No. 23A35

IN THE SUPREME COURT OF THE UNITED STATES

MOUNTAIN VALLEY PIPELINE, LLC, APPLICANT

v.

THE WILDERNESS SOCIETY, ET AL.

FEDERAL RESPONDENTS' RESPONSE IN SUPPORT OF EMERGENCY APPLICATION TO VACATE STAYS OF AGENCY AUTHORIZATIONS PENDING REVIEW

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The Solicitor General, on behalf of the federal respondents, respectfully submits this response to the application to vacate the court of appeals' orders granting stays of federal agency action pending judicial review. The application should be granted.

STATEMENT

1. In 2017, the Federal Energy Regulatory Commission (FERC) granted authorization under the Natural Gas Act, 15 U.S.C. 717 et seq., for the construction, operation, and maintenance of the Mountain Valley Pipeline (MVP) to transport natural gas from the natural-gas fields of West Virginia to Virginia. See 15 U.S.C. 717f(c)(1)(A). That 303-mile underground pipeline will cross approximately 3.5 miles in the Jefferson National Forest.

The Fourth Circuit previously exercised exclusive jurisdiction over challenges to actions by federal agencies (other than FERC) necessary for MVP. See 15 U.S.C. 717r(d)(1) (specifying

that petitions for review of agency actions by "Federal agenc[ies] (other than [FERC])" on which FERC pipeline authorizations are based are within the "exclusive jurisdiction" of the court of appeals for the circuit in which the natural-gas facility is located).[1] Such challenges to MVP have focused primarily on action by four agencies: two components of the Department of the Interior (DOI) (the United States Fish and Wildlife Service (FWS) and Bureau of Land Management (BLM)); one component of the Department of Agriculture (the United States Forest Service (USFS)), and one component of the Department of Defense (the United States Army Corps of Engineers (USACE)).

The Fourth Circuit has often granted stays of the challenged agency actions pending review and has ultimately vacated the federal agency actions at issue in every case in which it has resolved the merits. See Sierra Club, Inc. v. USFS, 897 F.3d 582, clarified, 739 Fed. Appx. 185 (4th Cir. 2018); Sierra Club v. USACE, 905 F.3d 285 (4th Cir. 2018) (per curiam); Sierra Club v. USACE, 909 F.3d 635 (4th Cir. 2018); Wild Virginia v. USFS, 24 F.4th 915 (4th Cir. 2022); Appalachian Voices v. DOI, 25 F.4th 259 (4th Cir. 2022); see also Wild Virginia v. DOI, No. 19-1866 (4th Cir. Oct. 11, 2019) (granting stay); Sierra Club v. USACE, 981 F.3d 251 (4th Cir. 2020) (per curiam) (same); cf. Sierra Club v. FERC, 68 F.4th 630, 636-641 (D.C. Cir. 2023) (chronicling on-and-off construction resulting from the Fourth Circuit's decisions).

[1] Challenges to FERC orders must be brought in the D.C. Circuit or in a court of appeals in which the relevant natural-gas company is located or has its principal place of business. 15 U.S.C. 717r(b).

Despite delays associated with those legal challenges, MVP represents that its pipeline is now mostly complete and that the only remaining work consists of stream crossings on federal and non-federal land, work between the pipeline's initial entry into and final exit from the Jefferson National Forest (a roughly 20-mile stretch that includes non-federal land), and final restoration of various areas disturbed by construction. Appl. 2-3; accord 23-1592 C.A. Doc. 48-1, at 4-5 (July 10, 2023). MVP further represents that it needs to resume construction by July 26 to be able to complete construction and put the pipeline into service "by the end of th[is] year." Appl. 25-26; Appl. App. 58.

2. The three petitions for review now at issue form the latest chapter in the litigation history described above.

a. On April 10, 2023, in Appalachian Voices v. DOI, No. 23-1384 (4th Cir.), ten environmental organizations petitioned the Fourth Circuit for review of the FWS's Biological Opinion (BiOp) and Incidental Take Statement (ITS) for MVP dated February 28, 2023, which the agency prepared under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 et seq. See 23-1384 C.A. Doc. 3-1, at 1-2. Previously, in October 2019, the Fourth Circuit had granted a stay pending review of FWS's original November 2017 BiOp/ITS for MVP and kept that stay in force until it dismissed the petition in light of the agency's new BiOp/ITS issued in September 2020. 19-1866 C.A. Docs. 41, 58, 60; see Appalachian Voices, 25 F.4th at 266. In February 2022, the Fourth Circuit then vacated the September 2020 BiOp/ITS, id. at 264, 266, necessitating the agency's (third) BiOp/ITS now at issue. See 23-

1384 Doc. 23-1, at 1-4, 6-21 (May 8, 2023) (discussing the analysis and rationale of the third BiOp/ITS).

On April 27, 2023, the petitioners for review in Appalachian Voices moved for a stay pending review of FWS's 2023 BiOp/ITS, which the government and MVP (as intervenor) opposed. 23-1384 C.A. Docs. 17, 23, 24. Petitioners argued that a stay was necessary and irreparable harm imminent because MVP had agreed to delay further pipeline construction only until May 31, 2023. 23-1384 C.A. Doc. 26-1, at 20 (May 16, 2023). By May 31, the Fourth Circuit had not acted on the stay motion.

b. On June 1, 2023, Wilderness Society filed two petitions for review, which the Fourth Circuit consolidated: Wilderness Society v. BLM, No. 23-1594 (4th Cir.), and Wilderness Society v. USFS, No. 23-1592 (4th Cir.). The first petition seeks review of BLM's Record of Decision (ROD) dated May 17, 2023, which approves issuance of a right-of-way and temporary use permit to MVP pursuant to the Mineral Leasing Act, 30 U.S.C. 181 et seq., for the two segments (totaling about 3.5 miles) of pipeline in the Jefferson National Forest. 23-1594 C.A. Doc. 2 & Ex. A, at 7, 23; see 30 U.S.C. 185(a) and (c)(2). The second petition seeks review of USFS's ROD dated May 15, 2023, which both approved a project-specific amendment to the Jefferson Forest Plan to allow the pipeline segment in the National Forest and documented USFS's concurrence in BLM's grant of a right-of-way. See 23-1592 C.A. Doc. 2 & Ex. A, at 1-2, 29. Previously, in July 2018, the Fourth Circuit had vacated the agencies' December 2017 right-of-way and forest-plan-amendment RODs. Sierra Club, 897 F.3d at 587, 589. And in

January 2022, the Fourth Circuit vacated the agencies' January 2021 right-of-way and forest-plan RODs, Wild Virginia, 24 F.4th at 920, 926, necessitating the third round of authorizations now at issue.

3. On June 3, 2023, Congress enacted the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10. Section 324 of that Act, which Congress entitled "Expediting completion of the Mountain Valley Pipeline," 137 Stat. 47 (capitalization altered), addresses four subjects relevant here.

First, in Section 324(b), Congress made findings that the "timely completion of construction and operation of the Mountain Valley Pipeline" is "required in the national interest." § 324(b). Congress found that the pipeline will, among other things, "serve demonstrated natural gas demand in the Northeast, Mid-Atlantic, and Southeast regions" and "increase the reliability of natural gas supplies and the availability of natural gas at reasonable prices." Ibid.

Second, Section 324(c) provides that, "[n]otwithstanding any other provision of law," "Congress hereby ratifies and approves all * * * approvals or orders issued pursuant to Federal law necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline," including all relevant "biological opinions, incidental take statements," and "permits." § 324(c)(1). Section 324(c) then "directs" the relevant federal agencies "to continue to maintain such * * * approvals or orders issued pursuant to Federal law." § 324(c)(2). And Section 324(f) provides that "[S]ection [324] supersedes any other provision of

law * * * that is inconsistent with the issuance of any authorization, permit, verification, biological opinion, incidental take statement, or other approval for the Mountain Valley Pipeline." § 324(f).[2]

Third, Section 324(e)(1) provides that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any action taken by the Secretary of the Army, [FERC], the Secretary of Agriculture, the Secretary of the Interior, or a State administrative agency acting pursuant to Federal law that grants an authorization, permit, verification, biological opinion, incidental take statement, or any other approval necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline." § 324(e)(1). That withdrawal of jurisdiction applies to any such agency approval "whether issued prior to, on, or subsequent to the date of enactment of [Section 324]" and to

[2] Section 324(d) separately directs the Secretary of the Army to issue within 21 days "all permits or verifications necessary" to "complete the construction of [MVP] across the waters of the United States." § 324(d)(1). Previously, in 2018, the Fourth Circuit had vacated the USACE's original verification that MVP could meet the conditions of a Nationwide Permit under the Clean Water Act, 33 U.S.C. 1251 et seq. See Sierra Club, 909 F.3d at 639. In 2020, the Fourth Circuit stayed the USACE's second round of nationwide-permit verifications pending judicial review. Sierra Club, 981 F.3d at 255. The court subsequently dismissed that challenge after USACE rescinded its 2020 verifications at MVP's request to allow MVP to seek an individual permit requiring state certifications. 20-2039 C.A. Docs. 74 (Mar. 12, 2021), 86 (Sept. 23, 2021); see Sierra Club v. West Va. Dep't of Envt'l Prot., 64 F.4th 487, 496 (4th Cir. 2023). In April 2023, the Fourth Circuit then vacated West Virginia's relevant certification. Id. at 493-494. As required by Section 324(d), USACE has recently issued a (fourth) authorization, which is not at issue here.

"any lawsuit pending in a court as of the date of enactment of [Section 324]." Ibid.

Finally, Section 324(e)(2) provides that the D.C. Circuit "shall have original and exclusive jurisdiction over any claim alleging the invalidity of [Section 324] or that an action is beyond the scope of authority conferred by [Section 324]." § 324(e)(2).

4. On June 3, 2023, the government and MVP filed letters in the Appalachian Voices case, in which the environmental-group petitioners' motion for a stay was still pending, notifying the court that "Section 324 provides a further reason" to deny a stay because it "withdraws th[e] [c]ourt's jurisdiction" to review the agency action being challenged. 23-1384 C.A. Doc. 34; see 23-1384 C.A. Doc. 35.

The government and MVP then each moved to dismiss all three petitions for review for want of jurisdiction in light of Section 324. 23-1384 C.A. Docs. 36 (June 5, 2023), 41 (June 14, 2023); 23-1592 C.A. Docs. 12 (June 5, 2023), 20 (June 14, 2023). The non-federal respondents in this Court (petitioners below) have not disputed that Section 324(e) by its terms withdraws the jurisdiction of all courts -- including the Fourth Circuit -- over a category of cases that encompasses their petitions for review. Instead, they opposed dismissal on the ground that Section 324's withdrawal of jurisdiction is unconstitutional. 23-1384 C.A. Doc. 43 (June 26, 2023); 23-1592 C.A. Doc. 22 (June 26, 2023).

Wilderness Society then moved for a stay pending review of USFS's ROD amending the Jefferson National Forest plan (but not

BLM's right-of-way ROD). 23-1592 C.A. Doc. 25-1, at 2 & n.1 (July 3, 2023). That motion briefly asserted that Section 324 "is unconstitutional" and "has no effect in this pending case" as "explained" in Wilderness Society's opposition to the pending motions to dismiss. Id. at 4-5. The Fourth Circuit ordered responses to the stay motion to be filed by Monday, July 10, 2023, 23-1592 C.A. Doc. 26 (July 5, 2023), which under Fourth Circuit rules meant "before midnight Eastern Time," 4th Cir. Local R. 25(a)(3). The government's reply briefs in support of its pending motions to dismiss, which were to contain the government's first presentations in support of Section 324's constitutionality, were due at the same time. 23-1384 C.A. Doc. 45, at 1 (June 27, 2023); 23-1592 C.A. Doc. 23, at 1 (June 27, 2023).

5. At 5:00 p.m. on July 10 -- before the filing of any responses to Wilderness Society's stay motion, and before the government's reply briefs responding to the argument that Section 324 is unconstitutional -- the Fourth Circuit entered a one-sentence order "grant[ing] the [stay] motion and stay[ing] construction during the pendency of th[e] petition for review." Appl. App. 1-2. The order states that the court acted "[u]pon consideration of [the] motion for stay pending [review]" but does not mention jurisdiction or Section 324's constitutionality. Ibid. Later that evening, after the court had entered its stay order, the government timely filed its opposition to the stay motion and its replies in support of its pending motions to dismiss all the petitions for review for want of jurisdiction, which responded to the claim that Section 324 is unconstitutional. 23-1592 C.A. Docs.

45-47; 23-1384 C.A. Doc. 54. MVP subsequently filed its timely stay opposition, which stated that even a short judicial stay would cause irreparable injury because, unless construction could restart by around July 26, 2023, the onset of winter conditions would prevent completion of the subterranean pipeline in time for MVP to "deliver natural gas to the customers who need it this winter." 23-1592 C.A. Doc. 48-1, at 17-19; Appl. App. 14.

The following morning (July 11), the Fourth Circuit entered another one-sentence order granting a stay of FWS's BiOp/ITS pending review in Appalachian Voices. Appl. App. 5-6. As in Wilderness Society, the order states that the court acted "[u]pon consideration of [the] motion for stay" but does not mention Section 324's withdrawal of jurisdiction (identified in the supplemental letters as a basis for denying a stay) or Section 324's constitutionality. Id. at 6.

On July 12, the Fourth Circuit consolidated the three petitions for review and scheduled oral argument on the pending motions to dismiss for want of jurisdiction. 23-1384 C.A. Doc. 56. The court scheduled argument for July 27, 2023 (ibid.), one day after the estimated date on which MVP had informed the court construction must restart to complete the pipeline this year. The court's order does not indicate when the court might rule on the motions to dismiss.

ARGUMENT

The application to vacate the court of appeals' stays should be granted. Section 324(e)(1)'s unambiguous text provides: "Notwithstanding any other provision of law, no court" -- which

includes the Fourth Circuit -- "shall have jurisdiction to review any action taken by [the relevant agencies] that grants * * * any * * * approval necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline, * * * including any lawsuit pending in a court as of the date of [Section 324's] enactment." § 324(e)(1) (emphases added). The category of cases covered by that jurisdictional bar clearly includes the petitions for review here. The non-federal respondents (hereafter, respondents) have never disputed that Section 324(e)(1) by its terms deprives the Fourth Circuit of jurisdiction over their petitions for review. Instead, they have argued that the Fourth Circuit has authority to decide whether Section 324(e)(1) is constitutional; that Section 324(e)(1) is unconstitutional; and that the Fourth Circuit therefore has jurisdiction to resolve the merits of the petitions for review and associated authority to stay the challenged agency actions pending that review.

Those arguments fail. Section 324 vests the D.C. Circuit with "exclusive jurisdiction" over "any claim alleging [Section 324's] invalidity." § 324(e)(2). Congress also acted well within its constitutional authority in enacting Section 324(e)(1). And respondents cannot succeed because Congress ratified the agency actions that they challenge and superseded any provision of law inconsistent with the issuance of those approvals. § 324(c)(1) and (f). Accordingly, the court of appeals lacked authority to stay the agency actions in these cases pending adjudication of respondents' petitions for review.

The Fourth Circuit's single-sentence stay orders offer no rationale for staying the FWS's and USFS's actions pending review. But the only plausible understanding of those orders is that the court concluded that respondents were likely to succeed in establishing that the Fourth Circuit possessed jurisdiction to decide Section 324(e)(1)'s constitutionality and that Section 324(e)(1) is unconstitutional. Those conclusions -- and others needed to satisfy the stay standard -- are demonstrably incorrect. This Court should therefore vacate the stays pending review. See Appl. 11-30. Alternatively, it would be appropriate for the Court to issue a writ of mandamus that vacates the stays. Cf. Appl. 30-33.

I. THE COURT SHOULD VACATE THE FOURTH CIRCUIT'S STAYS

An applicant seeking vacatur of a stay entered by a lower court bears the burden of establishing that (1) the "case could and very likely would be reviewed here upon final disposition in the court of appeals"; (2) the court below was "demonstrably wrong in its application of accepted standards in deciding to issue the stay"; and (3) the "rights of the parties to [the] case pending in the court of appeals * * * may be seriously and irreparably injured by the stay." Coleman v. Paccar Inc., 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers) (vacating court of appeals' stay pending resolution of petition for review); see Raysor v. DeSantis, 140 S. Ct. 2600, 2602 (2020) (Sotomayor, J., dissenting from denial of application to vacate stay); Planned Parenthood v. Abbott, 571 U.S. 1061, 1061 (2013) (Scalia, J., concurring); Western Airlines, Inc. v. International Bhd. Of Teamsters, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers).

In determining whether a lower court was demonstrably wrong in applying the accepted stay standard, the Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Nken, 556 U.S. at 434 (citation omitted); see Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2487-2490 (2021) (per curiam). MVP satisfies each requirement for vacatur. See Appl. 11-30.

A. This Court Would Very Likely Grant Review Of A Final Fourth Circuit Decision In Respondents' Favor

If the court of appeals were to hold Section 324 unconstitutional in its "final disposition" in this case, that decision "very likely would be reviewed [by this Court]." Coleman, 424 U.S. at 1304 (Rehnquist, J., in chambers).

To stay the agency actions at issue here pending judicial review, the Fourth Circuit had to determine that respondents are likely to succeed on the merits -- which would include establishing that the Fourth Circuit has jurisdiction to resolve the merits in respondents' favor. Section 324(e)(1), however, provides that "no court shall have jurisdiction to review" a category of agency actions that clearly encompasses the agency actions from which respondents have petitioned for review. Respondents have attempted to avoid that jurisdictional bar by arguing that Section 324(e)(1) is unconstitutional. The court of appeals' orders therefore are best understood as resting on a determination that Section

324(e)(1) is likely unconstitutional. If the Fourth Circuit adhered to that determination in its final disposition of this case, this Court would likely grant certiorari to review that conclusion.

Judging the constitutionality of an Act of Congress is "the gravest and most delicate duty" of the courts. Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). Consistent with that understanding, this Court regularly grants certiorari when "a Federal Court of Appeals has held a federal statute unconstitutional." United States v. Kebodeaux, 570 U.S. 387, 391 (2013). The Court follows that settled practice even in the absence of a circuit conflict. See, e.g., Vidal v. Elster, cert. granted, No. 22-704 (June 5, 2023); Torres v. Texas Dep't of Pub. Safety, 142 S. Ct. 2455, 2461 (2022); United States v. Vaello Madero, 142 S. Ct. 1539, 1542 (2022); Barr v. American Ass'n of Political Consultants, Inc., 140 S. Ct. 2335, 2345-2346 (2020) (plurality opinion); United States v. Sineneng-Smith, 140 S. Ct. 1575, 1578 (2020); Allen v. Cooper, 140 S. Ct. 994, 1000 (2020); Iancu v. Brunetti, 139 S. Ct. 2294, 2298 (2019); Kebodeaux, supra.

This Court's review of a final judgment holding Section 324 unconstitutional would be particularly warranted because the court of appeals has deprived Section 324(e)(1) of effect in its core applications. Indeed, the stays entered by the Fourth Circuit have already profoundly impaired the operation of Section 324(e)'s interlocking jurisdictional provisions, which Congress enacted for

the purpose of "expediting completion of the Mountain Valley Pipeline." § 324 (capitalization altered).

B. The Fourth Circuit's Stay Orders Demonstrably Fail To Satisfy The Accepted Stay Standards

The Fourth Circuit's orders granting stays pending review reflect that the court was "demonstrably wrong in its application of accepted standards in deciding to issue the stay." Coleman, 424 U.S. at 1304 (Rehnquist, C.J., in chambers). Under those accepted standards, the Fourth Circuit could have granted a stay only upon (1) a "strong showing that [respondents are] likely to succeed on the merits," and only if the court determined that (2) respondents would be "irreparably injured absent a stay." Nken, 556 U.S. at 434 (citation omitted). The remaining factors -- which "call[] for assessing the harm to the opposing party and weighing the public interest" -- "merge when [as here] the Government is [an] opposing party." Id. at 435. Under those four accepted stay factors, the Fourth Circuit's orders granting stays are fundamentally unsound.

1. Respondents cannot make a strong showing that they are likely to succeed on the merits

Respondents have no plausible likelihood of success on their petitions for review, and thus have fallen far short of making a "strong showing" of likely success. Section 324(e)(1) by its terms unambiguously deprives all courts, including the Fourth Circuit, of jurisdiction over all petitions for review of agency actions necessary for the construction and initial operation of MVP. As a result, to succeed on the merits, respondents would have to establish (1) that the Fourth Circuit has jurisdiction to consider

respondents' claim that Section 324(e)(1) is unconstitutional, and (2) that Section 324(e)(1) is unconstitutional and therefore does not deprive the Fourth Circuit of jurisdiction. Respondents would further have to establish that (3) the challenged agency actions are contrary to federal law, even though Congress in Section 324(c)(1) has expressly ratified those actions "[n]otwithstanding any other provision of law" and, in Section 324(f), has "supersede[d] any other provision of law" inconsistent with the issuance of "any" authorization for MVP. In the face of those obstacles, respondents cannot establish any likelihood of success on the merits.

a. Section 324(e)(2) deprives the Fourth Circuit of jurisdiction to consider any claim alleging that Section 324(e)(1) is unconstitutional

As a threshold matter, the Fourth Circuit is without jurisdiction even to decide respondents' claim that Section 324 is unconstitutional. Section 324(e)(2) vests the D.C. Circuit with "original and exclusive jurisdiction over any claim alleging the invalidity of [Section 324]." § 324(e)(2). For this reason alone, respondents cannot establish a likelihood of success in the Fourth Circuit. See Appl. 14-17.

Section 324(e)(2)'s grant of "exclusive jurisdiction" to the D.C. Circuit unambiguously withdraws jurisdiction from the Fourth Circuit to consider "any claim alleging [Section 324's] invalidity." The ordinary definition of "claim" -- "[a] statement that something yet to be proved is true" -- clearly encompasses respondents' contention that Section 324 is constitutionally invalid because that contention (which has yet to be proved true) is a

"claim" of statutory invalidity. Black's Law Dictionary 311 (11th ed. 2019) (emphasis omitted).[3]

That is the only reading of Section 324(e)(2) that accords with its statutory context. See Maracich v. Spears, 570 U.S. 48, 65-66 (2013) (statutory language must be construed in light of the statute "as a whole"). Section 324 was enacted in the wake of repeated rulings by the Fourth Circuit overturning past agency approvals necessary for construction of MVP. Section 324 does not disturb those prior rulings. But Section 324's provisions ratifying current necessary agency approvals, § 324(c)(1); providing that "no court shall have jurisdiction" over challenges to those agency actions, § 324(e)(1); and vesting the D.C. Circuit with exclusive jurisdiction over challenges to the constitutionality of those provisions, § 324(e)(2), collectively achieve Congress' goals of eliminating uncertainty resulting from past Fourth Circuit decisions relating to MVP and instead "expedit[ing]" (§ 324) its "timely completion," § 324(b). The channeling of issues to a particular judicial forum is unquestionably constitutional -- and respondents have not suggested otherwise.

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[3] This Court's decisions similarly use that ordinary definition of a "claim" to refer to a contention made in litigation. See, e.g., Biden v. Nebraska, 143 S. Ct. 2355, 2372 (2023) (discussing "the EPA's claim that the Clean Air Act authorized it to impose a nationwide cap on carbon dioxide emissions"); Dupree v. Younger, 143 S. Ct. 1382, 1388 (2023) (explaining that "claims of district court error at any stage of the litigation" may be raised on appeal from final judgment) (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996)); Brown v. Davenport, 142 S. Ct. 1510, 1529 (2022) (discussing criminal "defendant's claim that he 'was denied his constitutional right to a fair trial'") (citation omitted).

Respondents have instead argued that the word "claim" in Section 324(e)(2) should be read to mean "cause of action." In the abstract, that is one possible meaning of "claim." But it is plainly not the meaning consonant with the statutory context here. Section 324(e)(2) governs jurisdiction over "claims alleging the invalidity" of Section 324. The other provisions of Section 324, in turn, ratify agency actions and deprive the federal courts of jurisdiction to challenge those actions. The natural way for constitutional challenges to those provisions to arise is the way respondents' challenges have arisen here: In response to motions to dismiss petitions for review of the relevant agency actions. But Congress has determined that any challenge to the constitutionality of Section 324, whether or not triggered by a motion to dismiss in another court, must be adjudicated in the D.C. Circuit. § 324(e)(2). Respondents' interpretation would thus deprive Section 324(e)(2)'s exclusive-jurisdiction provision of practical effect and frustrate Congress's manifest purpose of ensuring that challenges to Section 324 are adjudicated by the D.C. Circuit rather than the Fourth Circuit. Cf. Pugin v. Garland, 143 S. Ct. 1833, 1841 (2023) ("We should not lightly conclude that Congress enacted a self-defeating statute.") (citation omitted).

b. Section 324(e)(1) is constitutional

Beyond that fatal threshold obstacle to review in the Fourth Circuit, respondents cannot make a "strong showing" that Section 324(e)(1) is unconstitutional. Section 324(e)(1) provides that "no court shall have jurisdiction to review any action taken by [listed agencies] that grants an authorization, permit, verifica-

tion, biological opinion, incidental take statement, or any other approval necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline." § 324(e)(1). That withdrawal of jurisdiction applies "[n]otwithstanding any other provision of law," ibid., thereby superseding the National Gas Act's more general grants of jurisdiction in 15 U.S.C. 717r(b) and (d)(1), which previously allowed the Fourth and D.C. Circuits to adjudicate challenges to MVP-related agency action. See pp. 1-2 & n.1, supra. And that change in law defining federal-court jurisdiction applies to the category of all challenges to any agency approval necessary for the construction and initial full-capacity operation of MVP, "including any lawsuit pending in a court as of the date of [Section 324's] enactment." § 324(e)(1). That provision falls well within the scope of Congress's legislative power to define and limit the jurisdiction of the lower federal courts, to withdraw jurisdiction previously given, and to subject pending cases to the new jurisdictional limitation. See Appl. 20-23.

i. 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 v. Peterson, 578 U.S. 212, 215 (2016). That principle applies to statutes exercising Congress's authority "to define and limit the jurisdiction of the inferior courts of the United States." Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938); see U.S. Const. Art. III, § 2, Cl. 2. Thus, where a prior "act of Congress [has] confer[ed] [lower-court jurisdiction]," that jurisdiction "may, at the will of Congress, be taken away in whole or in part; and if

withdrawn without a saving clause all pending cases though cognizable when commenced must fall." Kline v. Burke Const. Co., 260 U.S. 226, 234 (1922). Section 324 does exactly that, expressly using the term "jurisdiction" and defining a category of MVP-related cases, including "pending" cases, over which "no court shall have jurisdiction." § 324(e)(1). Such a statute "strip-[ping] federal courts of jurisdiction" "changes the law" just as much as "other exercises of Congress' legislative authority." Patchak v. Zinke, 138 S. Ct. 897, 905-906 (2018) (plurality opinion).

Furthermore, the manner in which Section 324(e)(1) withdraws jurisdiction does not "compel[] . . . findings or results under old law," Bank Markazi, 578 U.S. at 231 (quoting Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 438 (1992)), which the Court has said would impermissibly "usurp a court's [Article III] power to interpret and apply the law to the circumstances before it," id. at 225 (citation and brackets omitted). Section 324(e)(1) instead "directs courts to apply a new legal standard" governing their jurisdiction, a change that "does not impinge on judicial power." Id. at 230; see Patchak, 138 S. Ct. at 908 (plurality opinion). More specifically, Section 324(e)(1) calls on a court to make two determinations: (1) Does the case at issue seek "review [of] an[] action taken by" any of the administrative agencies listed in Section 324(e)(1), and (2) does that agency's action "grant[] * * * any * * * approval necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline"? § 324(e)(1). If the court answers both questions affirmatively, Section 324(e)(1) provides that "no court shall

have jurisdiction" to review the agency action. Ibid. But otherwise, the court may continue to exercise jurisdiction conferred elsewhere by the Natural Gas Act. The judicial findings needed to apply Section 324(e)(1)'s new legal standard governing federal jurisdiction typically may not be difficult to interpret or apply. But that fact does not suggest constitutional infirmity. A "statute does not impinge on judicial power [even] when it directs courts to apply a new legal standard to undisputed facts" or "effectively permit[s] only one possible outcome" in a case. Bank Markazi, 578 U.S. at 230.

ii. Respondents argued below that Section 324(e)(1) is unconstitutional under United States v. Klein, 80 U.S. (13 Wall.) 128 (1872). That is incorrect.

Klein involved an underlying statute that allowed individuals whose property was seized and sold by the government during the Civil War to recover the proceeds of the sale "upon proof that they had 'never given any aid or comfort to the [then-]present rebellion.'" Bank Markazi, 578 U.S. at 227 (discussing Klein) (citation omitted). In 1870, this Court held that a recipient of a Presidential pardon (granted to those who swore an oath of loyalty to the United States) "must be treated as loyal" and that evidence of a pardon therefore "operated as 'a complete substitute for proof'" that the recipient "'gave no aid or comfort to the rebellion.'" Ibid. (quoting United States v. Padelford, 76 U.S. (9 Wall.) 531, 543 (1870)). Klein recovered a monetary award in the Court of Claims on that basis. Ibid. While an appeal to this Court was pending, "Congress enacted a statute providing that no

pardon should be admissible as proof of loyalty"; that "acceptance of a pardon without disclaiming participation in the rebellion would serve as conclusive evidence of disloyalty"; and that "any claim based on a pardon" must be "dismiss[ed] for want of jurisdiction." Ibid.

The constitutional problem with that statutory withdrawal of jurisdiction was not that it required dismissal for want of jurisdiction or that Congress had prescribed a rule of decision. Klein itself recognized that "[i]f [Congress had] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as [a valid] exercise of the power of Congress" to make "'exceptions from the appellate jurisdiction.'" 80 U.S. (13 Wall.) at 145.

The problem in Klein was that the statute withdrawing jurisdiction functioned as a "means to [the] end" of "deny[ing] to pardons granted by the President the effect which this [C]ourt had adjudged them to have." Klein, 80 U.S. (13 Wall.) at 145. Klein explained that because the Constitution entrusts the pardon power "[t]o the [E]xecutive alone," Congress had no authority to "impair[] the effect of a pardon." Id. at 147. And because Congress lacked authority to "change the effect of such a pardon," Congress could not "direct[] the court to be instrumental to that end" by imposing an "arbitrary rule of decision" under which, contrary to this Court's earlier holding, a pardon was "conclusive evidence" of "rebellion or disloyalty." Id. at 145-146, 148; see Bank Markazi, 578 U.S. at 227-228 (interpreting Klein). "In other words, the statute in Klein infringed the judicial power * * * because it

attempted to direct the result without altering the legal standards governing the effect of a pardon -- standards Congress was powerless to prescribe." Id. at 228.

Section 324(e)(1), by contrast, changes the relevant legal standard governing jurisdiction over a category of cases -- a standard that Congress clearly has power under Articles I and III to enact. See Palmore v. United States, 411 U.S. 389, 401 (1973) (Article III vests Congress with "'the sole power of creating the [inferior federal courts] * * * and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'") (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845)).

Moreover, although "a statement in the Klein opinion question[s] whether 'the legislature may prescribe rules of decision to the Judicial Department . . . in cases pending before it,'" the Court has since made clear 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 (citations omitted). Indeed, this Court's decisions since Klein "ma[k]e clear that [Klein's] prohibition does not take hold when Congress 'amends applicable law.'" Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) (quoting Robertson, 503 U.S. at 441) (brackets omitted); accord Bank Markazi, 578 U.S. at 226. Those decisions have "dispelled" all "lingering doubts" about whether, as here, "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, 229.

iii. Patchak confirms that Section 324(e)(1) is constitutional. The four-Justice plurality in Patchak concluded that the statute there was constitutional because "[s]tatutes that strip jurisdiction 'change the law' for the purpose of Article III just as much as other exercises of Congress' legislative authority." Patchak, 138 S. Ct. at 906 (plurality opinion) (citation and brackets omitted). Justice Ginsburg, joined by Justice Sotomayor, concluded that the statute there was valid as a restoration of the federal government's sovereign immunity, a conclusion that applies equally in this case. Id. at 912-913 (Ginsburg, J., concurring in the judgment).[4] And the factors central to the Chief Justice's conclusion in his dissenting opinion, joined by Justices Kennedy

[4] Jurisdiction over the petitions for review here originally rested on 15 U.S.C. 717r, which authorized particular actions against federal agencies. The Administrative Procedure Act (APA), 5 U.S.C. 701 et seq., also waives federal agencies' sovereign immunity from suits for "judicial review" of "agency action" that "seek[] relief other than money damages," 5 U.S.C. 702. Section 324(e)(1), however, expressly withdrew jurisdiction to review specific agencies' actions "[n]otwithstanding any other provision of law." § 324(e)(1). In that regard, Section 324(e)(1) is similar to the statute in Patchak, which, as Justice Ginsburg explained, barred suit "'[n]otwithstanding any other provision of law'" and thereby effected a "[r]etraction of [the APA's] consent to be sued (effectively restoration of immunity)." 138 S. Ct. at 913 (Ginsburg, J., concurring in the judgment) (citation omitted). It is well established that, once Congress has waived federal sovereign immunity, that consent to suit may be "withdraw[n] [by Congress] at any time," Lynch v. United States, 292 U.S. 571, 581 (1934), including during a pending lawsuit, see District of Columbia v. Eslin, 183 U.S. 62, 63-65 (1901). See also Patchak, 138 S. Ct. at 912 (Ginsburg, J., concurring in the judgment).

and Gorsuch, that the statute there was unconstitutional are absent here. See id. at 914-922 (Roberts, C.J., dissenting).

First, the Chief Justice emphasized that the Patchak statute "target[ed] a single party for adverse treatment" because the statute's "practical operation unequivocally confirm[ed] that it concerns solely Patchak's suit." 138 S. Ct. at 917-918; see id. at 914 ("single pending case"); id. at 919-920 (concluding that Congress cannot "manipulate[] jurisdictional rules to decide the outcome of a particular pending case" and that "all that [the Patchak statute] does is deprive the court of jurisdiction in a single proceeding"). That feature distinguished the statute there from others -- like Section 324(e)(1) -- that permissibly withdraw jurisdiction over a "class of cases" and thus "cover[] more than a single pending dispute." Id. at 921. Section 324(e)(1) prospectively changes the law for a class of pending cases as well as future cases challenging existing and future administrative actions necessary for MVP's construction and initial operation at full capacity.[5]

[5] In addition to applying to the three pending Fourth Circuit cases before the Court (which were consolidated after Congress enacted Section 324), Section 324(e)(1) also applies to several cases pending in the D.C. Circuit. See Sierra Club v. FERC, 68 F.4th 630 (D.C. Cir. May 26, 2023) (Nos. 20-1512, 21-1040) (decision on two petitions for review for which the extended rehearing petition deadline is July 31); Appalachian Voices v. FERC, Nos. 22-1330, 23-1117 (D.C. Cir.) (two consolidated petitions for review; pending disposition of MVP's June 21 motion to dismiss based on Section 324(e)(1) and Appalachian Voice's June 22 opposed motion for voluntary dismissal); Bohon v. FERC, No. 1:20-cv-6, 2020 WL 2198050 (D.D.C. May 6, 2020), aff'd, 37 F.4th 663 (D.C. Cir. 2022), vacated, 143 S. Ct. 1779 (2023), appeal pending, No. 20-5203 (D.C. Cir.) (supplemental briefs addressing effect of Section 324 due Aug. 7, 2023); Bold Alliance v. FERC, No. 1:17-cv-1822, 2018 WL 4681004 (D.D.C. Sept. 28, 2018), appeal pending,

Second, the Chief Justice concluded that the Patchak statute -- which by its terms directed that an action "'shall be promptly dismissed'" -- "direct[ed] the precise disposition of [Patchak's] pending case" and therefore purported to "dispos[e] of the case outright, wresting any adjudicative responsibility from the courts." Id. at 917-918, 921; see id. at 914. Section 324(e)(1), by contrast, specifies the scope of federal jurisdiction and leaves courts to adjudicate whether dismissal for want of jurisdiction is warranted. See pp. 19-20, supra.

Third, the Chief Justice found that the plurality's reliance on "general tenets of jurisdiction stripping" reflecting "Congress's power to regulate the jurisdiction of the federal courts" to be flawed because the statute was not framed in "jurisdictional" terms. 138 S. Ct. at 918-919. Section 324(e)(1) differs by employing express "jurisdiction[al]" language. § 324(e)(1).

And finally, the Chief Justice emphasized that although Congress has power to change the law, "the concept of 'changing the law' must imply some measure of generality or preservation of an adjudicative role for the courts." 138 S. Ct. at 920. Section 324(e)(1) does both. It evinces "some measure of generality" (ibid.) by applying generally to a class of cases concerning a particular subject matter -- MVP -- and it does so without interfering with the judiciary's exclusive Article III authority to "interpret and apply the law" governing jurisdiction to the facts of each case, id. at 914.

No. 18-5322 (D.C. Cir.) (motions to govern future proceedings due within 30 days of disposition in Bohon).

c. Respondents cannot succeed on the merits because Congress, through Section 324(c) and (f), has ratified the relevant agency actions and superseded the prospective application of the statutes on which respondents rely

In any event, respondents have no plausible likelihood of success on the merits for the independent reason that Congress has ratified the agency actions that respondents challenge and superseded the application of the federal statutes that respondents contend the challenged actions violate. See Appl. 14, 18-20.

Section 324(c)(1) provides that, "[n]otwithstanding any other provision of law," "Congress hereby ratifies and approves all authorizations, permits, verifications, extensions, biological opinions, incidental take statements, and any other approvals or orders issued pursuant to Federal law necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline." § 324(c)(1) (emphases added). That text clearly encompasses the USFS authorization and FWS BiOp/ITS that the Fourth Circuit has stayed pending review. Indeed, respondents themselves acknowledge that Section 324's effect is to "'ratif[y] and approve[]' agency authorizations for MVP, including those from the Forest Service and BLM" challenged in Wilderness Society, 23-1592 C.A. Doc. 22-1, at 11, and the "[FWS's] BiOp/ITS" challenged in Appalachian Voices, 23-1384 C.A. Doc. 43-1, at 19-20. That ratification "notwithstanding any other provision of law" is fatal to respondents underlying petitions for review and thus fatal to any claim of a likelihood of success on the merits.

It has long been "well settled that Congress may, by enactment not otherwise inappropriate, 'ratify . . . acts which it might

have authorized,' and give the force of law to official action unauthorized when taken," even though (as is the case with ratifications generally) "the validation is retroactive in its operation." Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 301–302 (1937) (quoting Mattingly v. District of Columbia, 97 U.S. 687, 690 (1878)); see, e.g., United States v. Heinszen & Co., 206 U.S. 370, 382-384 (1907) (finding it "elementary" that Congress possesses the "power of ratification as to matters within [its] authority" and may therefore "retroactively give [executive action] validity," "'cur[ing] irregularities, and confirm[ing] proceedings which without the confirmation would be void'") (citation omitted); see also, e.g., Hodges v. Snyder, 261 U.S. 600, 603 (1923) (observing that such statutory ratifications must be applied when they "become effective before any adjudication ha[s] been made in [a] pending litigation as to the invalidity" of executive action). There is "no substantial argument" that Congress "act[s] unconstitutionally by ratifying" such agency action. Patchak, 138 S. Ct. at 911 (Breyer, J., concurring). That holds particularly true here, where respondents have no liberty or property interests (let alone vested ones) that are implicated by the agency actions that Congress has ratified to govern the prospective construction and operation of MVP.

Respondents' petitions for review allege procedural and decision-making defects in agency actions under various federal statutes. But Congress ratified the relevant agency approvals "notwithstanding any other provision of law." § 324(c)(1). And Congress, in Section 324, also expressly "supersede[d] any other

provision of law * * * that is inconsistent with the issuance of any * * * approval for the Mountain Valley Pipeline," including "any [agency] authorization, * * * biological opinion, [or] incidental take statement." § 324(f). Congress thereby made clear, using a belt-and-suspenders approach, that its express ratification of the agency actions necessary for MVP's construction and operation is the operative law that governs the lawfulness of the agency actions challenged here. See Atlantic Richfield Co. v. Christian, 140 S. Ct. 1335, 1350 n.5 (2020) (Congress may employ redundant provisions as "a belt and suspenders approach" to ensure that a statute operates as intended.). The only question for a court is whether a particular agency action falls within the class of actions that Congress ratified in Section 324(c)(1), and respondents conceded that point below.

Respondents therefore have shown no reasonable likelihood of success on the underlying merits, much less the "strong showing" required to warrant stays pending review.[6]

2. The equities do not support the court of appeals' stay orders

As described below, MVP has explained that it will be irreparably injured by a stay. The government and the public are also irreparably injured whenever a court order prevents the implementation of an Act of Congress. Respondents describe harms that they believe will arise in the absence of a stay, which are

[6] For the same reasons that respondents cannot prevail on the merits, the court of appeals cannot grant relief on the merits of the petitions, which, MVP explains, moots respondents' underlying claims. Appl. 14; see Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1309 (D.C. Cir. 2004) (per curiam).

grounded in the federal statutes they seek to enforce. But a court's discretion to grant a stay requires a balancing of the equities, including any countervailing "substantial[] injur[y]" to the other parties and "the public interest." Nken, 556 U.S. at 434 (citation omitted). And that balancing must account for priorities specified in Acts of Congress. Section 324(b) clearly prioritizes the timely completion of MVP over the interests protected by federal statutes like the ESA, and that congressional prioritization cuts decisively against a stay pending review.

Congress expressly found and declared that "the timely completion of construction and operation of the Mountain Valley Pipeline is required in the national interest." § 324(b) (emphases added). To that end, Congress ratified the agency actions at issue here notwithstanding any other provision of law, including the provisions of law on which respondents rely in challenging those agency actions, § 324(c)(1), and withdrew the jurisdiction of any court to review those actions, § 324(e)(1). Congress's determinations override any countervailing interests that respondents may invoke by reference to those statutes. Whatever benefit respondents or the court of appeals might believe would be gained by having the agencies again reconsider the challenged actions, Congress has determined that further reconsideration is unwarranted and has prioritized MVP's "timely" completion over interests addressed by any other federal statutes.

That judgment is for Congress alone. "[I]t is * * * the exclusive province of the Congress" to "formulate legislative policies and * * * establish their relative priority for the

Nation." TVA v. Hill, 437 U.S. 153, 194 (1978). And where, as here, Congress has itself "'decided the order of priorities in a given area,'" a court of equity must follow the "balance that Congress has struck" and cannot reweigh what factors it deems relevant to the public interest. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 497 (2001) (quoting Hill, 437 U.S. at 194). Given Section 324's "order[ing] of priorities in [this] given area," ibid., the Fourth Circuit could not have properly balanced the equities to favor stays pending review of agency actions that Congress has ratified. Congress's "declaration of public interest and policy" is thus dispositive. Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 551-552 (1937).

Finally, as discussed further below, the stays entered by the Fourth Circuit were contrary to important equitable considerations. Among other things, they irreparably injure the government by preventing agencies from implementing Congress's express direction to maintain agency authorizations necessary for MVP's construction and operation. See pp. 31-32, infra. Those equitable factors weigh heavily against the stays.

* * * * *

In short, the Fourth Circuit's orders granting stays despite respondent's failure to show any plausible likelihood of success on the merits, and despite the overwhelming equitable balance counseling against a stay, are demonstrably inconsistent with accepted stay standards.

C. The Fourth Circuit's Stay Will Cause Serious and Irreparable Injury

Finally, the third criterion for this Court to consider in deciding whether to vacate the stays erroneously entered by the Fourth Circuit -- whether the "rights of the parties to [the] case pending in the court of appeals" will be "seriously and irreparably injured by the stay," Coleman, 424 U.S. at 1304 (Rehnquist, J., in chambers) -- is readily satisfied here. MVP has explained that the stays will cause it irreparable harm. Appl. 24-27. The United States will likewise sustain such harm because the stay frustrates the operation of a federal statute. Congress enacted Section 324 specifically to "expedit[e] completion" of the pipeline, § 324 (capitalization omitted), based on its finding that the pipeline's "timely completion * * * is required in the national interest." § 324(b).

In addition to ratifying agency approvals, Congress also directed federal agencies -- including the agencies in this case -- to "continue to maintain" all agency "approvals or orders" that are "necessary for [MVP's] construction and initial operation at full capacity," § 324(c)(2), to ensure that MVP is expeditiously completed and placed into service. The Fourth Circuit's stays are preventing the government from complying with that requirement of a "duly enacted statute to help prevent the[] injuries" to the national interest that Congress determined would result from further delays. Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The government's "inability to enforce [that] duly enacted [statutory requirement] clearly

inflicts irreparable harm on the [government]." Abbott v. Perez, 138 S. Ct. 2305, 2324 n.17 (2018); see King, 567 U.S. at 1303 (Roberts, C.J., in chambers) ("Any time [the government] is enjoined by a court from effectuating statutes enacted by [the legislature], it suffers a form of irreparable injury.") (quoting New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)) (brackets omitted). Accordingly, this Court should vacate the stays.

II. ALTERNATIVELY, THE COURT SHOULD GRANT MANDAMUS RELIEF

For many of the same reasons, MVP has shown that, if the stays are not vacated, it is entitled to mandamus relief. The Fourth Circuit's extraordinary exercise of judicial power in the face of an Act of Congress depriving it of jurisdiction to adjudicate respondents' claim that Section 324 is unconstitutional, § 324(e)(2), and respondents' underlying petitions for review, § 324(e)(1) -- coupled with Congress's ratification of the very agency actions respondents challenge, § 324(c)(1) -- provides ample reason for mandamus. See Appl. 30-33.

A. "The traditional use of the writ [of mandamus] * * * has been to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction." Cheney v. United States Dist. Ct., 542 U.S. 367, 380 (2004) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943)) (brackets omitted). A party seeking mandamus relief must demonstrate that (1) it has "no other adequate means to attain the relief [it] desires"; (2) its "right to issuance of the writ is clear and indisputable"; and (3) issuance of "the writ is appropriate under the circumstances."

Id. at 380-381 (citations and internal quotation marks omitted). MVP satisfies those criteria.

First, there is no other adequate means for MVP to obtain the relief it seeks to enable it to timely complete its pipeline this year, as Section 324 was intended to accomplish. And although the Fourth Circuit has now scheduled oral argument on the government's and MVP's motions to dismiss for want of jurisdiction, the court set argument for July 27, the day after the date on which MVP had informed the court construction would need to restart in order to finish this year and allow natural-gas deliveries for winter heating. See p. 9, supra.

Second, for the reasons above, MVP's right to the writ is clear and indisputable. Section 324(e)(1) unambiguously withdraws jurisdiction from all courts to entertain petitions for review like those here; the Fourth Circuit lacks jurisdiction to consider respondents' contention that Section 324(e)(1) is unconstitutional; and, in any event, Section 324(e)(1) is clearly a constitutional change in the law. See pp. 14-28, supra.

Finally, issuance of a writ directing the dismissal of respondents' petitions for review is appropriate if the Court concludes that Section 324(e)(1) constitutionally withdraws jurisdiction over those petitions. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("[W]hen [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.") (citation omitted).

B. This Court, however, could also appropriately provide more limited mandamus relief that does not include an unconditional

mandate to dismiss the petitions. Section 324(e)(2) contemplates that challenges to Section 324's constitutionality may be adjudicated, but only by invoking the D.C. Circuit's "exclusive jurisdiction" over such a claim. § 324(e)(2). A court of appeals other than the D.C. Circuit confronting a case that falls within the terms of Section 324(e)(1)'s withdrawal of jurisdiction therefore lacks jurisdiction to review the challenged agency action and to decide a constitutional challenge to that jurisdictional bar. And given the "strong presumption of constitutionality due to an Act of Congress," United States v. Di Re, 332 U.S. 581, 585 (1948); see United States v. Morrison, 529 U.S. 598, 607 (2000), that court of appeals should reject any request to stay agency action while the constitutionality of Section 324(e)(1)'s withdrawal of jurisdiction is unresolved. But the court could hold the petition in abeyance for a limited time to allow the litigant to present its constitutional claim to the D.C. Circuit, and, once that claim is finally resolved, dispose of the case accordingly.

This Court likewise could tailor its mandamus remedy to give appropriate effect to the jurisdictional provisions in Section 324(e)(1) and (2) by directing vacatur of the Fourth Circuit's stays pending review, but allowing the Fourth Circuit to place the petitions for review in abeyance to afford respondents a further opportunity to present their claims of Section 324(e)(1)'s invalidity to the D.C. Circuit pursuant to Section 324(e)(2); and further directing the Fourth Circuit to dismiss those petitions unless respondents seek D.C. Circuit review and the D.C. Circuit enters a final judgment holding Section 324(e)(1) unconstitutional.

CONCLUSION

The application to vacate stays of agency action pending review should be granted.

Respectfully submitted.

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