No. 23A35

In The

Supreme Court of the United States

Mountain Valley Pipeline, LLC,

Applicant,

v.

The Wilderness Society, et al.,

Respondents.

On Emergency Application to Vacate the Stays Entered by the United States Court of Appeals for the Fourth Circuit in Nos. 23-1384, 23-1592, & 23-1594

OPPOSITION TO THE APPLICATION TO VACATE THE STAY ENTERED IN NOS. 23-1592 & 23-1594

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RULE 29.6 STATEMENT

Respondent The Wilderness Society has no parent corporation, and no publicly held company has any ownership interest in The Wilderness Society.

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INTRODUCTION

Last month, Congress enacted a statutory provision that crosses the line between legislating and judging. That provision—Section 324 of the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324, 137 Stat. 10, 47–48—was tailored to mandate victory for Applicant Mountain Valley Pipeline, LLC ("MVP") and the government in a narrow set of pending lawsuits over environmental permits for MVP's namesake pipeline.

Section 324 violates Article III and the separation of powers under *United States* v. *Klein*, 80 U.S. 128 (1871), and its kin. Congress cannot pick winners and losers in pending litigation by compelling findings or results without supplying new substantive law for the courts to apply. *Bank Markazi* v. *Peterson*, 578 U.S. 212, 225 n.17 (2016). Nor can Congress manipulate jurisdiction "as a means to an end" in particular pending cases. *Klein*, 80 U.S. at 145. Section 324 does both.

Despite what MVP and its supporters demand, nothing in Section 324 requires the Fourth Circuit to turn a blind eye and cede jurisdiction to an unconstitutional statute. The Fourth Circuit was not only empowered to police the boundary of Article III—it was obligated. "A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely," and neither the Fourth Circuit nor this Court can "overlook the intrusion" of Section 324. *Stern* v. *Marshall*, 564 U.S. 462, 502–03 (2011).

The Fourth Circuit is taking its constitutionally assigned task seriously. MVP insinuates that this case is languishing in the court of appeals with "no indication of when it might rule" on the jurisdictional questions. Appl. 11. What MVP neglects to

mention is that even before the company filed its application here, the Fourth Circuit scheduled expedited oral argument on those very questions for July 27, just two days from now. In the meantime, the court of appeals entered stays in the cases below to forestall irreparable harm to the petitioners while the cases proceed. Before entering the stays, the court of appeals heard from a chorus of voices, including members of Congress and federal courts scholars as *amici curiae*, explaining why Section 324 violates the separation of powers. MVP calls the stays below extraordinary. The only extraordinary thing here is that Congress attempted to decide these cases for itself.

Respondent The Wilderness Society is the only petitioner in Nos. 23-1592 and 23-1594 below and respectfully submits this response opposing MVP's application to vacate the stay entered in those consolidated cases. The court of appeals has jurisdiction over those cases and entered a stay affecting the Jefferson National Forest that was comfortably within that court's discretion. The application should be denied.

STATEMENT

A. Factual Background

The Mountain Valley Pipeline ("Pipeline") is a proposed 303-mile natural gas pipeline in West Virginia and Virginia. MVP chose a controversial route from the start. The company forced hundreds of private landowners into court for eminent domain proceedings, in some cases condemning easements across properties that families have passed down for generations. See Laurence Hammack, *Jury Trial Begins in Property Owner Compensation Dispute with Mountain Valley Pipeline*, The Roanoke Times (Mar. 15, 2022), perma.cc/XW4M-AQ74.

Unwilling landowners are not MVP's only problem. The terrain in this part of the country is both demanding and fragile. The Pipeline would climb up and down more than 200 miles of steep and landslide-prone mountains. See Federal Energy Regulatory Commission, Mountain Valley Pipeline and Equitrans Expansion Project: Final Environmental Impact Statement at 4-28 (June 2017), perma.cc/WJC6-QCDW ("Commission EIS"). Roughly a quarter of the route would traverse slopes approaching the steepness of a black diamond ski run, *Appalachian Voices* v. *U.S. Dep't of the Interior*, 25 F.4th 259, 265 & n.1 (4th Cir. 2022), and some areas like Peters Mountain and Brush Mountain on the Jefferson National Forest are considerably steeper, see Commission EIS, *supra*, at 4-28, 4-67. The route crosses protected public land, over one thousand streams, and habitat for endangered species found nowhere else. *Appalachian Voices*, 25 F.4th at 265–68.

To construct the Pipeline, MVP was required to obtain approval from the Federal Energy Regulatory Commission ("Commission") and from several other state and federal agencies. See *Sierra Club* v. *Fed. Energy Regul. Comm'n*, 68 F.4th 630, 636–37 (D.C. Cir. 2023) (describing required approvals for the Pipeline). On that list, MVP needed permission from the U.S. Forest Service ("Forest Service") and the Bureau of Land Management ("BLM") because 3.5 miles of the Pipeline would snake through the Jefferson National Forest in the mountains of southwest Virginia. *Id.* at 637.

The Pipeline cannot be built without violating standards in the mandatory forest plan for the Jefferson National Forest that protect natural resources and the

land's productivity. *Wild Virginia* v. *U.S. Forest Serv.*, 24 F.4th 915, 923 (4th Cir. 2022). One problem is that the construction techniques MVP intends to use are incompatible with the forest plan. ECF No. 25-3 at 66.[1] Another problem is that MVP has been dogged by an inability to effectively control erosion and sedimentation and protect water quality during construction. See *Sierra Club*, 68 F.4th at 650–51 (describing violation history); *Sierra Club* v. *W. Va. Dep't of Env't Protection*, 64 F.4th 487, 502 (4th Cir. 2023) (same). Every project on a national forest must be consistent with that forest's governing plan, so the Pipeline could not proceed if the standards remained in place. 16 U.S.C. § 1604(i).

Instead of rejecting the Pipeline, the Forest Service decided to amend the forest plan to accommodate MVP. The agency's regulations provide this option, but impose a mandatory framework with procedural and substantive requirements that the agency has struggled to follow. The court of appeals vacated the Forest Service and BLM approvals for the Pipeline in *Sierra Club* v. *U.S. Forest Service*, 897 F.3d 582, 606 (4th Cir.), *reh'g granted in part*, 739 Fed. App'x 185 (4th Cir. 2018), and again in *Wild Virginia*, 24 F.4th at 932, based in part on these errors. Immediately after *Sierra Club*, the Commission ordered MVP to stop construction on the national forest. See App'x 52–53. That has been the status quo for almost five years.

In mid-May of this year, the Forest Service and BLM issued their latest approvals for the Pipeline. On May 15, the Forest Service issued a record of decision, choosing once more to amend the mandatory plan, exempt MVP from the relevant

[1] Citations to filings below refer to No. 23-1592 unless otherwise indicated.

standards, and issue a letter of concurrence that BLM should grant MVP a right-of-way and temporary-use permit for construction. ECF No. 25-5. Two days later, BLM released its own record of decision electing to grant MVP the right-of-way and permit. ECF No. 25-7.

B. Procedural Background

The Wilderness Society filed the petitions for review in Nos. 23-1592 and 23-1594 below on June 1—just ten business days after BLM issued its record of decision. The petitions present claims under the Administrative Procedure Act, 5 U.S.C. § 704, alleging that the latest Forest Service and BLM approvals for the Pipeline violate several environmental statutes. ECF No. 16; ECF No. 15 (No. 23-1594). Under the Natural Gas Act, these claims must be litigated in the Fourth Circuit. 15 U.S.C. § 717r(d)(1).

No stay was necessary at the time these petitions were filed for two reasons. First, MVP remained subject to the Commission order following *Sierra Club* that prohibited construction on the national forest. ECF No. 25-1 at 4. Second, MVP could not start construction on the national forest, even with the Commission's blessing, until BLM issued the company a final approval called a notice to proceed. *Id.*

On June 3, President Biden signed into law the Fiscal Responsibility Act ("Act"). The Act was a must-pass bill to raise the nation's debt ceiling and avoid default. But the Act also carried a rider, Section 324, intended to help MVP escape a "judicial hellhole," because the Pipeline "would be finished today if it weren't for the rulings by the Fourth Circuit." 169 Cong. Rec. S1877, 1890 (daily ed. June 1, 2023) (statement of Sen. Capito).

Section 324 includes several provisions at issue here:

- Section 324(c)(1) provides that "[n]otwithstanding any other provision of law . . . Congress hereby ratifies and approves" all authorizations necessary for the construction and initial operation of the Pipeline.
- Section 324(c)(2) provides that "[n]otwithstanding any other provision of law," Congress directs applicable agencies "to continue to maintain" authorizations for the Pipeline.
- Section 324(e)(1) provides that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review" any approval necessary for the construction and initial operation of the Pipeline, "including [in] any lawsuit pending in a court as of the date of enactment."
- 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" Section 324 confers.
- Section 324(f) provides that Section 324 "supersedes any other provision of law" that is "inconsistent with the issuance of any authorization" for the Pipeline.

Section 324 was aimed at four specific approvals, including the three challenged in Nos. 23-1384, 23-1592, and 23-1594 below. See 169 Cong. Rec. at S1877 (statement of Sen. Capito) (targeting approvals "from the U.S. Forest Service, the Bureau of Land Management, and the Fish and Wildlife Service, along with approval from the Federal Energy Regulatory Commission").

When the Act became law, MVP filed motions to dismiss or, in the alternative, for summary denial under Fourth Circuit Local Rule 27(f) based on Section 324. ECF No. 12-1; ECF No. 11-1 (No. 23-1594). Soon after, the government indicated that it would also move to dismiss based on Section 324. See ECF No. 17 at 3. On The Wilderness Society's unopposed motion, the court of appeals consolidated Nos. 23-1592 and 23-1594 and allowed The Wilderness Society to file a single response to MVP and the government by June 26. ECF Nos. 19, 21.

The Wilderness Society timely opposed the motions. ECF No. 22. The Wilderness Society explained that Section 324 violates Article III and the separation of powers under *Klein* and this Court's ensuing precedent. The Wilderness Society further explained that the Fourth Circuit was both empowered and obligated to consider the constitutional defects in Section 324. The court of appeals also heard from members of Congress and federal courts scholars as *amici curiae* supporting The Wilderness Society. ECF Nos. 27, 28. As the scholars explained, Section 324 "obliterat[es] the line between lawmaking and adjudicating." ECF No. 28 at 11.

MVP and the government had seven days to reply. Fed. R. App. P. 27(a)(4). Instead, they filed notices (not motions) granting themselves an extra week and informing the court of appeals that they intended to reply by July 10. ECF Nos. 23, 24.

Meanwhile, MVP's construction plans were picking up steam. On June 28, the Commission issued an order authorizing MVP to resume all construction activities, including construction on the Jefferson National Forest. App'x 51. At that point, the

only remaining hurdle to construction on the national forest was that MVP needed BLM to issue a notice to proceed. On July 3, just two business days after the Commission issued the construction order, The Wilderness Society filed a motion for a stay pending review under Federal Rule of Appellate Procedure 18(a). ECF No. 25-1. The motion "focused on the Forest Service's role" in approving the Pipeline, but sought a stay of both the Forest Service and BLM approvals. *Id.* at 2. The Wilderness Society did not request a temporary administrative stay in that motion because it was not clear precisely when BLM would issue the notice to proceed or what construction schedule it might include, but The Wilderness Society informed the court of appeals that such a request could become necessary when the notice to proceed issued. *Id.* at 5 & n.3.

On July 5, the court of appeals ordered MVP and the government to respond to the stay motion by July 10. ECF No. 26. That same day, counsel for the government informed counsel for The Wilderness Society that BLM had issued MVP the notice to proceed sometime on July 3. ECF No. 32 at 4–5. The notice to proceed revealed that MVP intended to start construction on the national forest that day—July 5—and that high-impact construction would begin the next week. See *id.*

On July 6, The Wilderness Society moved for a temporary administrative stay. *Id.* at 1. The Wilderness Society explained that an administrative stay was necessary because high-impact construction was slated to commence on the national forest before the underlying stay motion would be fully briefed. *Id.* at 1–2. The Wilderness Society also voluntarily committed to an expedited timeline for its anticipated reply

in support of its underlying stay motion. *Id.* at 6. And to expedite the case further, The Wilderness Society informed the court of appeals under Fourth Circuit Local Rule 27(d)(2) that the court should not await The Wilderness Society's reply before acting on the stay motion given the imminent irreparable harm at stake. *Id.* The court of appeals ordered the government and MVP to respond to the motion for a temporary administrative stay by the next day, a Friday. ECF No. 33.

MVP filed its response just before the close of business and the government filed after hours. They argued that Section 324 is constitutional, that The Wilderness Society faced no irreparable harm, that the public interest disfavored a stay because Section 324 prioritized the Pipeline, and that the equities weighed against The Wilderness Society. ECF Nos. 35, 36. In its response, MVP confirmed that it "already ha[d] mobilized construction resources and ha[d] resumed work in the Jefferson National Forest." ECF No. 35 at 9. In view of the exigent circumstances, The Wilderness Society replied that night. ECF No. 37.

The next business day was Monday, July 10. This was the court-imposed deadline for MVP and the government to respond to The Wilderness Society's stay motion, and their self-extended deadline to reply in support of their motions to dismiss. MVP filed its reply that afternoon. ECF No. 41. At 5:00 PM, the court of appeals issued an order granting The Wilderness Society's stay motion and terminating the motion for a temporary administrative stay. App'x 1–2. Fourth Circuit Local Rule 27(d)(1) anticipates that the court may act on a motion without a response, and allows any party adversely affected by such an action to apply for

reconsideration, vacation, or modification. After hours, MVP filed its response and the government filed both its response and its reply in support of its motion to dismiss. ECF Nos. 45, 47, 48. To this day, neither MVP nor the government has requested relief under Fourth Circuit Local Rule 27(d)(1). The motions to dismiss are still pending.

Two days later, the Fourth Circuit *sua sponte* consolidated Nos. 23-1592 and 23-1594 with No. 23-1384, a separate case challenging an approval for the Pipeline issued by the U.S. Fish and Wildlife Service, which MVP and the government have also moved to dismiss based on Section 324. ECF No. 56 (No. 23-1384). The court of appeals scheduled oral argument on the motions to dismiss for this Thursday, July 27. *Id.* MVP filed its emergency application in this Court two days after that order.

REASONS TO DENY THE APPLICATION

In just two days, the Fourth Circuit will hear oral argument on the constitutional defects in Section 324, which that court is fully empowered to adjudicate under the text of the Act. The court of appeals is proceeding with appropriate dispatch toward a final resolution of the constitutional issues and the posture of this case calls for deference in the meantime. The Court should decline MVP's invitation to rush into the same constitutional issues before *any* court has addressed them in a written opinion.

The power to vacate a stay "should be exercised with the greatest of caution and should be reserved for exceptional circumstances." *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers). An applicant seeking vacatur must establish that (1) the case "could and very likely would be reviewed here upon

final disposition in the court of appeals"; (2) the issuance of the stay was "demonstrably wrong" under "accepted standards"; and (3) the applicant "may be seriously and irreparably injured by the stay." *Coleman* v. *Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers).[2]

Because the court of appeals ordinarily is more familiar "with the facts and issues in a given case," a stay issued below "is entitled to great deference." *Garcia-Mir* v. *Smith*, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers). And deference to the court of appeals "is especially warranted when . . . that court is proceeding to adjudication on the merits with due expedition," as the Fourth Circuit is here. *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 571 U.S. 1061, 1061 (2013) (Scalia, J., joined by Thomas, J., and Alito, J., concurring in denial of application to vacate stay) (quoting *Doe* v. *Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers)). MVP has not overcome the deference owed to the court of appeals.

I. MVP TAKES THE COURT'S REVIEW FOR GRANTED.

The application should be denied at the outset because MVP ignores an essential component of its burden. MVP is required to show that the case "could and very likely would be reviewed here upon final disposition in the court of appeals."

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[2] MVP prefers the four-factor test from *Nken* v. *Holder*, 556 U.S. 418 (2009), Appl. 11–12, but that formulation does not lessen MVP's burden. Demonstrating likelihood of success on the merits requires MVP to overcome the deference owed to the court of appeals and to establish that this Court would likely grant review. See *Does 1–3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., joined by Kavanaugh, J., concurring in denial of application for injunctive relief) (likelihood of success on the merits "encompass[es] not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case").

Coleman, 424 U.S. at 1304 (Rehnquist, J., in chambers). This is a necessary predicate to the power under the All Writs Act to vacate a stay entered below. *Id.* at 1302–03 (citing 28 U.S.C. § 1651). MVP has not even acknowledged this requirement, much less tried to make the showing it demands.[3]

Instead, MVP invites the Court to take up a frontier question of constitutional law as a court of first instance. To date, no court has issued a written opinion discussing whether Section 324 violates Article III and the separation of powers. The Fourth Circuit impliedly concluded The Wilderness Society and the other petitioners in the consolidated cases below are likely to prevail on that point, but its interlocutory orders do not address the constitutional issues explicitly or resolve them conclusively. App'x 1–6; Cf. *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."). The Fourth Circuit will hear oral argument on the motions to dismiss presenting these constitutional questions in just two days. ECF No. 56 (No. 23-1384). At this early stage, it is premature to say this Court's eventual review is likely.

[3] MVP briefly proposes certiorari before judgment and summary dismissal as an alternative to its request for an extraordinary writ of mandamus. Appl. 33–34. But MVP does not come close to showing that this case "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court," Sup. Ct. R. 11, much less that certiorari before judgment is likely.

II. THE COURT OF APPEALS DID NOT ERR, MUCH LESS DEMONSTRABLY ERR, WHEN GRANTING THE STAY.

The Fourth Circuit was right to grant The Wilderness Society's motion for a narrow stay of the authorizations allowing MVP to build the Pipeline across the Jefferson National Forest. MVP's principal argument to the contrary is that the court of appeals lacked jurisdiction to enter the stay. Appl. 12–23. Not so. The Fourth Circuit is fully empowered to determine Section 324's constitutionality, correctly concluded that The Wilderness Society is likely to succeed in showing that Section 324 is unconstitutional, and entered a stay that was comfortably within its discretion. The court of appeals had an ample record supporting its evident, albeit implicit, conclusion that The Wilderness Society established all four factors required for a stay pending review.[4]

A. The Fourth Circuit Has Jurisdiction to Consider Arguments In Pending Cases About Section 324's Constitutionality.

Federal courts always possess the jurisdiction to determine their own jurisdiction, and making that determination in this case requires the Fourth Circuit to confront whether Section 324 is constitutional. See *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 291 (1947)). MVP argues that Section 324 wrests this power from the Fourth Circuit, but MVP misreads the statute.

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[4] MVP faults the court of appeals for the brevity of its stay orders, Appl. 1, but such orders routinely lack detailed explanation given their non-definitive nature. See, *e.g.*, *Sierra Club* v. *W. Va. Dep't of Env't Protection*, No. 22-1008 (4th Cir. Feb. 8, 2022) (denying stay in case involving MVP); *Appalachian Voices* v. *U.S. Dep't of the Interior*, No. 20-2159 (4th Cir. Nov. 18, 2020) (same).

MVP surmises that Section 324(e)(2) leaves the D.C. Circuit with exclusive jurisdiction to consider the Act's constitutionality, Appl. 14–17, but the text of Section 324(e)(2) cannot do the heavy lifting MVP's interpretation requires. Section 324(e)(2) directs that the D.C. Circuit "shall have original and exclusive jurisdiction over any *claim alleging* the invalidity of this section or that an action is beyond the scope of authority conferred by this section." § 324(e)(2) (emphasis added). This is a venue provision that prescribes where a party must file post-enactment claims directly challenging Section 324 or actions taken pursuant to it. For example, a party may wish to challenge the permit that Section 324(d) directed the Secretary of the Army to issue, on the grounds that Section 324(d) is unconstitutional, that the permit itself went further than the Act allowed, or both, and could do so by filing a petition for review in the D.C. Circuit.

The venue restriction in Section 324(e)(2) does not apply to this case. The Wilderness Society's claims arise under the Administrative Procedure Act, 5 U.S.C. § 704, alleging violations of environmental statutes. ECF No. 16; ECF No. 15 (No. 23-1594). They do not "alleg[e] the invalidity of" Section 324 or "that an action is beyond the scope of authority" it confers. Nor could they. Section 324 had not been enacted when The Wilderness Society filed its petitions for review.

MVP would rewrite Section 324(e)(2) to sweep more broadly than the statute Congress wrote. According to MVP, only the D.C. Circuit can hear "arguments" or "challenges" to Section 324's constitutionality. Appl. 15–16. But the statute does not

mention arguments or challenges. It governs only *claims alleging* invalidity or unauthorized action. The plain text of Section 324(e)(2) dooms MVP's interpretation.

When Congress employs a legal term of art like "claim," courts must give that term its accepted legal meaning absent instruction to the contrary. *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). The accepted legal meaning of the word "claim" when paired with the word "alleging" is a claim for relief or an "interest or remedy recognized at law," such as a cause of action. *Claim*, Black's Law Dictionary (11th ed. 2019); see also *id.* ("A demand for . . . a legal remedy to which one asserts a right[.]"). This definition spans jurisdictional contexts. See, *e.g.*, *Axon Enter., Inc.* v. *Fed. Trade Comm'n*, 143 S. Ct. 890, 900 (2023) ("District courts may ordinarily hear those challenges by way of 28 U.S.C. § 1331's grant of jurisdiction for claims 'arising under' federal law."). It governs how to plead. See Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief[.]"). And it shapes foundational doctrines like res judicata. See, *e.g.*, *Lucky Brand Dungarees, Inc.* v. *Marcel Fashions Grp.*, 140 S. Ct. 1589, 1595 (2020) ("Suits involve the same claim (or cause of action) when they arise from the same transaction or involve a common nucleus of operative facts." (cleaned up)). At bottom, a claim is not equivalent to an argument. See *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal *claim* is properly presented, a party can make any *argument* in support of that claim[.]" (emphases added)).

In addition, Section 324(e)(2) does not forbid the Fourth Circuit from hearing constitutional arguments raised in defense of environmental claims predating the Act

because Section 324(e)(2) applies only to new cases. The provision uses the future tense "shall have" to describe when its terms control. See *Bell* v. *Maryland*, 378 U.S. 226, 236 (1964) ("shall" followed by a verb signifies the "future tense"). Even MVP agreed below that Section 324(e)(2) employs "prospective 'shall have' language." ECF No. 41 at 6. The "prospective orientation" of that phrase "could not have escaped Congress'[s] attention." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987). Considering both subparts of Section 324(e) together as MVP urges, Appl. 15, only underscores this limitation. Just a few lines above subsection (e)(2), subsection (e)(1) purports to eliminate judicial review over "any lawsuit *pending* in a court as of the date of enactment." § 324(e)(1) (emphasis added). If Congress had intended for Section 324(e)(2) to affect arguments in pending cases, it knew how to say so. *Jama* v. *Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005) ("Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

In fact, Congress knows how to write a statute that operates in exactly the way MVP supposes this one does. The Alaska Natural Gas Pipeline Act provides that the D.C. Circuit "shall have original and exclusive jurisdiction *to determine . . . the constitutionality* of any provision of this chapter." 15 U.S.C. § 720e(a)(2) (emphasis added). If Section 324(e)(2) contained the same language, MVP might be on stronger footing. But the language Congress employed in Section 324(e)(2) is limited to certain kinds of claims, not freestanding determinations of constitutionality. None of the

claims here fall within Section 324(e)(2)'s venue limitation, so the Fourth Circuit is not foreclosed from determining Section 324's constitutionality in these cases.

MVP's contrary arguments are not persuasive. First, MVP reads the word "claim" in isolation and asserts that the ordinary and common meaning of the word encompasses arguments. Appl. 16. The problem for MVP is that the word "claim" in Section 324(e)(2) does not appear in isolation. By pairing the words "claim" and "alleging," Congress confirmed that it employed the word "claim" as a legal term of art with a widely understood meaning. "[A]llegations in a complaint" are the raw material of which "claim[s] of entitlement to relief" or "cause[s] of action" are made. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555, 558 (2007). "And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice," the Court should presume that Congress meant to use their "widely accepted definitions." *Morissette*, 342 U.S. at 263.

Second, MVP accuses The Wilderness Society of cherry-picking dictionary entries. Appl. 16. The opposite is true. MVP argues its preferred definition of the word "claim"—"[a] statement that something yet to be proved is true"—is best because it is listed first in Black's Law Dictionary. Appl. 16. But it is "often quite untrue" that "the first sense listed in a dictionary is the 'main' sense." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 418 (2012). This case shows why first is not always best. Every other entry reinforces that a claim is something akin to the foundation for a civil action. See *Claim*, Black's Law Dictionary (11th ed. 2019) ("The assertion of an existing right"; "any right to payment or to an equitable

remedy, even if contingent or provisional"; "[a] demand for money, property, or a legal remedy to which one asserts a right"; "the part of a complaint in a civil action specifying what relief the plaintiff asks for"; "[a]n interest or remedy recognized at law"; "the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing"). Together, the words "claim" and "alleging" evoke a common understanding among judges and lawyers, and that is the way Congress used them here. Even if the statute were ambiguous on this point (and it is not), any ambiguity would weigh against MVP's interpretation. See *Morissette*, 342 U.S. at 263 (absence of congressional direction to give legal terms of art different meanings "may be taken as satisfaction with widely accepted definitions, not as a departure from them").

Third, MVP and several of its *amici* argue it is "obvious" that Congress did not intend for the Fourth Circuit to entertain constitutional arguments about Section 324. Appl. 15–16. The text of Section 324(e) compels a different conclusion and it is the statutory text—as opposed to the subjective intent of a handful of legislators—that supplies the law. The best way to effectuate the balance Congress struck is to apply the statute Congress enacted. See *Bd. of Governors of Fed. Rsrv. Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."). By its terms, no part of the Act deprives the Fourth Circuit of jurisdiction to consider constitutional arguments about Section 324.

B. Section 324 Violates the Separation of Powers.

The Fourth Circuit correctly concluded that The Wilderness Society is likely to succeed in showing Section 324 is unconstitutional. Congress overstepped the line that separates legislating and judging when it enacted Section 324 by picking winners and losers in pending litigation without supplying new substantive law. "[T]he entire constitutional enterprise depends on there *being* such a line" and failing to enforce the boundary "reduces Article III to a mere 'parchment barrier[] against the encroaching spirit' of legislative power." *Bank Markazi*, 578 U.S. at 249 (Roberts, C.J., dissenting) (quoting The Federalist No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961)).

Klein describes the basic line. *Klein* invalidated a law targeting suits by pardoned Confederates seeking compensation for property seized during the Civil War. In a prior case, this Court had held that a pardon was proof of loyalty and entitled claimants to damages. Congress responded by passing a new law while Klein's case was pending that required courts to consider a pardon as proof of *dis*loyalty and stripped jurisdiction over any cases where a claimant prevailed based on a pardon, requiring the claims to be dismissed. *Klein*, 80 U.S. at 143–44. *Klein* held the new law unconstitutional because it withdrew jurisdiction "as a means to an end" in pending cases, imposing an "arbitrary rule of decision" on the judiciary and thereby "pass[ing] the limit which separates the legislative from the judicial power." *Id.* at 145–47.

MVP and the government downplay *Klein*, but this Court's recent decisions confirm that *Klein*'s core holding remains: Congress cannot direct the Article III

courts to reach particular results in particular pending cases. The precise contours of *Klein*'s prohibition may vary depending on whether Congress prescribes a rule of decision or manipulates jurisdiction "as a means to an end," *id.* at 145, but its bedrock rule is the same in both scenarios. Section 324 runs afoul of that rule twice over.

1. *Section 324(c)(1) and Section 324(f) compel results under old law.*

Section 324(c)(1) and Section 324(f) violate Article III and the separation of powers because they attempt to compel a result for MVP and the government in pending litigation without supplying new substantive law. This Court has explained that a statute affecting pending litigation violates the separation of powers when it "compel[s] . . . findings or results under old law" but not when it (1) "change[s] the law by establishing new substantive standards" and (2) entrusts "application of those standards" to the courts. *Bank Markazi*, 578 U.S. at 231 (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992)); see also *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (statute that "set out substantive legal standards for the Judiciary to apply, and in that sense change[d] the law," satisfied *Klein* but violated Article III on other grounds); *Patchak* v. *Zinke*, 138 S. Ct. 897, 922 (2018) (Roberts, C.J., dissenting) (If a provision determining the outcome of a pending case "is constitutional, it is because the provision establishes new substantive standards and leaves the court to apply those standards in the first instance. That is the rule set forth plainly in *Bank Markazi*.").

Not every change in law will clear this hurdle. For example, *Bank Markazi* explains that Congress may not pass a law saying, in the case of "*Smith* v. *Jones*,

Smith wins," or a law that is a fig leaf for the same, like one "directing judgment for Smith if the court finds that Jones was duly served" or "that the sun rises in the east." 578 U.S. at 231. Because they do not "supply any new legal standard," these hypothetical laws would violate the separation of powers. *Id.*

So too here. Section 324(c)(1) and Section 324(f) violate Article III under this Court's rubric because they compel specific results in pending cases without supplying new substantive standards for any court to apply. Section 324(c)(1) "ratifies and approves" agency authorizations that are "necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline," including those from the Forest Service and BLM. § 324(c)(1). But ratification merely confirms the decisions the Forest Service and BLM already made under then-existing law, so Section 324(c)(1) offers nothing new. See *United States* v. *Heinszen*, 206 U.S. 370, 384 (1907) (endorsing Latin maxim meaning "every ratification relates back and is equivalent to a prior command").

Section 324(f) is no better. It states that Section 324 "supersedes any other provision of law" that is "inconsistent with the issuance of any authorization" for the Pipeline. § 324(f). This blank check offers no specificity except to say that it overrides "any other section of [the] Act or other statute, any regulation, any judicial decision, [and] any agency guidance." *Id.* Both provisions fail to provide any clues about how their edicts might supply a new substantive standard for the courts to apply—aside from the result that MVP and the government must win.

These provisions of Section 324 go beyond anything the Court has blessed before. *Robertson* upheld a statute known popularly as the Northwest Timber Compromise, intended to resolve two lawsuits over logging in Oregon and Washington that threatened the northern spotted owl. 503 U.S. at 431–33. The statute prescribed substantive standards governing where, how, and how much timber could be harvested on federal public lands, and it authorized judicial review of timber sales according to those standards. *Id.* at 433–34. The statute also identified the two lawsuits by caption and case number, stating that compliance with the new substantive standards would be adequate to satisfy the laws underlying those cases. *Id.* at 434–35. The Court found no Article III problem because the statute replaced the laws involved in the two lawsuits with new standards for courts to apply and did not direct "particular applications under either the old or the new standards." *Robertson*, 503 U.S. at 437.

Bank Markazi upheld a provision of the Iran Threat Reduction and Syria Human Rights Act of 2012 that is codified at 22 U.S.C. § 8772. Section 8772 allowed victims of state-sponsored terrorism to execute judgments against assets of the Central Bank of Iran in a pending consolidated proceeding following judgments against Iran in sixteen cases. *Bank Markazi*, 578 U.S. at 219–23 & n.5. Specifically, the statute allowed execution after the district court made findings about the location and ownership interest of the assets, whether they were subject to an Iran-specific executive order, their value, and whether anyone had a constitutionally protected interest in them. *Id.* at 218–19. The district court tasked with these determinations

noted they were "not mere fig leaves" and that Section 8772 left "plenty . . . to adjudicate." *Id.* at 229–30 & n.20. The Iranian bank argued Section 8772 violated the separation of powers, but this Court disagreed because the statute "establish[ed] new substantive standards" and "entrust[ed] to the District Court application of those standards." *Id.* at 231.

Unlike the statutes in *Robertson* and *Bank Markazi*, Section 324(c)(1) and Section 324(f) offer no substantive replacement standards and leave no substantive questions of law or fact to adjudicate. MVP insists that determining whether a permit is "necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline" is a new substantive standard for a reviewing court to apply. Appl. 19 (quoting § 324(c)(1)). But while the concept of necessity may imply some measure of judgment, Section 324 does not allow for any. The statute defines "Mountain Valley Pipeline" by reference to specific Commission approvals for the Pipeline, which enumerate the permits that are necessary. Compare § 324(a) (defining "Mountain Valley Pipeline" by reference to Commission Docket No. CP16-10), with Commission EIS, *supra*, at 1-43 (listing necessary approvals under CP16-10, including the challenged authorizations from the Forest Service and BLM). This is no more of a standard than a statute that says MVP wins "if the court finds that the sun rises in the east." *Bank Markazi*, 578 U.S. at 231. The result is a foregone conclusion and the supposed standard is a fig leaf.

MVP presses two more rationales to save Section 324 but neither carries the day. First, MVP points out that Congress generally may ratify agency actions. Appl.

18. But Congress may exercise the power to ratify only "by enactment not otherwise inappropriate." *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 301 (1937). Put simply, Congress cannot use ratification in a way that violates the Constitution, including the separation of powers. *Patchak*, 138 S. Ct. at 916 (Roberts, C.J., dissenting) ("[B]ecause Congress has 'no judicial powers' to render judgment 'directly,' it likewise cannot do so indirectly[.]" (quoting *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 398 (1980))). Congress may ratify agency rules of general applicability that impact pending litigation, *Heinszen*, 206 U.S. at 387, consistent with Congress's power to supply new substantive standards that do the same, *Bank Markazi*, 578 U.S. at 231. But Congress cannot employ ratification in a way that fails to supply any new standard apart from the result that a favored party in a pending case must win.

Second, MVP suggests that because Section 324(c)(1) and Section 324(f) apply "[n]otwithstanding any other provision of law" and "supersede[] any other provision of law," these provisions must "unambiguously 'change[] the law.'" Appl. 18. While superordinating language like this may help prioritize competing provisions "in the event of a clash," Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012), these clauses do not provide a substantive change in law within the meaning of *Bank Markazi*. It would be empty formalism to conclude that a statute saying "Smith wins" violates the separation of powers, *Bank Markazi*, 578 U.S. at 231, but that one saying "Smith wins notwithstanding any other provision of law" does not.

2. *Section 324(e)(1) manipulates jurisdiction as a means to an end.*

Section 324(e)(1) is independently unconstitutional because it strips jurisdiction in order to guarantee judgment for MVP and the government. Congress violates the separation of powers when it manipulates jurisdiction over pending cases "as a means to an end." *Klein*, 80 U.S. at 145; see also *Patchak*, 138 S. Ct. at 919–20 (Roberts, C.J., dissenting) ("Congress exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending case."). Yet that is precisely what Section 324(e)(1) sets out to do.

Section 324(e)(1) provides that "no court shall have jurisdiction to review any action taken by the [relevant agencies] . . . that grants an authorization . . . or any other approval necessary for the construction and initial operation" of the Pipeline. Section 324(e)(1) thus strips jurisdiction over the same approvals that Section 324(c)(1) purports to ratify, and it explicitly strips jurisdiction over "any lawsuit pending in a court as of the date of enactment."

The text and practical effect of Section 324 confirm that its jurisdiction-stripping provision is an unconstitutional "means to an end." *Klein*, 80 U.S. at 145. The title of Section 324 itself makes plain that Congress attempted to eliminate jurisdiction over pending litigation concerning Pipeline approvals to "[e]xpedit[e] completion" of the Pipeline and guarantee that MVP and the government would win. On its face, the statute attempts to ensure only cases challenging Pipeline approvals are dismissed. See § 324(e)(1) (stripping jurisdiction over actions "grant[ing]" approvals "for the Mountain Valley Pipeline"). "The law serves no other purpose—a

point, indeed, that is hardly in dispute." *Bank Markazi*, 578 U.S. at 242 (Roberts, C.J., dissenting). And even MVP agrees that, as a practical matter, "Section 324's unambiguous text prevents the [court of appeals] from taking any further action in this case other than dismissing it." ECF No. 35 at 3. The statute thus fails to "preserve[] any role for the court beyond that of stenographer." *Patchak*, 138 S. Ct. at 918 (Roberts, C.J., dissenting).

Section 324(e)(1) closely parallels the unconstitutional statute in *Klein* in at least three important ways. First, both here and there, "one party to the controversy"—the government—stripped jurisdiction "as a means" to decide a pending case "in its own favor." *Klein*, 80 U.S. at 145–46. According to *Klein*, asking whether such transparent self-dealing offends Article III is a question that seems "to answer itself." *Id.* at 147. The same answer applies here.

Second, both Section 324(e)(1) and the statute in *Klein* operate asymmetrically to benefit specific parties. In *Klein*, the proviso stripped appellate jurisdiction differently depending on which party prevailed below and on what grounds. 80 U.S. at 130–34. Likewise, Section 324(e)(1) eliminates jurisdiction over any lawsuit challenging an agency action that "*grants* . . . any . . . approval necessary" for the Pipeline, but it does not preclude MVP from suing over permit denials. § 324(e)(1) (emphasis added). Manipulating jurisdiction like this confirms that Section 324(e)(1) is a transparent attempt "to pick winners and losers in pending litigation." *Patchak*, 138 S. Ct. at 921 (Roberts, C.J., dissenting).

Third, both Section 324(e)(1) and the statute in *Klein* stripped jurisdiction in a way that would make it impossible for courts to reach any other issues. In *Klein*, the jurisdiction-stripping language made it unnecessary and impossible for courts to apply the meaning that the proviso ascribed to a presidential pardon. 80 U.S. at 133–34. Here, Section 324(e)(1) purports to make it impossible to apply the new standard MVP argues was created by Section 324(c)(1). If a statutory provision like Section 324(c)(1) can be deemed constitutional at all, "it is because the provision establishes new substantive standards and leaves the court to apply those standards in the first instance." *Patchak*, 138 S. Ct. at 922 (Roberts, C.J., dissenting). But Section 324(e)(1), like the jurisdiction-stripping language in *Klein*, "short-circuits the requisite adjudicative process and decides the suit outright." *Id.*

MVP's contrary arguments are not persuasive. To start, *Patchak* does not save Section 324(e)(1). That case upheld Section 2(b) of the Gun Lake Trust Land Reaffirmation Act ("Gun Lake Act"), Pub. L. No. 113-179, 128 Stat. 1913 (2014), which required dismissal of any pending action relating to a specified parcel of land. *Patchak*, 138 S. Ct. at 904–05 (plurality op.). But *Patchak* was a fractured decision that did not produce a controlling opinion. MVP relies on the plurality's reasoning that Section 2(b) of the Gun Lake Act did not violate Article III because it was a jurisdiction-stripping provision that changed the law. Appl. 21 (citing *Patchak*, 138 S. Ct. at 906–07 (plurality op.)). That view did not command a majority, and two Justices concurred in the judgment on wholly separate grounds involving sovereign

immunity that are not implicated here.[5] See *Patchak*, 138 S. Ct. at 912–13 (Ginsburg, J., and Sotomayor, J., concurring in the judgment). As a result, there is "no lowest common denominator or 'narrowest grounds' that represents the Court's holding." *Nichols* v. *United States*, 511 U.S. 738, 745 (1994).

In fact, an equal number of Justices in *Patchak* agreed that "Congress cannot, under the guise of altering federal jurisdiction, dictate the result of a pending proceeding." 138 S. Ct. at 919 (Roberts, C.J., joined by Kennedy, J., and Gorsuch, J., dissenting); see also *id.* at 913 (Sotomayor, J., concurring in the judgment) ("Congress may not achieve through jurisdiction stripping what it cannot permissibly achieve outright, namely, directing entry of judgment for a particular party."). If depriving a court of jurisdiction over particular pending cases "is sufficient to change the law," then Article III "'provides no limiting principle' on Congress's ability to assume the role of judge and decide the outcome of pending cases." *Id.* at 920 (Roberts, C.J., dissenting) (quoting *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50,

[5] Section 324(e)(1) does not include any "unmistakable hallmarks of a provision withdrawing the sovereign's consent to suit"—for instance, it "does not mention 'immunity,' [or] 'consent to be sued.'" *Patchak*, 138 S. Ct. at 921–22 (Roberts, C.J., dissenting); see also *Lynch* v. *United States*, 292 U.S. 571, 583 (1934) (sovereign immunity not restored where the statute purportedly doing so "ma[de] no mention of consent to sue"). There are no textual parallels between Section 324(e)(1) and the waiver of immunity in 5 U.S.C. § 702. Cf. *Patchak*, 138 S. Ct. at 913 (Ginsburg, J., concurring in the judgment) (concluding Section 2(b) of the Gun Lake Act restored sovereign immunity because its language—stating certain lawsuits "shall be promptly dismissed"—"is the mirror image of the [Administrative Procedure Act]'s immunity waiver"). And there is no contextual reason to believe Section 324(e)(1) has anything to do within sovereign immunity. Cf. *id.* at 913–14 (Sotomayor, J., concurring in the judgment) (noting Congress enacted Section 2(b) of the Gun Lake Act after years of litigation over sovereign immunity).

73 (1982)); see also *id.* at 913 (Sotomayor, J., concurring in the judgment) ("[A]n Act that merely deprives federal courts of jurisdiction over a [particular] proceeding is not enough to be considered a change in the law[.]"); Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 323 (7th ed. 2015) (*Klein* "stresses that Congress'[s] attempt to regulate jurisdiction is not a talisman that renders any such legislative effort constitutional.").

MVP also tries to defend Section 324(e)(1) by minimizing *Klein* and drawing a favorable comparison to *Ex parte McCardle*, 74 U.S. 506 (1868). These efforts fall short. First, MVP and the government argue that *Klein* is cabined by the fact that it involved the pardon power. Appl. 23; SG Br. 20–22. This is revisionist history. *Klein* "unmistakabl[y] indicat[ed] that the impairment of the pardon power was an *alternative* ground for its holding, secondary to its Article III concerns." *Bank Markazi*, 578 U.S. at 245 n.2 (Roberts, C.J., dissenting); see also *Sioux Nation*, 448 U.S. at 404 ("[T]he proviso [in *Klein*] was unconstitutional in two respects[.]"). MVP also tries to reduce *Klein* to a one-case-only rule, Appl. 22, but *Klein* is not so limited. *Klein* had several companion cases and the proviso was unconstitutional just the same. See, *e.g.*, *Armstrong* v. *United States*, 80 U.S. 154 (1871); *Pargoud* v. *United States*, 80 U.S. 156 (1871); *Backer* v. *United States*, 7 Ct. Cl. 551 (1871).

MVP's reliance on *McCardle* fares no better. The situations here and there are different in at least two important ways. First, unlike the broad class of habeas cases over which Congress stripped this Court's appellate jurisdiction in *McCardle*, Section 324(e)(1) strips jurisdiction over a discrete set of cases all involving the same private

party. This is constitutionally suspect on its face. See *Patchak*, 138 S. Ct. at 920 (Roberts, C.J., dissenting) (to pass Article III muster a law "must imply some measure of generality or preservation of an adjudicative role for the courts"); *United States* v. *Winstar Corp.*, 518 U.S. 839, 897 (1996) ("[G]enerality in the terms by which the use of power is authorized will tend to guard against its misuse to burden or benefit the few unjustifiably."). Second, the Court in *McCardle* stressed that habeas petitioners had alternative avenues of judicial review. 74 U.S. at 514. In contrast, Section 324(e)(1) leaves no other avenue for judicial review of the claims it terminates. Not even the D.C. Circuit could hear them. See § 324(e)(1) ("no court shall have jurisdiction").

* * *

The Fourth Circuit's interlocutory decision—that The Wilderness Society is likely to succeed in showing that Section 324 is unconstitutional—was correct according to this Court's precedents and should be upheld under any standard of review. Of course, an applicant for vacatur of a stay must overcome deference and demonstrate that the court of appeals was "demonstrably wrong" under "accepted standards." *Coleman*, 424 U.S. at 1304 (Rehnquist, J., in chambers). MVP cannot possibly make that heightened showing. "[T]he difficulty of a question is inversely proportional to the likelihood that a given answer will be clearly erroneous." *Planned Parenthood*, 571 U.S. at 1061 (Scalia, J., joined by Thomas, J., and Alito, J., concurring in denial of application to vacate stay). The splintered result in *Patchak* demonstrates that these questions are hard ones. That could end the Court's inquiry.

C. The Stay Was Comfortably Within the Fourth Circuit's Discretion.

The Fourth Circuit's decision to enter a stay focused on the Jefferson National Forest was comfortably within that court's discretion. MVP invites this Court to reweigh the equities de novo, but the court of appeals is entitled to deference. The Fourth Circuit had an ample record on which it could conclude that The Wilderness Society satisfied all four factors governing whether to issue a stay under *Nken* v. *Holder*, 556 U.S. 418, 426 (2009). At a bare minimum, the court of appeals was not demonstrably wrong even if MVP would have preferred a different outcome.

First, The Wilderness Society was and is likely to succeed on the merits. Section 324 does not terminate this case because the provision is unconstitutional. The Fourth Circuit received briefing on this question from the parties, members of Congress, and federal courts scholars, and it reached the correct result. The Wilderness Society went on to explain at length why the Forest Service violated its statutory and regulatory obligations, ECF No. 25-1 at 9–18, which MVP does not dispute here.

Second, The Wilderness Society demonstrated that the organization and its members would suffer irreparable harm from construction absent a stay. Detailed and specific declarations from members and staff of The Wilderness Society established the environmental damage that Pipeline construction would cause and the ways those impacts would irreparably harm their interests. ECF Nos. 25-17, 25-18, 25-19. This Court has recognized that environmental harm "by its nature . . . is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co.* v.

Vill. of Gambell, 480 U.S. 531, 545 (1987). The court of appeals was on solid ground here.

Third, The Wilderness Society demonstrated that a stay pending review would not substantially injure the other parties. The Forest Service and BLM are not injured, much less substantially injured, by a stay. BLM does not administer the Jefferson National Forest and a stay will not impact its operations. The Forest Service can continue to manage ordinary activities on the national forest apart from the Pipeline even under a stay, just as it has under the Commission order prohibiting construction on the national forest for the last five years. Meanwhile, any monetary harm to MVP does not tip the scale back in its direction. This Court has recognized that when irreparable environmental harm is likely, "the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco*, 480 U.S. at 545. The Fourth Circuit's own precedent supported the same conclusion. See *Sierra Club* v. *U.S. Army Corps of Eng'rs*, 981 F.3d 251, 264–65 (4th Cir. 2020) (irreparable environmental harm from pipeline construction outweighed over $140 million in claimed unrecoverable costs from stay pending review).

Finally, The Wilderness Society established that a stay would be in the public interest and the court of appeals appropriately reached the same conclusion. The Fourth Circuit has recognized that any public interest in gas projects does not trump compliance with applicable environmental laws. See *id.*; accord, *League of Women Voters of U.S.* v. *Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action."). Once the court of appeals

determined that The Wilderness Society was likely to succeed on the merits and that irreparable environmental damage would occur while the case was heard in the ordinary course, it was fitting for the court of appeals to conclude that a stay would be in the public interest.

Critically, the Fourth Circuit did not ignore the impact of Section 324(b)'s declaration that timely completion of the Pipeline is in the national interest. The court received briefing from The Wilderness Society and MVP on this question before entering the stay. ECF Nos. 25, 32, 35. The court of appeals was apprised that it "must consider the views of Congress when determining whether to grant equitable relief," but The Wilderness Society explained that "324(b) [did] not deprive the [Fourth Circuit] of its discretion to determine how a stay would affect the public interest." ECF No. 25-1 at 22 (citing *United States* v. *Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 496–97 (2001)). At most, Section 324(b) declares that timely completion of MVP "is *a* public interest"—not the only one. *Amoco*, 480 U.S. at 545–46. And in any event, the court of appeals had a factual record supporting the conclusion that a narrow stay affecting the Jefferson National Forest would not impair the goals Congress identified in Section 324(b) because the existing interstate natural gas pipeline network downstream of the Pipeline does not have enough capacity to accommodate the flow of additional gas from the Pipeline this winter. ECF No. 25-20.

Finally, the Fourth Circuit evidently rejected MVP's baseless charge that The Wilderness Society engaged in strategic delay. The Wilderness Society filed its

petitions for review just two weeks into a six-year limitations period, 28 U.S.C. § 2401(a), and sought interim relief only when it was clear that irreparable harm was truly imminent. MVP's various public statements about its route-wide construction timeline could not have alerted The Wilderness Society to the schedule for construction on the Jefferson National Forest specifically, which MVP has called "a small portion of the pipeline right-of-way." ECF No. 25-16 at 3. Nothing about The Wilderness Society's conduct was dilatory. The Fourth Circuit was well within its discretion to resolve this and every other equitable consideration the way it did. MVP has not met its heavy burden to show otherwise.

III. MVP FACES NO IRREPARABLE HARM FROM THE STAY AFFECTING THE JEFFERSON NATIONAL FOREST.

MVP cannot obtain vacatur without showing that it is irreparably harmed by the narrow stay affecting the Jefferson National Forest. See *Whalen* v. *Roe*, 423 U.S. 1313, 1317–18 (1975) (Marshall, J., in chambers) (conclusion that the "applicant would suffer no irreparable injury . . . necessarily decides the application and renders unnecessary consideration" of other factors). MVP has hardly argued this point, let alone carried its burden. The application could be denied on that ground alone.

MVP and its *amici* spend most of their time speculating about harms to the gas supply chain, individuals and businesses, and the national interest—in short, to anyone but MVP. See Appl. 24–27. But for the extraordinary remedy MVP seeks, this puts the cart before the horse. While "in a close case, it may be appropriate to 'balance the equities'" among the parties and the public interest, in applications for vacatur, that balancing occurs only after the applicant first demonstrates irreparable injury

to itself. *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); see also Stephen Shapiro et al., *Supreme Court Practice* 17-33 (11th ed. 2019) (collecting cases).

This is not a close case. MVP states that without vacatur, it will be "delayed in recouping its investment through revenues generated by operation of the Pipeline." Appl. 27. But revenue delayed is not revenue lost. See *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974) ("[T]emporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury."). Even the "possibility" of recovery "weighs heavily against a claim of irreparable harm." *Id*. Applicants must establish not merely that expenditures may be "difficult to recoup," but rather that "recoupment will be impossible" or "that the outlays at issue will place the plan itself in jeopardy." *Conkright* v. *Frommert*, 556 U.S. 1401, 1402–03 (2009) (Ginsburg, J., in chambers).

MVP has not made that showing. The Commission awarded MVP a fourteen percent return on equity, so recoupment is just a matter of time. See *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at ¶ 84 (Oct. 13, 2017). According to MVP, the company's recoupment of costs and the Pipeline's completion will simply be "delayed." Appl. 26–27. And any delay may be short-lived considering the speed with which the Fourth Circuit is proceeding. MVP leans on other equities to make up for its failure to show irreparable harm from the narrow stay below, but irreparable harm is a central part of MVP's burden and the company has not carried it.[6]

[6] In fact, MVP has not carried its burden even under a de novo standard because it does not address the substantial injury that would befall The Wilderness Society and its members from Pipeline construction across the national forest.

IV. MVP IS NOT ENTITLED TO A WRIT OF MANDAMUS OR CERTIORARI BEFORE JUDGMENT.

MVP makes a last-ditch plea for an extraordinary writ of mandamus compelling the Fourth Circuit to dismiss The Wilderness Society's petitions for review, or alternatively, a writ of certiorari before judgment and summary dismissal. MVP has not come close to satisfying the heavy burden necessary for such "drastic and extraordinary remedies." *Ex parte Fahey*, 332 U.S. 258, 259 (1947).

1. A writ of mandamus is an "extraordinary remed[y], . . . reserved for really extraordinary causes." *Id.* at 260. To be entitled to this exceptional remedy, MVP must show that (1) it has "no other adequate means to attain the relief"; (2) its "right to issuance of the writ is clear and indisputable"; and (3) "the writ is appropriate under the circumstances." *Cheney* v. *U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380–81 (2004) (cleaned up). MVP cannot satisfy any of these three requirements.

First, MVP has other adequate means to attain relief from the stay, most obviously by making its case to the Fourth Circuit at oral argument in two days. MVP could also seek relief under Fourth Circuit Local Rule 27(d)(1). For reasons of its own, MVP came directly to this Court's emergency docket instead. The requirement that a party seeking mandamus have no other means to attain relief is "designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380–81. That is what MVP is attempting. *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383 (1953) ("[W]hatever may be done without the writ may not be done with it.").

The gravamen of MVP's request for a writ of mandamus is that the ordinary appellate process would frustrate the purpose of Section 324. But MVP does not explain how the ongoing, expedited proceedings in the Fourth Circuit are necessarily incompatible with the timely completion of the Pipeline. MVP could convince the Fourth Circuit to dismiss this case and dissolve the stay as soon as Thursday, which would leave MVP plenty of time to complete construction before its self-imposed winter deadline. See Appl. 7 (MVP needs "approximately three months to complete the Pipeline before winter weather sets in" around November 1). MVP cannot use a writ of mandamus to bypass this potential avenue of relief.

Second, MVP's right to a writ of mandamus is not clear and indisputable. As The Wilderness Society has explained, the Fourth Circuit has jurisdiction to determine whether Section 324 is unconstitutional, and the statute violates Article III. On the merits, the narrow stay affecting the Jefferson National Forest was comfortably within the Fourth Circuit's discretion.

Third, MVP has not shown that mandamus would be appropriate under the circumstances. MVP argues that "mandamus is especially appropriate in order to preserve the proper constitutional role of the coordinate branches of government." Appl. 33.[7] But it is Section 324—not the Fourth Circuit's stay—that poses the true danger to the separation of powers. It would pervert the purpose of the writ if it were

[7] MVP also criticizes the conduct of parties that are not involved in Nos. 23-1592 and 23-1594 and have nothing to do with the narrow stay affecting the national forest.

used to abet Congress's arrogation of the judicial power. See *Cheney*, 542 U.S. at 390–91 (mandamus should not be used to "impair[]" the "separation of powers").

2. Certiorari before judgment and summary dismissal are equally extraordinary and equally inappropriate here for three reasons. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."). First, MVP has not bothered to articulate why this case satisfies the "imperative public importance" standard. Sup. Ct. R. 11. Even crediting Section 324(b), this case pales in comparison to the matters of "extraordinary national importance" that typify the cases this Court reviews before judgment. See Stephen Shapiro et al., *Supreme Court Practice* 4-60 (11th ed. 2019) (describing certiorari before judgment in cases involving the census, Iran hostage crisis, wartime court martial of enemy saboteurs, nationwide coal strike, and wartime seizure of steel mills). Second, the Fourth Circuit is "proceed[ing] expeditiously to decide this case." *United States* v. *Clinton*, 524 U.S. 912, 912 (1998) (denying certiorari before judgment). Third, summary dispositions are "usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). For the reasons shown above, those conditions are not met here.

CONCLUSION

The application to vacate the stay issued by the court of appeals in Nos. 23-1592 and 23-1594 should be denied. If the Court construes the application as a petition for writ of mandamus or certiorari before judgment and summary dismissal, the petition should be denied.

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Respectfully submitted,

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