administrative Procedure Act. Congress, of course, had no obligation to pass any of these laws, and it is free to repeal or change them at any time.

2. The Constitution provides that "[a]ll legislative [p]owers herein granted shall be vested in … Congress," including the power to regulate interstate commerce. U.S. Const. art. I, § 1; *id.* § 8, cl. 3. Moreover, in the Property Clause, the Constitution specifically grants Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. Const. art. IV, § 3, cl. 2, authority particularly relevant to the Respondents' challenge to the approval of Pipeline construction in the Jefferson National Forest.

With these powers, Congress may make national energy and environmental policy. *See, e.g.*, *Fed. Energy Regul. Comm'n v. Mississippi*, 456 U.S. 742, 757 (1982) ("We agree with appellants that it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. … [A]ctivities of these utilities … bring them within the reach of Congress' power over interstate commerce."); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 282 (1981) ("[T]he power

conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State."); *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) ("[W]e have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" (second alteration in original) (citation omitted)). And Congress exercised those powers to pass the laws upon which the Respondents' challenges to the Pipeline rest.

3. However, just as Congress holds the power to impose regulatory requirements and delegate regulatory authority to agencies, it possesses the complementary power to modify or eliminate those requirements and rescind those delegations. *Cf. Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1437 (9th Cir. 1989) ("It is fully within Congress' prerogative legislatively to alter the reach of the laws it passes, assuming no constitutional principles are thereby violated."); *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1162-63 (10th Cir. 2004) ("To give specific orders *by duly enacted legislation* in an area where Congress has previously delegated managerial authority … is merely to reclaim the formerly delegated authority. Such delegations, which are accomplished by statute, are always revocable in like manner …."); *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 901 (5th Cir. 1995) ("As part of its legislative powers, Congress designates the scope of agency authority, and if Congress so chooses, it can subsequently restrict or limit that delegation of power to the agency.").

For example, Congress could generally exempt *all* pipeline approvals from complying with all statutes and regulations that impose pipeline-related requirements if it wants to do so. Or it could generally prohibit any pipeline from being constructed in a national forest. It could also take more targeted action to change the law, as it did here, and decide that because the timely completion of a specific pipeline is in the national interest, any agency actions necessary for the construction of that pipeline are consistent with all federal laws, and any inconsistent law is superseded. Just as Congress "legitimate[ly] exercise[s] … *legislative* power" when it overrides an agency decision under the Congressional Review Act, *Citizens for Const. Integrity v. United States*, 57 F.4th 750, 763 (10th Cir. 2023), *petition for cert. filed*, No. 22-1186 (U.S. June 6, 2023), it also permissibly exercises legislative authority when it passes a law that approves an agency decision.

4. Moreover, Congress can change the law whenever it sees fit; there's no timing restriction. It can change the relevant law before a regulatory proceeding begins, during the proceeding, or after the proceeding concludes. *See, e.g.*, *Apache Survival Coal. v. United States*, 21 F.3d 895, 899-900, 901-05 (9th Cir. 1994) (upholding a change in the relevant law that Congress made during a project's approval process); *All. for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1174 (9th Cir. 2012) (upholding a change in the relevant law after a district court found that final agency action violated federal law); *Friends of Animals v. Jewell*, 824 F.3d 1033, 1038-39, 1042-45 (D.C. Cir. 2016) (similar).

Congress can also change the law, as it did here, after the regulatory process has concluded, *even while* the agency action is being challenged in court. *See Dole*, 870 F.2d at 1432 (upholding a change in the relevant law that Congress made while litigation challenging an approval process was ongoing); *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1168 (9th Cir. 2007) (same). The Respondents' contrary claim that Congress could not change the law related to the Pipeline can be distilled to the following proposition: a judicial challenge to agency action (taken only because Congress delegated the agency authority to take that action) freezes Congress's constitutional authority to change the law upon which the agency action was based. Such an argument is flatly inconsistent with the Constitution, which vests *all* legislative power in Congress.

5. The Respondents do not suggest that Congress lacks the general authority to pass legislation related to pipelines or to change existing statutes. They instead suggest that something nefarious is afoot because the FRA applies to a single pipeline project. But Congress may legislate as broadly or narrowly as it sees fit, and—as this Court has recognized—it may pass targeted legislation that applies only to a single subject. *See Bank Markazi*, 578 U.S. at 234; *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) ("Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid ...."). This is unsurprising because, so long as a statute is otherwise constitutional, Congress may write the law as broadly or narrowly as it deems appropriate. *See, e.g.*, *Bank Markazi*, 578 U.S. at 233 ("The Bank's argument is further flawed, for it rests on the assumption that legislation

must be generally applicable, that 'there is something wrong with particularized legislative action.'" (citation omitted)).

As part of its authority to define the scope of the legislation it passes, Congress may exempt a specific project from generally applicable laws, as it did here. *See, e.g.*, *Consejo*, 482 F.3d at 1168 ("Assuming it uses constitutional means, Congress may exempt specific projects from the requirements of environmental laws."); *Dole*, 870 F.2d at 1431 ("[I]t is simply not true that Congress may not create exemptions from generally applicable statutes in order to authorize state-specific projects."). This makes perfect sense: Congress adopted the generally applicable statutes, and it can change them—and exempt specific projects from their requirements—as it so desires.

6. Finally, since Congress could have retained for itself the power to approve pipelines rather than delegate that authority to agencies, Congress has the authority to ratify those agency approvals. *See* FRA § 324(c)(1). "It is well settled that Congress may, by enactment not otherwise inappropriate, 'ratify … acts which it might have authorized'" itself. *Swayne & Hoyt v. United States*, 300 U.S. 297, 301-02 (1937) (alteration in original) (citation omitted). This Court has called Congress's ratification power "elementary," *United States v. Heinszen*, 206 U.S. 370, 382 (1907), and recognized that a ratification "is conclusive upon the courts," *Wilson v. Shaw*, 204 U.S. 24, 32 (1907).

II. The FRA Does Not Intrude Upon the Judicial Power

A. Congress intended for the Pipeline-related provisions in the FRA to apply to pending litigation. *See, e.g.*, § 324(e)(1) (applying the jurisdiction-stripping provision to "any lawsuit pending in a court as of the date of enactment of this section"). For over two centuries, this Court has consistently held that Congress does not run afoul of the separation of powers merely by adopting laws that affect pending cases. *See, e.g.*, *Miller v. French*, 530 U.S. 327, 349 (2000); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

Indeed, this Court's decisions make clear that Congress may "amend the law and make the change applicable to pending cases, *even when the amendment is outcome determinative*." *Bank Markazi*, 578 U.S. at 215 (emphasis added); *see, e.g.*, *Patchak*, 138 S. Ct. at 905 (plurality opinion) (upholding legislation that established new legal standards "that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins"); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429-31 (1855). As Chief Justice Marshall wrote, "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *Schooner Peggy*, 5 U.S. at 110.

Because courts must apply a new governing law to a pending case, Congress of course has the power to "direct courts to" do so. *Bank Markazi*, 578 U.S. at 229. In fact, Congress may order courts to "apply newly enacted, outcome-altering legislation in pending civil cases," even when the legislation governs "one or a very small number

of specific subjects." *Id.* at 229, 234. For example, this Court has upheld statutes that identify cases by name, *see, e.g.*, *id.* at 232; *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992), and has approvingly cited a D.C. Circuit decision upholding a statute that retroactively stripped jurisdiction over suits challenging the construction of a single memorial on the National Mall, *Bank Markazi*, 578 U.S. at 234 (citing *Nat'l Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001)).

The critical question for separation-of-powers purposes is neither the breadth of the statute nor the number of pending cases it might impact, but whether Congress has utilized its constitutionally prescribed legislative power or usurped the judicial power. And that turns on whether Congress has changed the law, as it did here.

"Article III of the Constitution establishes an independent Judiciary … with the 'province and duty … to say what the law is' in particular cases and controversies." *Id.* at 225 (second alteration in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Consequently, Congress may not "prescribe or superintend how [the courts] decide" cases. *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (citation omitted). It is the sole province of the judiciary, rather than the legislature, to "apply [a] rule to particular cases" and "of necessity expound and interpret that rule." *Marbury*, 5 U.S. at 177.

By contrast, it is the province of Congress to make or amend the law, even when a new law changes the result of a pending case. *See Bank Markazi*, 578 U.S. at 229-30 ("[A] statute does not impinge on judicial power" simply because "it directs

courts to apply a new legal standard to" pending cases, even when it "effectively permit[s] only one possible outcome."). The heart of the issue, then, is whether Congress has (properly) made new law or (improperly) tried to tell the courts how to apply existing law to a given set of facts.

For instance, in *Robertson*, this Court considered a challenge to a statute that effectively changed the outcome of pending litigation challenging agency action regarding timber harvesting in Pacific Northwest national forests home to the northern spotted owl. 503 U.S. at 431. It upheld the statute because it "compelled changes in law, not findings or results under old law." *Id.* at 438. And in *Bank Markazi*, this Court upheld a statute so specific that it targeted a proceeding by docket number; the Court did so because the statute established "new substantive standards, entrusting to the … Court application of those standards to the facts." 578 U.S. at 231. It noted that "[a]pplying laws implementing Congress' policy judgments, with fidelity to those judgments, is commonplace for the Judiciary." *Id.* at 232.

B. To be sure, in *Klein*, 80 U.S. at 146, this Court stated that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." But later decisions have sharply limited the seemingly broad sweep of this dictum, cautioning that "[o]ne cannot take this language from *Klein* 'at face value'" because "congressional power to make valid statutes retroactively applicable to pending cases has often been recognized." *Bank Markazi*, 578 U.S. at 228 (citation omitted).

Klein addressed whether a post-Civil War statute enacted by Congress was unconstitutional. In an earlier decision, *United States v. Padelford*, this Court held that receiving a presidential pardon for disloyal conduct was sufficient proof of loyalty for purposes of a statute that required those seeking to recover the value of property seized by Union forces during the Civil War to prove their loyalty. 76 U.S. (9 Wall.) 531, 543 (1869). After this Court decided *Padelford*, Congress directed courts to dismiss recovery suits brought by those who had received presidential pardons for disloyalty. *See Klein*, 80 U.S. at 143-44.

The Court in *Klein* held that the law was unconstitutional because it did not create any "new circumstances" but instead required courts to deem certain evidence (*i.e.*, a pardon) insufficient to satisfy a standard established by existing law. *Id.* at 146-47. The statute effectively prohibited the judiciary from giving "the effect to evidence which, in its own judgment, such evidence should have." *Id.* at 147. According to the Court, the provision essentially prescribed a "rule of decision" because it told the judiciary "to give [evidence] an effect precisely contrary" to its own judgment. *Id.* The Court said that by doing this, Congress "inadvertently passed the limit which separates the legislative from the judicial power." *Id.*

This Court has recognized that *Klein* is "a deeply puzzling decision." *Bank Markazi*, 578 U.S. at 226 (citation omitted). And it has made clear in subsequent cases that *Klein*'s "rules of decision" language means only that Congress "may not usurp a court's power to interpret and apply the law to the [circumstances] before it." *Id.* at 225 (alteration in original) (citation omitted). It does not preclude Congress

from changing law that applies to pending litigation. *See id.* at 215; *Plaut*, 514 U.S. at 226. Notably, in the more than 150 years since *Klein* was decided, "the only case to strike down a law explicitly on *Klein* grounds was *Klein* itself; every *Klein*-based challenge to federal legislation has, quite appropriately, failed."[5] Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. Cin. L. Rev. 53, 55 (2010).

C. In the FRA, as described above, Congress made several substantive changes to the law governing the Pipeline. *See supra* Section I.A. It established new law for the courts to apply; it created "new circumstances." It did not purport to direct courts to make certain findings or reach particular conclusions *under old law*. Indeed, because of the FRA, the question of whether *prior* agency actions related to the Pipeline were consistent with *prior* law has become moot and is no longer relevant.

For example, when Congress ratifies an action of the Executive Branch, as it did in the FRA, *see* § 324(c)(1), that ratification is "equivalent to an original authority," *Mattingly v. District of Columbia*, 97 U.S. 687, 690 (1878); *Wilson*, 204 U.S. at 32. By ratifying an action, Congress "give[s] the force of law to official action" that may have been "unauthorized when taken." *Swayne & Hoyt*, 300 U.S. at 302; *see also Mattingly*, 97 U.S. at 690 (stating that Congress by ratification "may therefore cure irregularities, and confirm proceedings which without the confirmation would be void"). As a result, particularly in light of the Respondents' argument below that

[5] This makes the single-sentence decisions by the Fourth Circuit even more remarkable. To find that the Respondents had shown a likelihood of success on the merits, the Fourth Circuit, at a minimum, presumably concluded that the FRA is likely unconstitutional. And based on the arguments presented below, it likely relied on *Klein*'s reasoning to do so. That the Fourth Circuit appears to be bucking 150 years of precedent rejecting this line of argument is further evidence that this Court must intervene.

agency actions involving the Pipeline were contrary to law, the FRA changes the law regarding the Pipeline in a fundamental way. It removes any legal doubt about the validity of those actions by giving them the "force of law," *Swayne & Hoyt*, 300 U.S. at 302, and "cur[ing]" any alleged "irregularities," such as those advanced by the Respondents, *Mattingly*, 97 U.S. at 690. *See also* FRA § 324(f) (Pipeline-related provisions "supersede[] any other provision of law … that is inconsistent with the" relevant agency actions).

Additionally, any argument that the FRA impermissibly picks a winner in a specific case, *see Bank Markazi*, 578 U.S. at 231, falls wide of the mark. Far from requiring courts to declare one litigant the winner, the FRA creates an objective standard under new law for courts to interpret and apply in adjudicating challenges to agency actions related to the Pipeline. For instance, the most relevant provision applies only to agency action "necessary for the construction and initial operation at full capacity of the … Pipeline." FRA § 324(c)(1). To determine if that provision applies to a given agency action (and thus falls within the statutory ratification), a court must engage in a quintessentially judicial task—one it is free to perform independently with unfettered judgment. It must apply the new law to a given set of facts. The judicial task of interpreting and applying the FRA is no different in substance from the judicial task performed in construing countless other federal statutes. *See, e.g.*, *Egelhoff v. Egelhoff ex. rel. Breiner*, 532 U.S. 141, 143, 146 (2001) (interpreting a statute to compel dismissal of plaintiff's claims as preempted because they were based on state laws that "relate to" employee benefit plans).

To be sure, as we discuss below, the new law in the FRA renders the legal claims advanced by the Respondents in their petitions for review utterly without merit. But that does not create a separation-of-powers issue; "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts." *Bank Markazi*, 578 U.S. at 230. There is no "less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment" solely because the arguments are "uncontested or incontestable." *Pope v. United States*, 323 U.S. 1, 11 (1944).

III. Because the FRA Changed the Law Related to the Pipeline, the Respondents Have No Likelihood of Success on the Merits

Congress changed the substantive law that applies to the Pipeline, and the agency decisions contested by the Respondents therefore do not violate any federal law. Their claims are now moot, and they have no chance of success on the merits.

A. The Respondents allege below that the agency decisions violate the Mineral Leasing Act, the National Forest Management Act, the National Environmental Policy Act, the ESA, and the Administrative Procedure Act. But Congress changed those laws' applicability to the Pipeline when it passed the FRA so that any agency action approving the Pipeline does not (and will not) violate any of those statutes, or indeed *any* federal law.

Congress "ratifie[d] and approve[d]" the agency actions at issue "[n]otwithstanding any other provision of law." FRA § 324(c)(1). This means that the various statutes that the Respondents rely upon below no longer provide any basis to chal-

lenge the agency actions at issue—the Respondents' claims are now moot. *See Consejo*, 482 F.3d at 1174 ("[T]he 2006 Act [which directed an agency to carry out a project notwithstanding any other provision of law] renders the claims based on past violations of NEPA, the Endangered Species Act, the Migratory Bird Treaty Act, and the Settlement Act moot."); *Dole*, 870 F.2d at 1423, 1438 (affirming dismissal of a case on mootness grounds where plaintiffs alleged that an agency approval violated a statute after Congress passed a law that ordered the agency to approve the project "notwithstanding" the statute that plaintiffs relied upon).

Notably, even if the statutes that the Respondents rely upon were at one time inconsistent with the agency actions at issue, they now cannot sustain the Respondents' challenges because the FRA provisions "supersede[] any … law … inconsistent with the issuance of any" Pipeline approvals. *See* FRA § 324(f). In other words, the laws that the Respondents rely upon simply do not apply to the actions they challenge, and they necessarily cannot form the basis of any claim for relief. *See Salazar*, 672 F.3d at 1175 (rejecting an ESA-based challenge to agency action because "Congress effectively provided that no statute, and this must include the ESA, would apply to the [action]").

Finally, Congress's intent to facilitate the Pipeline's "timely … construction and operation," *see* FRA § 324(b); *see also id.* § 324(d), is further evidence that the otherwise generally applicable regulatory requirements relied upon by the Respondents—that can, and often do, slow down projects—do not apply here. *See Consejo*, 482 F.3d at 1168-69 (statute that required a project to "proceed 'without delay' 'upon

the enactment'" supported the court's conclusion that the law exempted a specific project from generally applicable laws); *id.* at 1169 ("Each of those claims [alleging that the project violated statutory requirements], if relief were to be granted, would delay commencement of the Lining Project. Congress has instructed otherwise [and the claims are thus moot] ….").

B. Because Congress ratified the contested agency decisions in the FRA, to challenge those administrative actions, the Respondents would have to challenge the FRA itself (and could not rely on the now-superseded generally applicable laws). *See James v. Hodel*, 696 F. Supp. 699, 701 (D.D.C. 1988) ("Once Congress has … ratified agency action by statute, even if that action had been arbitrary and capricious, judicial review requires a challenge to the statute itself."). But the Respondents would have no likelihood of success with respect to that challenge, either. For starters, they are in the wrong court to mount that attack. *See* FRA § 324(e)(2).[6] And while the D.C. Circuit would have jurisdiction to consider a challenge to the FRA's validity, as explained above, any such action would not succeed because Congress acted well within its legislative authority in passing the FRA.

IV. The Stays Granted by the Fourth Circuit Directly Obstruct an Important Policy Decision Made by Congress and Are an Affront to the Separation of Powers

In the FRA, Congress did not just make the determination that the Pipeline should be finished; it found that the "*timely* completion of construction and operation

[6] As the Applicant has explained, the Fourth Circuit lacks jurisdiction to hear the Respondents' challenges to the FRA's validity. *See* Emergency Appl. 14-17. Jurisdiction to hear those claims lies "exclusive[ly]" in the D.C. Circuit. FRA § 324(e)(2).

of the … Pipeline *is required in the national interest*." *Id.* § 324(b) (emphasis added). It noted, for example, that the Pipeline "will serve *demonstrated* natural gas demand in the Northeast, Mid-Atlantic, and Southeast regions." *Id.* (emphasis added). Indeed, Congress made clear that the federal government should not delay the Pipeline any further by ordering the Secretary of the Army *within twenty-one days* to issue all permits and verifications necessary to complete and allow for the operation of the Pipeline, the last agency action required to finish the project. In sum, Congress didn't decide in the FRA that the Pipeline should be completed at some point in the distant future; rather, it expressly acted to get the Pipeline operating as quickly as possible.

The unexplained stays issued by the Fourth Circuit directly frustrate that clear Congressional objective. So long as the stays are in effect, the Pipeline can't be finished and begin operating. And given that these are stays that will be in effect until the appeal is resolved (as opposed to short-term administrative stays), it is likely that even if the Applicant and federal government ultimately prevail in the Fourth Circuit, the completion of the Pipeline will be delayed for many months. Therefore, absent this Court's intervention, the policy decision made by Congress in the FRA will not come to fruition: the "timely completion of construction and operation" of the Pipeline that "is required in the national interest," FRA § 324(b), will not take place.

To be sure, there are those who, in good faith, strongly oppose the Pipeline project. But "[w]hatever one thinks of the policy decision Congress made, it was Congress' prerogative to make it." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 599 (2012) (Ginsburg, J., concurring). For "when it comes to the Nation's policy, the

Constitution gives Congress the reins." *Biden v. Nebraska*, 143 S. Ct. 2355, 2381 (2023) (Barrett, J., concurring).

Indeed, in a series of recent decisions, this Court has emphasized that, under our constitutional system, important policy decisions impacting our nation should be made by Congress, not federal agencies. *See, e.g.*, *id.* at 2372-75 (majority opinion); *West Virginia v. EPA*, 142 S. Ct. 2587, 2607-16 (2022); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2485-90 (2021). That is precisely what Congress has done here. Through the FRA, the American people's elected representatives approved the Pipeline, which has been the subject of considerable public debate, by ratifying prior agency actions, requiring agencies to maintain those actions, and ordering the issuance of the remaining agency decisions necessary for its completion and operation.

As has been explained above, there was no basis for the Fourth Circuit to put that decision on indefinite hold; the Fourth Circuit has not even offered one. The stays issued below are an affront to the separation of powers. It is up to Congress to determine this nation's energy and environmental policy, not the Fourth Circuit. This Court should immediately vacate the stays issued below so that the policy decision made by Congress on a matter of national importance may be implemented.

CONCLUSION

For these reasons, this Court should vacate the stays issued by the Fourth Circuit.

Respectfully submitted,

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