No. 23A__

IN THE

Supreme Court of the United States

MOUNTAIN VALLEY PIPELINE, LLC,
Applicant,

v.

THE WILDERNESS SOCIETY, et al.,
Respondents.

MOUNTAIN VALLEY PIPELINE, LLC,
Applicant,

v.

APPALACHIAN VOICES, et al.,
Respondents.

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

EMERGENCY APPLICATION TO CHIEF JUSTICE JOHN G. ROBERTS, JR. TO VACATE THE STAYS OF AGENCY AUTHORIZATIONS PENDING ADJUDICATION OF THE PETITIONS FOR REVIEW

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PARTIES TO THE PROCEEDINGS

The parties to the Fourth Circuit case No. 23-1592 are:

Applicant Mountain Valley Pipeline, LLC was Intervenor-Respondent below.

Respondent The Wilderness Society was Petitioner below.

Respondents United States Forest Service; Homer L. Wilkes, in his official capacity as Under Secretary for Natural Resources and Environment, U.S. Department of Agriculture; and Kenderick Arney, in his official capacity as Regional Forester of the Southern Region were Respondents below.

The parties to the Fourth Circuit case No. 23-1594 are:

Applicant Mountain Valley Pipeline, LLC was Intervenor-Respondent below.

Respondent The Wilderness Society was Petitioner below.

Respondents United States Bureau of Land Management; Deb Haaland, in her official capacity as Secretary of the Interior; and Mitchell Leverette, in his official capacity as State Director, Bureau of Land Management, Eastern States were Respondents below.

The parties to the Fourth Circuit case No. 23-1384 are:

Applicant Mountain Valley Pipeline, LLC was Intervenor-Respondent below.

Respondents Appalachian Voices; Wild Virginia; West Virginia Rivers Coalition; Preserve Giles County; Preserve Bent Mountain, a chapter of Blue Ridge Environmental Defense League; West Virginia Highlands Conservancy; Indian Creek Watershed Association; Sierra Club; Chesapeake Climate Action Network; and Center for Biological Diversity were Petitioners below.

Respondents United States Department of the Interior, Deb Haaland, in her official capacity as Secretary of the U.S. Department of the Interior; United States Fish and Wildlife

Service, an agency of the U.S. Department of Interior; Cindy Schulz, in her official capacity as Field Supervisor, Virginia Ecological Services, Responsible Official; and Martha Williams, in her official capacity as Director of the U.S. Fish and Wildlife Service were Respondents below

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Applicant Mountain Valley Pipeline, LLC (MVP) states that MVP is organized as a series limited liability company and has members. MVP's members that hold interests in the Mountain Valley Pipeline project are: MVP Holdco, LLC (MVP Holdco); US Marcellus Gas Infrastructure, LLC (USG); WGL Sustainable Energy LLC (formerly WGL Midstream, Inc.) (WGL); RGC Midstream, LLC; and Con Edison Gas Pipeline and Storage, LLC (ConEd).

Publicly held entities hold, indirectly through members of MVP, at least 10% of the interests in the Mountain Valley Pipeline project. Equitrans Midstream Corporation (NYSE: ETRN), the parent company of MVP Holdco, indirectly owns a 47.205% interest; NextEra Energy, Inc. (NYSE: NEE), the parent company of USG, indirectly owns a 32.164% interest; and AltaGas Ltd. (TSX: ALA), the parent company of WGL, indirectly owns a 10.0% interest.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

- *Appalachian Voices, et al.* v. *United States Department of the Interior, et al.*, No. 23-1384 (4th Cir. April 10, 2023)

- *The Wilderness Society* v. *United States Forest Service, et al.*, No. 23-1592 (4th Cir. June 2, 2023)

- *The Wilderness Society* v. *Bureau of Land Management, et al.*, No. 23-1594 (4th Cir. June 2, 2023)

- *In re Mountain Valley Pipeline and Equitrans Expansion Project*, R8-MB 168 (Department of Agriculture, Forest Service)

- *In re Mountain Valley Pipeline and Equitrans Expansion Project*, VAES-058143-04 (Department of the Interior, Bureau of Land Management)

- *In re Mountain Valley Pipeline and Equitrans Expansion Project*, VAES-058143-05 (Department of the Interior, Bureau of Land Management)

- *In re Mountain Valley Pipeline, LLC*, No. CP16-10-000, Project Nos. 05E2VA00-2016-F-0880 and #05E2WV00-2015-F-0046 (Department of the Interior, Fish & Wildlife Service)

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INTRODUCTION

Mountain Valley Pipeline LLC (MVP) seeks vacatur of two extraordinary stay orders issued by the United States Court of Appeals for the Fourth Circuit that are presently blocking completion of the Mountain Valley Pipeline project. MVP also seeks a mandamus order (or a summary ruling on certiorari) holding that the Fourth Circuit lacked jurisdiction to issue the challenged orders. In both of those stay orders, the court of appeals, without a word of explanation, defied Congress's clear commands in Section 324 of the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324, 137 Stat. 10, 47-48 (2023) (the "Act"), that (i) all federal-law agency authorizations necessary for completion of the Pipeline are lawful notwithstanding any other provision of law; (ii) no court has jurisdiction to adjudicate challenges to the lawfulness of those authorizations, again notwithstanding any other provision of law; and (iii) the United States Court of Appeals for the D.C. Circuit has exclusive jurisdiction to adjudicate all claims challenging the constitutionality of Section 324 or alleging that challenged agency actions are not within the scope of authorizations covered by the Act.

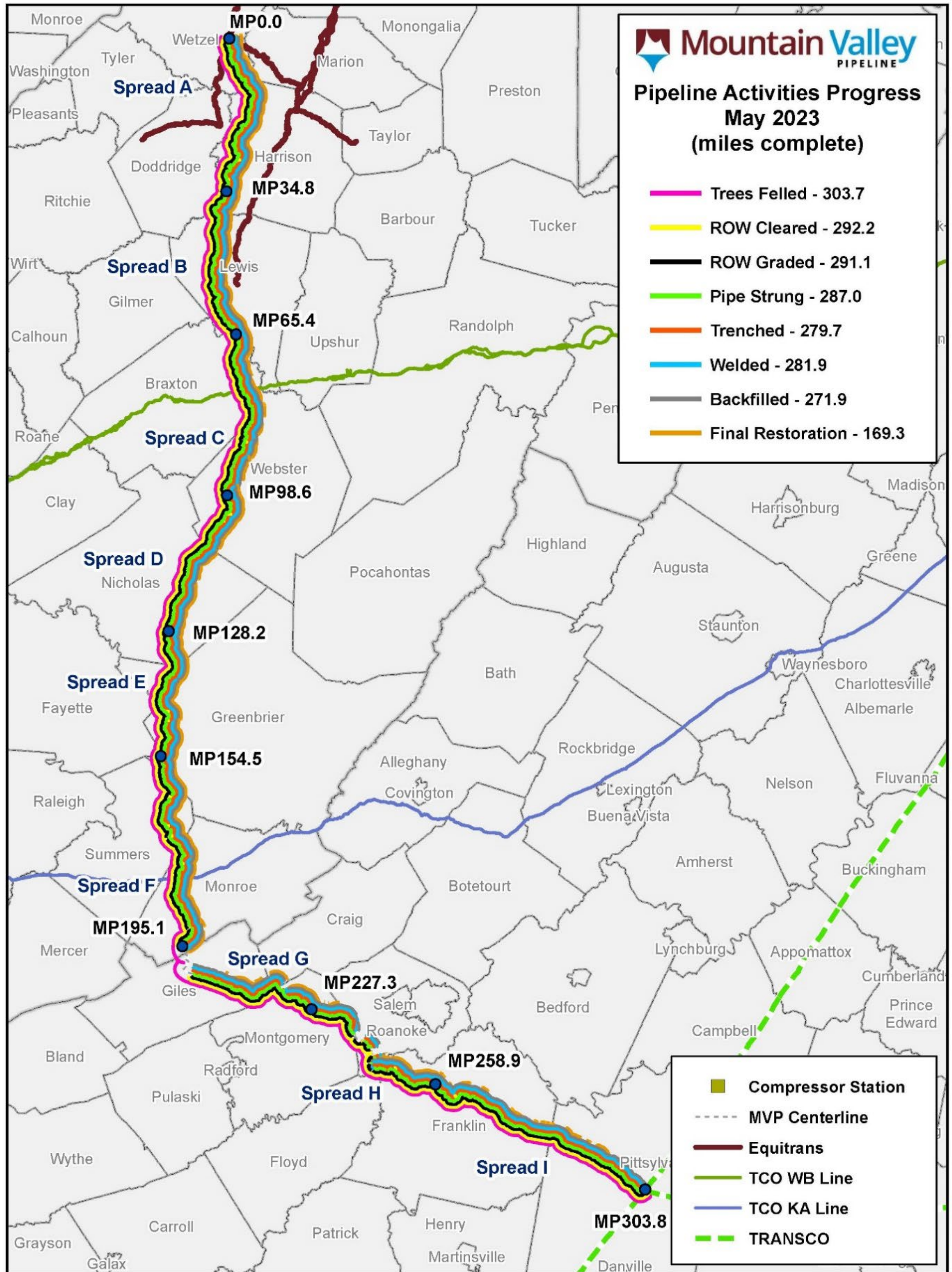
The Mountain Valley Pipeline project (the "Project") is a 303-mile natural gas pipeline that will deliver gas to existing pipelines and other customers along the Pipeline's route in the Southeast and Mid-Atlantic regions. The Project has been embroiled in litigation over the past six years. Various groups, including the petitioners at whose behest the Fourth Circuit issued the stays here, have filed dozens of lawsuits in the Fourth Circuit and elsewhere, challenging virtually every federal authorization issued for the project.[1] Those suits have presented arguments under a range

[1] See, *e.g.*, *Sierra Club* v. *FERC*, 68 F.4th 630, 636 (D.C. Cir. 2023); *Sierra Club* v. *W. Virginia Dep't of Env't Prot.*, 64 F.4th 487, 496 (4th Cir. 2023); *Sierra Club* v. *State Water Control Bd.*, 64 F.4th 187, 191 (4th Cir. 2023); *Sierra Club* v. *FERC*, 38 F.4th 220, 226 (D.C. Cir. 2022); *Appalachian Voices* v. *United States Dep't of Interior*, 25 F.4th 259, 265 (4th Cir. 2022); *Wild Virginia* v. *United States Forest Serv.*, 24 F.4th 915, 920 (4th Cir. 2022); *Mountain Valley*

of laws, from the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA) to various substantive statutes, as well as agency rules, regulations, and guidance. Project opponents sought stays to interrupt and delay construction. The same three-judge panel of the Fourth Circuit has routinely granted those requests.

Despite the years of delay occasioned by this litigation, the Pipeline is "already mostly finished." *Appalachian Voices* v. *U.S. Dep't of the Interior*, 25 F.4th 259, 282 (4th Cir. 2022). All that remains is construction of a 3.5-mile stretch of the Pipeline that would traverse the federally-owned Jefferson National Forest, as well as completion of stream crossings outside the Forest and final restoration of the construction environment. App'x 57. At this point, over-4,400 acres of trees have already been cleared and only 3.39 acres of tree clearing remain, including all trees in the Jefferson National Forest. And major earth-disturbing activities necessary for building the Pipeline—clearing, grading, and trenching—are substantially complete outside the Jefferson National Forest. App'x 9-11. As the map below shows, other than final restoration work, the Pipeline is substantially complete except for a short stretch in Monroe and Giles Counties, Virginia that traverses Jefferson National Forest and several small sections further east where pipe must be strung and welded.

Pipeline, LLC v. *N.C. Dep't of Env't Quality*, 990 F.3d 818, 823 (4th Cir. 2021); *Sierra Club* v. *United States Army Corps of Eng'rs*, 981 F.3d 251, 260 (4th Cir. 2020); *Appalachian Voices* v. *FERC*, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019); *Sierra Club* v. *United States Army Corps of Eng'rs*, 909 F.3d 635, 639-643 (4th Cir. 2018); *Sierra Club, Inc.* v. *U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018).



App'x 10-11.

In recent months, MVP received the necessary authorizations from the United States Forest Service (Forest Service) and the Bureau of Land Management (BLM) authorizing construction in the Jefferson National Forest, as well as a Biological Opinion and Incidental Take Statement from the Fish and Wildlife Service concluding that the construction and operation of the Pipeline would not jeopardize any species of wildlife federally listed for protection under the Endangered Species Act. Petition for Review Ex. A, *The Wilderness Society* v. *U.S. Forest Service*, No. 23-1592 (4th Cir. June 1, 2023) (Forest Service Record of Decision); Petition for Review Ex. A, *The Wilderness Society* v. *Bureau of Land Mgmt.*, No. 23-1594 (4th Cir. June 1, 2023) (BLM Record of Decision); Joint Petition for Review Ex. A, *Appalachian Voices* v. *U.S. Dep't of the Interior*, No. 23-1384 (4th Cir. Apr. 10, 2023) (Biological Opinion and Incidental Take Statement). This is the third iteration of these authorizations—the Fourth Circuit vacated or stayed the two previous versions, requiring years of agency re-work. See *Appalachian Voices*, 25 F.4th at 265 (concerning Biological Opinion and Incidental Take Statement); Order, *Wild Virginia* v. *United States Dep't of Interior*, No. 19-1866 (4th Cir. Oct. 11, 2019) (staying Biological Opinion and Incidental Take Statement pending appeal and holding appeal in abeyance); *Wild Virginia* v. *United States Forest Serv.*, 24 F.4th 915, 920 (4th Cir. 2022) (vacating Forest Service authorization); *Sierra Club, Inc.* v. *United States Forest Service*, 897 F.3d 582 (4th Cir. 2018) (same).

And on June 28, 2023, the Federal Energy Regulatory Commission (FERC) authorized MVP to resume construction generally. App'x 55. With the necessary authorizations in hand, MVP promptly deployed workers and equipment to the field to do the work needed to complete the Pipeline by the end of this year. That work was, however, brought to a halt by the stay orders that are the subject of this application. As it had repeatedly done before, the Fourth Circuit issued orders blocking construction while it adjudicated petitions for review of the orders of the Forest

Service and BLM authorizing construction in the Jefferson National Forest (Nos. 23-1592 and 23-1594) and the Biological Opinion and Incidental Take Statement issued by the Fish and Wildlife Service (No. 23-1384).

The most recent stay orders are, however, critically different from all the rulings that preceded them. Last month, overwhelming bipartisan majorities in both Houses of Congress enacted, and President Biden signed into law, legislation to "[e]xpedit[e] [c]ompletion of the Mountain Valley Pipeline." Act § 324. In that legislation, Congress expressly "ratifie[d] and approve[d]" all federal authorizations for the Project, including the specific agency actions that the Fourth Circuit stayed in the orders at issue here—and Congress did so "[n]otwithstanding any other provision of law." *Id.* § 324(c)(1). The Act directed all agencies to "continue to maintain" those permits, *id.* § 324(c)(2), and compelled the U.S. Army Corps of Engineers (the "Corps") to issue the one then-remaining federal authorization needed for completion of the Pipeline within 21 days, *id.* § 324(d) (directing "EXPEDITED APPROVAL"), which the Corps has done. And Congress expressly stripped all courts—including the Fourth Circuit—of "jurisdiction to review any action" by a federal agency granting an authorization necessary "for the construction and initial operation at full capacity of the Mountain Valley Pipeline"—again, a category that unambiguously includes the actions that are the subject of this application. *Id.* § 324(e)(1). In case its intent to facilitate prompt completion of this Project were not clear enough, the statute expressly "supersedes any other provision of law (including * * * any * * * other statute, any regulation, any judicial decision, or any agency guidance) that is inconsistent with the issuance of any authorization * * * or other approval for the Mountain Valley Pipeline." *Id.* § 324(f).

Congress was equally emphatic about why it was taking these steps. In the legislation itself, Congress "f[ound] and declare[d] that the timely completion of construction and operation

of the Mountain Valley Pipeline is required in the national interest." *Id.* § 324(b). And Congress identified the specific benefits undergirding its conclusion that the national interest required prompt completion of the Pipeline. The Pipeline:

> [1] will serve demonstrated natural gas demand in the Northeast, Mid-Atlantic, and Southeast regions,
>
> [2] will increase the reliability of natural gas supplies and the availability of natural gas at reasonable prices,
>
> [3] will allow natural gas producers to access additional markets for their product, and
>
> [4] will reduce carbon emissions and facilitate the energy transition.

Ibid.

The court of appeals thus had no authority to issue the stay orders that MVP challenges in this application. Section 324 unambiguously removes jurisdiction from all courts, including the Fourth Circuit, to determine whether the Forest Service and BLM authorizations for work in the Jefferson National Forest, and the Biological Opinion and Incidental Take Statement of the Fish and Wildlife Service, are lawful. Section 324 also amends and supersedes all other provisions of law that might have provided a basis for challenging the permits, and substantively ratifies and approves the underlying authorizations, thereby depriving the court of appeals of any ability to grant petitioners relief and rendering moot their petitions for review. And Section 324 also provides that only the D.C. Circuit shall have jurisdiction to adjudicate claims that Section 324 is unconstitutional or that a challenged authorization is "beyond the scope of authority conferred by th[e] section." Act § 324(e)(2). Thus the Fourth Circuit could not lawfully have predicated its stay orders on the (unstated) conclusion that Section 324 was unconstitutional and therefore of no effect.

It is critical that the stay orders be vacated, and the underlying petitions for review be dismissed, as soon as possible, and in any event no later than July 26, 2023. MVP has only approximately three months to complete the Pipeline before winter weather sets in and precludes significant construction tasks until the spring of 2024. See App'x 58. Congress could not have been clearer that the national interest requires that the Pipeline be completed "expediti[ously]." Act § 324. And the failure to complete the Pipeline this year will deprive its shippers—including natural gas and electric utilities, gas producers, and others—of critical additional gas transportation capacity for the upcoming winter peak demand season, contributing to natural gas shortages and price spikes, harming the general public and businesses alike.

The court of appeals lacked jurisdiction to grant the relief it ordered (or any other). Even assuming that court had jurisdiction, Congress has ratified the underlying agency actions and superseded any provision of law that could have conceivably served as a basis for relief. The court of appeals' stay orders flew in the face of this recent, on-point, and emphatic congressional command that the remaining construction of the Mountain Valley Pipeline must proceed without further delay because "construction and operation of the [Project] is required in the national interest." Act § 324(b). This Court's intervention is needed.

STATEMENT

A. Statutory Background

On June 3, 2023, the President signed into law the Fiscal Responsibility Act. Section 324 of the Act "finds and declares that the timely completion of construction and operation of the Mountain Valley Pipeline is required in the national interest." Act § 324(b). The Pipeline, Congress found, "will serve demonstrated natural gas demand * * * , will increase the reliability of natural gas supplies and the availability of natural gas at reasonable prices, will allow natural gas producers to access additional markets for their product, and will reduce carbon emissions and

facilitate the energy transition." *Ibid.* The Act then "ratifies and approves," "notwithstanding any other provision of law," all administrative actions "necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline." *Id.* § 324(c)(1). The Act similarly directs that any further required authorizations be issued by the relevant federal agencies within 21 days. *Id.* § 324(d).

The Act also provides that "no court shall have jurisdiction to review any action taken by" an administrative agency "necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline * * * whether issued prior to, on, or subsequent to the date of enactment of this section, and including any lawsuit pending in a court as of the date of enactment of this section." *Id.* § 324(e)(1). The Act confers "original and exclusive jurisdiction" on the D.C. Circuit to hear "any claim alleging the invalidity of [Section 324] or that an action is beyond the scope of the authority conferred by this section." *Id.* § 324(e)(2).

B. Procedural History

This application concerns two pending Fourth Circuit proceedings involving petitions to review agency authorizations of the Project. One proceeding challenges the May 15 and 17, 2023 authorizations to complete work in the Jefferson National Forest, and the other challenges the Biological Opinion and Incidental Take Statement issued by the Fish and Wildlife Service on February 28, 2023.

1. *Case Nos. 23-1592 and 23-1594*

In *Wild Virginia* v. *United States Forest Service*, 24 F.4th 915 (4th Cir. 2022), the Fourth Circuit vacated 2021 actions of the Forest Service and BLM authorizing construction of the Pipeline in the Jefferson National Forest. While the Fourth Circuit rejected most of the arguments leveled against those authorizations, it found fault with certain aspects of the Forest Service's analysis and remanded to the agencies for further consideration. On remand, the agencies

comprehensively addressed each deficiency identified by the court of appeals. The Forest Service issued a new Record of Decision on May 15, 2023. BLM issued its Record of Decision on May 17, 2023.

The Wilderness Society filed petitions for review in the Fourth Circuit on June 1, 2023, just days before Section 324 went into effect. On June 5, 2023, Mountain Valley Pipeline moved to dismiss the pending petitions for review, or in the alternative, for summary denial in light of the Act. MVP contended that the Act had stripped the Fourth Circuit of jurisdiction to hear the petitions for review and that, alternatively, the Fourth Circuit lacked jurisdiction for the additional reason that the Act's ratification of previously approved permits rendered the case moot. On June 14, 2023, the United States moved to dismiss the petitions for review. Like MVP, it argued that the Act deprived the Fourth Circuit of jurisdiction and had mooted the case. In opposing the motions to dismiss, the Wilderness Society contended that Section 324 was unconstitutional and that Section 324(e)(2) did not deprive the Fourth Circuit of jurisdiction to adjudicate the Act's constitutionality. In reply, both MVP and the government pointed out that the Act confers on the D.C. Circuit exclusive jurisdiction to resolve all challenges to the constitutionality of the law and that the Fourth Circuit therefore lacked jurisdiction to consider the Wilderness Society's arguments that the Act unconstitutionally eliminated that court's authority to consider the petitions for review.

On July 3, 2023, the Wilderness Society moved to stay the Forest Service's authorization pending resolution of the petitions for review. The Wilderness Society argued that it was likely to succeed on the merits of its challenge to the Forest Service's authorization, and also that Section 324 did not deprive the Fourth Circuit of jurisdiction to adjudicate the legality of the Forest Service's action because that provision was unconstitutional. The Fourth Circuit ordered MVP and the United States to respond by July 10, 2023. Three days later, the Wilderness Society moved

for a temporary administrative stay in order to prevent MVP—which then possessed all of the necessary authorizations to restart construction—from beginning planned earth-moving work on July 12, 2023 while the stay motions were under consideration.

On July 10, 2023—*before the deadline the Court itself had set for MVP and the United States to file their oppositions* and before the United States had filed its brief defending the constitutionality of the Act—the Fourth Circuit entered a one-sentence order "stay[ing] construction [of the Pipeline] during the pendency of this petition for review." The court offered no explanation for its decision. But given that the court stayed the Forest Service's authorization pending adjudication of the petition for review—rather than merely entering an administrative stay—the court must have concluded, albeit implicitly, that the Wilderness Society was likely to succeed in establishing that Section 324 is unconstitutional and therefore does not deprive the Fourth Circuit of jurisdiction to consider the petition for review, and that Wilderness Society was likely to succeed in its challenge to the Forest Service's action.

2. *Case No. 23-1384*

In *Appalachian Voices* v. *U.S. Department of the Interior*, 25 F.4th 259 (4th Cir. 2022), the Fourth Circuit vacated the Fish and Wildlife Service's September 4, 2020 Biological Opinion and Incidental Take Statement and remanded to the agency for further consideration. On remand, the agency considered the new data that the Fourth Circuit held it had failed to consider. On February 28, 2023, the Fish and Wildlife Service issued its new Biological Opinion and Incidental Take Statement for the project.

On April 10, 2023, Appalachian Voices, joined by other organizations, filed a petition for review of the Biological Opinion and Incidental Take Statement in the Fourth Circuit. On April 27, 2023, those petitioners filed a motion for a stay pending adjudication of their petition for review. That motion was fully briefed but not decided before President Biden signed the Act into

law. On June 5, 2023, MVP moved to dismiss the petition for review or, alternatively, for summary disposition, in light of the newly enacted Section 324, raising the same arguments as it raised in its motion to dismiss case Nos. 23-1592 and 23-1594. On June 14, 2023, the United States followed suit, filing its own motion to dismiss. On June 26, 2023, the organizations that had petitioned for review filed their opposition to the motions to dismiss, raising the same constitutional arguments as were raised by Wilderness Society in case Nos. 23-1592 and 23-1594.

On July 11, 2023, in a one-sentence order, the Fourth Circuit granted the motion and stayed the effectiveness of the Biological Opinion and Incidental Take Statement pending adjudication of the petition for review. The Fourth Circuit did not request any supplemental briefing concerning the motion to stay in light of Section 324 before issuing its order. As in case Nos. 23-1592 and 23-1594, the court offered no explanation or basis for its exercise of jurisdiction in issuing the stay, although its entry of a stay pending adjudication of the petition for review indicates that the court concluded that Appalachian Voices was likely to succeed in establishing that Section 324 is unconstitutional and that the Biological Opinion and Incidental Take Statement are invalid.

On July 12, 2023, the Fourth Circuit consolidated Case Nos. 23-1592 and 23-1594 with Case No. 23-1384 and scheduled oral argument on the pending motions to dismiss for lack of jurisdiction. The Court gave no indication of when it might rule on those motions.

REASONS FOR GRANTING THE APPLICATION

"[W]hen considering an application to vacate a stay," this Court applies the same "well-established principles" that guide the determination whether to "stay a judgment entered below." *Certain Named & Unnamed Non-Citizen Children & Their Parents* v. *Texas*, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers); see *Coleman* v. *Paccar Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). The Court thus applies the "governing four-factor test." *Alabama Ass'n of Realtors* v. *Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2488 (2021) (per curiam).

Under that test, 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 [stay] 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* v. *Holder*, 556 U.S. 418, 426 (2009) (citation omitted). All four factors strongly support vacating the stay orders entered in this case.

I. MOUNTAIN VALLEY PIPELINE IS LIKELY TO PREVAIL ON THE MERITS

Section 324 unambiguously deprives the Fourth Circuit of jurisdiction over the petitions for review by withdrawing statutory jurisdiction to review challenges to the agency actions at issue in these cases. Section 324 also unambiguously moots the petitions for review by amending all other relevant provisions of law and ratifying and directing maintenance of the agency orders that the petitioners challenge as inconsistent with several federal statutes, thereby depriving the Fourth Circuit of the ability to grant any effective relief. Those provisions could not be more clear, and no party disputes that, if the statute is applied by its terms, these petitions for review must be dismissed. Petitioners' only response is to argue that Section 324 is unconstitutional. The Fourth Circuit's entry of orders staying the challenged agency actions and construction of the Pipeline pending resolution of the petitions for review in their entirety must therefore reflect that court's unstated conclusion that Section 324 is likely unconstitutional. But the court unquestionably lacked jurisdiction to adjudicate that question, as Congress channeled jurisdiction over constitutional challenges to Section 324 to the D.C. Circuit.

In all events, Section 324 is a valid exercise of Congress's Article I powers to establish standards for environmental permitting and to prescribe the jurisdiction of the lower courts. In exercising those authorities, Congress did not impinge on the Article III judicial power. This Court has repeatedly upheld legislation that, like the Act, establishes new legal standards that "apply

retroactively to pending lawsuits, even when it effectively ensures that one side wins." *Patchak* v. *Zinke*, 138 S. Ct. 897, 905 (2018) (plurality op.); *Bank Markazi* v. *Peterson*, 578 U.S. 212, 215-216 (2016).

A. The Fourth Circuit Lacked Jurisdiction to Consider the Petition for Review and Therefore Acted *Ultra Vires* When It Entered the Stays.

1. Section 324(e)(1) stripped the Fourth Circuit of jurisdiction to hear this case. That provision states that "[n]otwithstanding any other provision of law," "no court shall have jurisdiction to review any action taken by" an agency that is "necessary" for "construction or initial operation at full capacity of the Mountain Valley Pipeline." Act § 324(e)(1). Section 324(e)(1) explicitly applies to such agency action "whether issued prior to, on, or subsequent to the date of enactment" of the legislation, and includes in its sweep "any lawsuit pending in a court as of the date of enactment of this section." *Ibid.* The parties do not dispute that the Forest Service, BLM, and Fish and Wildlife Service authorizations that the petitioners challenge are "necessary for the construction" of the "Mountain Valley Pipeline" and therefore fall within the scope of Section 324(e)'s withdrawal of jurisdiction. *Ibid.*

Because Section 324(e)(1) "makes clear that it is retroactive" to pending cases, the Fourth Circuit was required to "apply that law" and to "alter the outcome accordingly." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995). The Fourth Circuit therefore should have concluded that it lacked jurisdiction over these cases and dismissed them without proceeding further. "'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). Instead of heeding Congress's unambiguous command, the Fourth Circuit exceeded the scope of its jurisdiction by

entering stays of the very agency orders that Congress deprived the Fourth Circuit of jurisdiction to review.

2. The Fourth Circuit lacked jurisdiction to enter the stays for a second, independent reason: Section 324(c) renders the case moot. Congress explicitly "ratifie[d] and approve[d]" all federal authorizations, permits, and other actions necessary for the construction and operation of the Pipeline, and expressly directed (in mandatory terms) each agency official "to continue to maintain" such authorizations. Act § 324(c). That provision clearly and unambiguously applies to the authorizations that petitioners challenged in these actions; there is no dispute on that point. And Congress made clear that its ratification and direction to maintain the agency authorizations applies "[n]otwithstanding any other provision of law," and that Section 324 "supersedes any other provision of law * * * that is inconsistent with the issuance of any [such] authorization." *Id.* § 324(c), (f). Thus, even if the Fourth Circuit agreed with petitioners that the agencies' approvals violated the federal laws that applied before the enactment of the Act (*e.g.*, the APA or NEPA), the court could not grant petitioners any effective relief because under the current applicable law the permits have been ratified and must be maintained. See *Church of Scientology of Cal.* v. *United States*, 506 U.S. 9, 12 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895))).

3. In an effort to avoid the conclusion that Section 324 deprived the Fourth Circuit of jurisdiction over this case, petitioners contended below that Section 324 is unconstitutional. But Section 324(e)(2) channels "original and *exclusive* jurisdiction over any claim alleging the invalidity of this section" to the D.C. Circuit, Act § 324(e)(2) (emphasis added), thereby unambiguously stripping the Fourth Circuit (and all other courts other than the D.C. Circuit) of

jurisdiction to consider the Act's constitutionality. Congress routinely channels jurisdiction over particular categories of cases to particular courts—the Federal Circuit has exclusive jurisdiction over patent appeals, 28 U.S.C. § 1295, the Court of Federal Claims has exclusive jurisdiction over monetary claims against the government, 28 U.S.C. § 1491, and the D.C. Circuit has exclusive jurisdiction over appeals of certain Federal Communications Commission orders, 47 U.S.C. § 402(b)—and it unquestionably has the constitutional authority to do so. Petitioners do not contend otherwise. The combined effect of Sections 324(e)(1) and 324(e)(2) thus required the Fourth Circuit to dismiss these actions (leaving petitioners free to raise their constitutional arguments in the D.C. Circuit).

Yet the Fourth Circuit did not do so, instead entering orders staying the agencies' actions and staying construction of the Pipeline. The court thus evidently accepted the argument of the petitioners below that Section 324(e)(2)'s jurisdiction-channeling provision "does not apply to this case." Petitioner's Opposition to Federal Respondents' Motion to Dismiss and Intervenor's Motions to Dismiss or, in the Alternative, for Summary Denial 5, *The Wilderness Society* v. *U.S. Forest Service*, No. 23-1592 (4th Cir. June 26, 2023) (Opposition to Motion to Dismiss). In petitioners' view, Section 324(e)(2)'s channeling of jurisdiction over any "claim" challenging Section 324's constitutionality applies only to "cause[s] of action" asserted in "new cases"— and therefore Section 324(e)(2) purportedly does not encompass constitutional challenges raised, as here, in an opposition to a motion to dismiss. *Id.* at 6-7.

That argument cannot be reconciled with the plain text and obvious congressional purpose of Section 324. As an initial matter, Section 324(e)(2) works in conjunction with, and must be construed together with, Section 324(e)(1). The latter provision deprives *all* courts of the ability to "review any action taken" by a federal agency to approve construction of the Pipeline, including

in "any lawsuit pending in a court." Act § 324(e)(1). Section 324(e)(2) then provides an "exclusive" outlet for challenges to the legislation itself in a single court. Congress therefore clearly foresaw that parties involved in pending lawsuits concerning the Pipeline would seek to challenge Section 324's constitutionality. Those challenges by definition would (absent Section 324) be raised in the context of procedural motions in pending lawsuits. Section 324(e)(2) therefore reflects Congress's intent that the exclusive forum for all such challenges would be the D.C. Circuit.

Petitioners' equation of "claim" with "cause of action" in "new cases" also violates the principle that courts should "normally seek[] to afford the law's terms their ordinary meaning." *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1480 (2021). Congress nowhere signaled an intent to restrict the word "claim" in Section 324(e)(2) to a "legal term of art" meaning a "cause of action," as petitioners contended below. Opposition to Motion to Dismiss 6. Tellingly, petitioners' construction is *the fourth listed definition* for "claim" in Black's Law Dictionary for the proposition that it must mean "cause of action." CLAIM, Black's Law Dictionary (11th ed. 2019); Opposition to Motion to Dismiss 6 (quoting Black's Law Dictionary). But the *first* definition—"[a] statement that something yet to be proved is true"—hews much closer to the ordinary and common meaning of "claim." *Id.* This more common definition easily encompasses petitioners' constitutional challenges.

Petitioners' narrow reading of the word "claim" is also at odds with the "overall statutory scheme" of "[e]xpediting" and ensuring the "timely completion of construction and operation of the Mountain Valley Pipeline," by consolidating and simplifying review of the legislation in a single forum. Act §§ 324, 324(b); see *W. Virginia* v. *Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022) ("It is a fundamental canon of statutory construction that the words of a statute must be

read in their context and with a view to their place in the overall statutory scheme." (citation omitted)). Under petitioners' reading, these constitutional issues would need to be litigated in parallel in every forum in which an agency action is challenged because each court in which a petition for review was filed would need to consider its own subject-matter jurisdiction. Congress surely did not intend to invite (or even require) parallel adjudication of threshold jurisdictional issues via a statute whose express purpose was to expedite the completion of the Pipeline.

Sections 324(e)(1) and 324(e)(2) therefore establish that only the D.C. Circuit—not the Fourth Circuit—has jurisdiction to consider Section 324's constitutionality. The Fourth Circuit's orders staying the agency actions and construction pending resolution of the petitions for review —notwithstanding Section 324(e)(1)'s unambiguous withdrawal of jurisdiction over petitioners' challenges to those actions—must reflect the court's implicit conclusion that petitioners are likely to succeed on their argument in that court that Section 324 is unconstitutional. See *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 317 (1985). In staying the agency authorizations based on its conclusion that Section 324 is likely unconstitutional, the Fourth Circuit exceeded its authority.[2]

B. The Act Is Constitutional.

Petitioners contended below—and the Fourth Circuit evidently agreed—that the Act invades the judicial power by purporting to dictate the outcome of this case. But an unbroken line of Supreme Court decisions "make[s] clear" that Congress "may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative." *Bank Markazi*, 578 U.S. at 215; see also *Plaut*, 514 U.S. at 218; *Robertson* v. *Seattle Audubon Soc.*, 503

[2] Even if Section 324(e)(2) did not deprive the Fourth Circuit of jurisdiction to Section 324's constitutionality, the stay orders must be vacated. Petitioners did not demonstrate that they were likely to succeed in establishing that Section 324 is unconstitutional for the reasons stated below.

U.S. 429, 441 (1992). Congress violates Article III only when it purports to direct the Judiciary to reach a particular result in a pending case under "*pre-existing*" law. *Bank Markazi*, 578 U.S. at 226 n.17 (emphasis added); see *Robertson*, 503 U.S. at 439 (statutes cannot "direc[t] results under old law"). Rather than directing a result under old law, Section 324 alters the law governing all cases pertaining to the Pipeline by replacing the preexisting legal standards set forth in various federal environmental laws with the standards contained in Section 324, and by channeling adjudication of disputes concerning those standards and Section 324's constitutionality to the D.C. Circuit. Section 324 therefore falls well on the constitutional side of the line.

1. Section 324 first amends existing law by "ratif[ying] and approv[ing]" all authorizations for the Pipeline, and by directing the relevant agencies to "continue to maintain" those authorizations. Act § 324(c)(1). That amendment expressly applies "[n]otwithstanding any other provisions of law," *id.* §324(c), (e)(1), and "supersedes any other provision of law," *id.* §324(f). Because these provisions unambiguously "change[] the law," rather than "compel[ling] * * * findings or results under old law," they do not infringe on the judicial power. *Patchak*, 138 S. Ct. at 905 (plurality op.) (quoting *Plaut*, 514 U.S. at 218 and *Robertson*, 503 U.S. at 438).

As an initial matter, Congress unquestionably has constitutional authority under Article I to ratify Executive Branch action, even retroactively, and even if the action was unauthorized when taken. See *United States* v. *Heinszen*, 206 U.S. 370, 382-383 (1907); *Patchak*, 138 S. Ct. at 911 (Breyer, J., concurring); see also *Fund for Animals, Inc.* v. *U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19 & n.7 (D.C. Cir. 2006). Congress enacts statutes that the Executive Branch must "faithfully execute[]." U.S. Const., art. II, § 3. Thus, petitioners' challenges that the Executive Branch exceeded or violated some statutory command are, at their core, claims that Congress has not authorized the Executive Branch to take the challenged action. But such a challenge—even if

meritorious when filed—cannot deprive Congress of its power to pass a separate statutory provision authorizing the same agency action. Otherwise, individual litigants could, through the mere filing of a petition for review, prevent Congress from exercising its constitutionally assigned powers.

Nor does the specific ratification at issue in this case—Congress's ratification of the Forest Service, BLM and Fish and Wildlife Service authorizations concerning the Pipeline—violate Article III. Instead of impermissibly directing courts to affirm those authorizations under old law, the Act supplies new substantive law for courts to apply by altering the underlying environmental law standards governing the Pipeline. Indeed, Congress clarified that the provision "supersedes any other provision of law," Act § 324(f), and applies "[n]otwithstanding any other provision of law," *id.* § 324(c). In other words, Section 324 sets forth a new standard for the reviewing court to apply: instead of evaluating whether the challenged actions comply with, for example, NEPA, the National Forest Management Act (NFMA), the Mineral Leasing Act (MLA), or the Endangered Species Act, the court determines whether the action falls within the scope of the congressional ratification—that is, is the action "necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline," *id.* § 324(c). Section 324 is thus analogous to the provision supplanting timber harvesting restraints found in the Migratory Bird Treaty Act and other statutes that this Court upheld in *Robertson*, and the statute superseding the Terrorism Risk Insurance Act and subjecting particular assets to execution that this Court upheld in *Bank Markazi*. See *Robertson*, 503 U.S. at 434-435; *Bank Markazi*, 578 U.S. at 231-232. Nothing in the Constitution requires Congress to express its intent through amendments to NEPA, NFMA, or other statutes—rather than, as here, taking the equivalent route of ratifying the

Executive Branch's authorizations. See *Robertson*, 503 U.S. at 439-440 (deeming particular actions to meet existing standards does not violate Article III).

Petitioners nonetheless contend that Section 324 violates Article III because it "leave[s] no questions of law or fact to adjudicate." Opposition to Motion to Dismiss 14. That is not true. Courts must apply Section 324(c) and (e)(1) before resolving any particular challenge to an authorization for the Pipeline. In doing so, they must determine whether the authorization "is necessary for the construction and initial operation at full capacity of the [Pipeline]." Act § 324(c), (e). The standard may not be "difficult to interpret or apply." *Patchak*, 138 S. Ct. at 910 (plurality op.). But Congress may permissibly "direct[] courts to apply a new legal standard to undisputed facts," even when the consequent outcome is then clear. *Bank Markazi*, 570 U.S. at 230-231 (statutes that alter the legal standard in a manner that "effectively permit[s] only one possible outcome" are constitutional). The relevant question thus is not whether the standard leaves "too little for courts to do," but whether it "attempt[s] to direct the result without altering the [applicable] legal standards." *Id.* at 228. Section 324's ratification of executive action makes the proper outcome clear—because Congress has permissibly changed the governing substantive standards for the court to apply.

2. The validity of Section 324(c) alone compels dismissal here. But even if it did not, Section 324(e) independently and validly amends the law applicable to this case. That provision strips all courts of jurisdiction to hear pending and future cases challenging the lawfulness of all agency authorizations necessary for construction of the Pipeline, and channels to the D.C. Circuit all disputes over the lawfulness of Section 324 and all questions about whether a particular agency action falls within the scope of Section 324. Act §324(e).

"Statutes that strip jurisdiction," or that channel jurisdiction into a particular court, "'chang[e] the law' for the purposes of Article III." *Patchak*, 138 S. Ct. at 906-907 (plurality op.) (citing *Ex parte McCardle*, 7 Wall. 506, 510-515 (1869)). As the *Patchak* plurality explained, "Congress generally does not violate Article III when it strips federal jurisdiction over a class of cases." *Id*. at 906. Like the statute at issue there, Section 324 "creates new law for suits relating to" the Pipeline, and preserves a threshold question for courts to determine, namely, whether the suit is encompassed within Section 324(e)(1)'s withdrawal of jurisdiction because it challenges an agency action "necessary" to construction of the Pipeline. See *id*. at 908 (jurisdiction-stripping statute left question for courts to adjudicate, namely, whether a suit "relat[ed] to" particular property). Section 324(e)(1) is therefore constitutional.

That conclusion is reinforced by the fact that Section 324(e)(1) self-evidently does not attempt to use jurisdiction stripping as an indirect way of directing the result in a particular case. Cf. *Patchak*, 138 S. Ct. at 920 (Roberts, C.J., dissenting) ("Because the Legislature has no authority to direct entry of judgment for a party, it cannot achieve the same result by stripping jurisdiction over a particular proceeding."). Congress may eliminate the courts' jurisdiction over a "class of cases" even though the necessary consequence of that action is that the would-be plaintiffs in those cases lose their claims when their actions are dismissed for lack of jurisdiction. *Id*. at 906-907 (plurality op.) (describing *Ex parte McCardle*, which upheld elimination of habeas jurisdiction despite the necessary consequence that pending habeas cases were dismissed and therefore resolved against the petitioners); accord *id*. at 919 (Roberts, C.J., dissenting) (Congress may "tell the courts what *classes* of cases they may decide"). But where Congress "target[s]" jurisdiction over a *particular* case, it may be impermissibly attempting to "direct entry of judgment for a party"

in a specific case by eliminating the court's power to decide that case. *Id*. at 917, 919-920 (Roberts, C.J., dissenting).

Section 324(e)(1) does not implicate that concern because it does not "strip[] jurisdiction over a *particular* proceeding." *Id*. at 920 (emphasis added). Rather, Section 324(e)(1) applies to both a broad class of cases that are already pending—there are currently eight cases brought by several distinct petitioners pending in two courts of appeals that challenge just some of the multiple MVP-related orders by six agencies—*and* to any future challenges to future agency authorizations. That category of pending and future cases involves multiple petitioners, multiple agencies, and presumably parties whose identity is not yet known. In those respects, Section 324(e)(1) is like the statute in *McCardle* or any other statute of general application that, by altering the courts' jurisdiction over a category of cases, affects outcomes in both pending and future cases. Section 324(e)(1) therefore does not create a "one-case-only regime" that impermissibly "pronounce[s] the equivalent of 'Smith wins.'" *Id.* at 918; see *id*. at 921 (noting that *McCardle* statute governed a class of cases). Indeed, *Bank Markazi* explained that "[t]his Court and lower courts have upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects," citing with favor a D.C. Circuit decision upholding a very similar statute stripping courts of jurisdiction to review permits for a single construction project. 578 U.S. at 234 (citing *National Coalition To Save Our Mall* v. *Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001)); *Patchak*, 138 S. Ct. at 918 (Roberts, C.J., dissenting) (noting that statute in *Bank Markazi* was not a "one-case-only regime" even though the statute pertained to a single subject—execution claims based on terrorism judgments against Iran).

In addition, as discussed above, Section 324 leaves issues for the courts to decide. *Patchak*, 138 S. Ct. at 920 ("In my view, the concept of 'changing the law' must imply some measure of

generality or preservation of an adjudicative role for the courts."). Petitioners and other challengers may raise their constitutional challenges to Section 324 in the D.C. Circuit, and they may also argue that particular agency actions are not "necessary" for construction and therefore do not fall within Section 324's coverage (and thus continue to be subject to pre-existing legal standards). That is additional confirmation that Section 324 does not reflect an attempt to use jurisdictional means to direct a result in a particular case.

In attempting to resist that conclusion, petitioners below relied almost exclusively on *United States* v. *Klein*, 80 U.S. 128 (1871)—a decision that this Court has subsequently narrowed and clarified. See, *e.g.*, *Bank Markazi*, 578 U.S. at 226-229 ("More recent decisions * * * have made it clear that *Klein* does not inhibit Congress from 'amend[ing] applicable law.' * * * Section 8772, we hold, did just that." (citations omitted)); *Patchak*, 138 S. Ct. at 909 (plurality op.) (*Klein* concerned pardons, a topic on which Congress was powerless to change governing law); *id*. at 919 (Roberts, C.J. dissenting) (in *Klein*, Congress did not alter legal standards and therefore its elimination of jurisdiction had the intent and effect of directing a result). This case bears no resemblance to *Klein*. In contrast to the statute at issue in *Klein*, which purported to direct the result in cases involving presidential pardons (a matter the "Constitution vests in another branch," *Patchak*, 138 S. Ct. at 909 (plurality op.)), Congress plainly has broad constitutional authority to modify the standards governing permits issued under federal statutes like NFMA and the MLA, or to exempt particular projects like the Pipeline from those standards entirely. In so doing, Congress does not violate Article III.

II. THE REMAINING FACTORS COMPEL VACATUR OF THE STAYS

A. The Fourth Circuit's Stay Orders Will Inflict Irreparable Harms and Frustrate the Public Interest.

In Section 324(b) of the Act, Congress announced with unmistakable clarity that "timely completion of construction and operation of the Mountain Valley Pipeline is required in the national interest." The text of the Act itself spells out the concrete benefits the Pipeline would deliver. Specifically, the Pipeline:

> [1] will serve demonstrated natural gas demand in the Northeast, Mid-Atlantic, and Southeast regions,
>
> [2] will increase the reliability of natural gas supplies and the availability of natural gas at reasonable prices,
>
> [3] will allow natural gas producers to access additional markets for their product, and
>
> [4] will reduce carbon emissions and facilitate the energy transition.

Act § 324(b).

To remove any doubt that the public interest requires prompt completion of the Pipeline, Congress further declared that Section 324 "supersedes any other provision of law" that would impede the authorizations necessary for completion. *Id.* § 324(f). And, of course, by ratifying and approving all authorizations, Congress made clear both that the interest in completing this Pipeline takes precedence over the conditions and limitations imposed by multiple overlapping federal and State authorizations, and that Courts are not to override Congress' policy choice on this matter.

Members of this Court have recognized that barring a sovereign from "employ[ing] a duly enacted statute to help prevent * * * injuries constitutes irreparable harm." *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); see also *INS* v. *Legalization Assistance Project of L.A. County Fed'n of Labor*, 510 U.S. 1301, 1305-1306 (1993) (O'Connor, J., in chambers) (emphasizing harm from "improper intrusion by a federal court into the workings of a

coordinate branch of the Government"). That is precisely the effect of the Fourth Circuit's stay orders.

Time is of the essence. Maintaining the stay orders for even a few additional weeks will prevent the Pipeline from being placed in service by the end of the year as currently planned. MVP mobilized crews into the field and positioned equipment to recommence work last month as soon as it obtained all necessary authorizations to complete work on the Pipeline. The Fourth Circuit's stays have brought that work to a halt.

The stay of the Forest Service and BLM authorizations to work in the Jefferson National Forest, if not lifted before July 26, 2023, will almost certainly prevent completion of construction before the Spring 2024. App'x 58. Re-mobilizing crews after a stay has been lifted may take weeks, and the actual earth-disturbing work remaining in the Jefferson National Forest will take roughly three months to complete. After the first frost occurs—and in this part of central Appalachia that is typically around November 1—conditions will not allow MVP to safely complete any significant construction work until the end of winter. App'x 58. Consequently, unless a stay is lifted by the end of July, MVP will not be able to complete the Pipeline until the Spring of 2024 at the earliest. App'x 14; see also App'x 23 (explaining that, if the Pipeline is completed, "[c]ustomers will see an immediate benefit * * * this winter"). The stay of the Biological Opinion and Incidental Take Statement has equally dire and immediate consequences and also must be lifted by July 26, 2023. MVP has planned to complete the remainder of its stream crossings by the end of the year. App'x 13. The stays of the Biological Opinion and Incidental Take Statement put that substantial work on hold. If all of the stays are not lifted within the next several weeks, it is extremely unlikely that MVP can complete all of those crossings and other critical construction tasks before next Spring. App'x 58.

That additional delay—on top of years of delay and billions of dollars of losses already incurred as a result of the barrage of prior litigation seeking to prevent the Pipeline from being built—will undermine the public interest benefits Congress identified in the Act. Project capacity for the Pipeline has been fully subscribed since 2014, including by utilities that serve the mid-Atlantic and Southeast regions. App'x 60. The need for the Pipeline is demonstrated by the market impact of recent events on regional gas prices for the upcoming winter heating season. Immediately after Section 324's passage, prices for the winter season dropped significantly, and after the Fourth Circuit entered the stays at issue here, prices rose substantially. App'x 61-64. As Congress recognized in Section 324, timely delivery of that additional supply is a national priority. Demand for natural gas in the Mid-Atlantic and Southeast regions that the Pipeline will serve continues to rise, leading to substantial price increases and potential shortages of a sometimes life-saving natural resource. App'x 27-28, 32, 38, 42, 48. Winter storms pose a particular threat to the supply chain and continuity of service, regularly forcing natural-gas consumers to absorb price spikes. App'x 38 (discussing effects of Winter Storm Uri); App'x 27-28 (discussing effects of Winter Storm Elliot); App'x 49 (same). As soon as it is completed, the Pipeline will provide a reliable source of natural gas and help insulate customers from severe price fluctuations—reducing costs for consumers and businesses at exactly the time demand will be most intense. App'x 27-28, 32-33, 39, 43, 49-50. If the stays remain in place, however, individuals and businesses will have to endure yet another winter season of price spikes and supply shortages.

The Fourth Circuit stay orders will also inflict concrete and material harm to the environment. MVP mobilized construction resources while all of its authorizations were in place and has resumed work in the Jefferson National Forest. Environmental resources are at greatest risk during construction. Sediment is disturbed raising erosion risk, outside materials and

equipment are temporarily present, and the potential for accidents and human error is greatest. Work began again on July 5, 2023. App'x 58. Having begun, it is imperative that the work be completed both carefully and expeditiously.[3] Keeping this work stopped midway will only prolong the period when the right-of-way within the Jefferson National Forest is disturbed and do more harm than good for the environment. More broadly, the sooner the Pipeline is completed the sooner the surrounding environment can be fully restored.

Another lengthy delay in completing the Pipeline will also impose substantial unrecoverable costs on MVP, which will need to take actions to prevent environmental harms along the Project right-of-way. MVP knows from long experience that the cost of maintaining temporary erosion controls during the pendency of a stay is roughly $20 million per month; overall cost increases associated with six years of litigation have run into the billions of dollars. App'x 59. At the same time, MVP will be further delayed in recouping its investment through revenues generated by operation of the Pipeline.

B. The Balance of Equities Overwhelmingly Favors Vacatur of the Stays.

The Court should not reward petitioners for their brazen strategy of delay and gamesmanship. As petitioners know, meaningful pipeline construction cannot take place after the first frost of the winter. See App'x 58. Thus, if MVP cannot complete construction before approximately November 1, the Pipeline cannot be completed until next summer. With approximately three months of work remaining, the Pipeline will not be operational in 2023 unless MVP may begin uninterrupted construction by July 26, 2023. See App'x 58. Petitioners have therefore, at every turn, sought to drag out proceedings, day by day, week by week across this

[3] BLM's Right-of-Way Notice to Proceed (see Petitioner's Motion for Temporary Administrative Stay Ex. 1, *The Wilderness Society* v. *U.S. Forest Service*, No. 23-1592 (4th Cir. July 6, 2023)) outlines the various tasks MVP intends to undertake in the Jefferson National Forest and the schedule by which it plans to complete them in the 2023 construction season.

summer—and perhaps into next—in order to translate litigation delay of a matter of days or weeks into construction delays of a matter of months or years.

For example, Wilderness Society has sought to maximize the length of proceedings by delaying petitioning for review, waiting to seek stays so that, as here, they cannot meaningfully be adjudicated before MVP has already spent the time and money to restart construction, and forum-shopping so that, at a minimum, the courts will spend MVP's only annual construction period adjudicating threshold issues. MVP received the last of its authorizations at issue here on May 17, 2023. The actions Wilderness Society now challenges were final at that point, and Wilderness Society could have filed its petitions for review immediately thereafter. Instead, Wilderness Society waited for weeks to even file its petitions, and then waited nearly a month to file a motion for a stay pending review.

This delay is inexcusable. MVP's construction schedule is no secret. On May 30, 2023, MVP notified the court of appeals in the related *Appalachian Voices* proceeding that it expected to commence full construction soon after receiving its section 404 permit from the Corps, perhaps as early as June 15, 2023. See Notice Regarding Mountain Valley's Construction Plans, *Appalachian Voices* v. *U.S. Dep't of the Interior*, No. 23-1384 (4th Cir. May 30, 2023). And less than two weeks later MVP clarified that it would receive that permit on or before June 24, 2023, consistent with the deadline that Congress imposed in Section 324. See Notice of Supplemental Authority, *Appalachian Voices* v. *U.S. Dep't of the Interior*, No. 23-1384 (4th Cir. June 12, 2023). Yet Wilderness Society did not even file its petitions for a stay pending review in the Fourth Circuit until July 3, 2023, depriving both the court of appeals and MVP of any meaningful opportunity to adjudicate the stay before MVP mobilized for and reinitiated construction. In its motion, Wilderness Society suggests that it did not seek a stay sooner because BLM had not yet issued a

notice to resume construction. That claim is simply not credible in the face of MVP's repeated public statements, including representations to the Fourth Circuit, regarding its intent to resume construction promptly after receiving its permit from the Corps. For reasons of its own, Wilderness Society chose to wait to file this motion, and equity will not tolerate that delay.

What's more, petitioners have attempted to avoid challenging the constitutionality of Section 324 in the D.C. Circuit—the one court of appeals that unquestionably has jurisdiction to consider such arguments. For its part, Wilderness Society and the *Appalachian Voices* petitioners have declined to file a challenge there. Far more brazenly, many of the petitioners in the *Appalachian Voices* proceeding are also petitioners in a separate proceeding in the D.C. Circuit and sought to *voluntarily dismiss* their pending challenge there shortly after the Act's passage. See Petitioners' Motion for Voluntary Dismissal with Prejudice, *Appalachian Voices* v. *FERC*, No. 22-1330 (D.C. Cir. June 22, 2023); Intervenors Response to Motion for Voluntary Dismissal with Prejudice, *Appalachian Voices* v. *FERC*, No. 22-1330 (D.C. Cir. July 3, 2023). They did so shortly after MVP moved to dismiss that appeal in light of Section 324, a motion that gave those parties a ready and prompt pathway to raise any concerns about the statute's constitutionality (in opposing dismissal). See Intervenors' Motion to Dismiss or for Summary Affirmance, *Appalachian Voices* v. *FERC*, No. 22-1330 (D.C. Cir. June 21, 2023). Those petitioners appear to be trying to avoid any adjudication of the constitutionality of Section 324 in the D.C. Circuit, which has recently upheld a nearly identical statutory provision. See *Friends of the Earth* v. *Haaland*, 2023 WL 3144203, at *2 (D.C. Cir. Apr. 28, 2023) (per curiam); accord *Nat'l Coal. to Save Our Mall*, 269 F.3d at 1097. This obvious forum shopping effort is both completely at odds with Section 324's text and, absent this Court's immediate review, mires the Fourth Circuit in complex threshold

questions about its jurisdiction—all while another winter and thus another pause of construction approaches.

III. THE COURT MAY ALSO TREAT THIS APPLICATION AS A PETITION FOR A WRIT OF MANDAMUS

For the same reasons the Fourth Circuit lacked jurisdiction to enter the stays challenged in this application, it lacks jurisdiction to adjudicate the underlying petitions for review in Nos. 23-1384, 23-1592, and 23-1594. MVP therefore requests that this Court treat this application as a petition for a writ of mandamus directing the Fourth Circuit to dismiss the petitions for review. Cf. *Biden* v. *Nebraska*, 143 S. Ct. 477 (2022) (Mem) (treating an application to vacate an injunction as a petition for certiorari before judgment and granting the petition). The Fourth Circuit could have concluded that it possessed the authority to issue the stays at issue only by first concluding that petitioners were likely to succeed on their argument in that court that Congress could not constitutionally eliminate the court's jurisdiction to decide the underlying petitions for review or provide that the authorizations covered by Section 324 are valid notwithstanding any other provision of law. But Congress unambiguously provided that the D.C. Circuit has exclusive jurisdiction to adjudicate those very constitutional questions. Act § 324(e)(2). And, whatever else is true, Congress indisputably has the constitutional authority to designate the D.C. Circuit as the sole forum for adjudicating all constitutional challenges to Section 324. See p. 15, *supra*. The Fourth Circuit therefore lacked the authority, even provisionally, to determine the constitutionality of Section 324. Consequently, the Fourth Circuit was bound by Congress's instruction that the petitions for review may not proceed in that court.

This Court may "issue all writs necessary or appropriate in the aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). And while a writ of mandamus is an extraordinary remedy, its paradigmatic use is to "confine the court against

which mandamus is sought to a lawful exercise of its prescribed jurisdiction." *Cheney* v. *U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943)) (internal alterations omitted). This Court will issue a writ of mandamus if the petitioner can show 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) "the writ is appropriate under the circumstances." *Id.* All three conditions are amply satisfied.

MVP has no other adequate avenue for relief. Only this Court has the power to "confine the [Fourth Circuit] to a lawful exercise of its prescribed jurisdiction." *Id*. Congress expressly deprived the Fourth Circuit of jurisdiction in order to consolidate all challenges to the constitutionality of Section 324 (as well as any claims that particular authorizations are not within the scope of Section 324) in the D.C. Circuit. Thus, by entering the challenged stays and proceeding to adjudicate the petitions for review on its docket, the Fourth Circuit is depriving MVP and the United States of the streamlined litigation procedures that Congress specifically crafted for these cases. This Court has recognized that mandamus is both appropriate and often the only available remedy in the analogous context in which district courts wrongfully deny motions to transfer, denying defendants the benefit of a proper forum for the duration of a litigation. See, *e.g.*, *TC Heartland LLC* v. *Kraft Foods Group Brands LLC*, 581 U.S. 258, 270 (2017) (reversing the Federal Circuit's denial of a petition for writ of mandamus based on a claim of improper venue). And ordinary appellate review at the conclusion of proceedings is not adequate relief. Congress specifically determined that the national interest requires not only that the Pipeline be "completed," but that it be done in an "expedit[ed]" and "timely" fashion. Act § 324(b). Streamlining litigation in a single forum is critical to achieving that objective. Waiting months or years for eventual review in this Court upon the conclusion of proceedings in the Fourth Circuit

thus deprives this express congressional command of all force. See *Cheney*, 542 U.S. at 382 (explaining that the writ is especially appropriate where "the action of the political arm of the Government taken within its appropriate sphere [must] be promptly recognized, and * * * delay and inconvenience of a prolonged litigation [must] be avoided by prompt termination of the proceedings in the district court").

MVP's right to relief is "clear and indisputable." Although the Fourth Circuit provided no explanation or analysis when it issued the stays challenged in this application, in the face of Section 324's unambiguous text, the Fourth Circuit could not have concluded that it had jurisdiction to act unless it first concluded that Section 324 was likely unconstitutional. For the reasons explained above, however, that statute is plainly constitutional in all respects. Even more to the point, there is no conceivable basis for concluding that Congress lacked the constitutional authority to vest the D.C. Circuit with exclusive jurisdiction to adjudicate all challenges to the constitutionality of Section 324. The Fourth Circuit could not have concluded that it had the power to issue the stays challenged in this application unless it concluded Section 324 was likely unconstitutional insofar as it stripped the court of jurisdiction to act. But the court lacked jurisdiction to adjudicate the provision's constitutionality, and thus the court was bound by Section 324's express terms and had no jurisdiction to proceed. See, *e.g.*, *Mallard* v. *United States Dist. Court*, 490 U.S. 296, 309 (1989) (finding mandamus relief appropriate where lower court acted without jurisdiction); *United States Alkali Exp. Ass'n* v. *United States*, 325 U.S. 196, 203-204 (1965) (same); *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 223 (1945) (same); *Ex parte Peru*, 318 U.S. 578, 590 (1943) (same); *Ex parte Northern Pac. Ry.*, 280 U.S. 142 (1929) (same). Absent jurisdiction, "the only function remaining to the court is that of announcing the

fact and dismissing the cause." *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 7 Wall. at 514).

Issuance of the writ is appropriate under the circumstances. Congress has exercised its constitutional prerogatives to amend retroactively the relevant legal standards and processes in order to hasten completion of an infrastructure project it considers vital to the national interest. The Fourth Circuit's continued maintenance of these appeals in excess of its jurisdiction vitiates Congress's statutory scheme, undermining Congress's constitutional role in the process. This Court has recognized that mandamus is especially appropriate in order to preserve the proper constitutional role of the coordinate branches of government. See *Cheney*, 542 U.S. at 382.

Mandamus is appropriate for another reason as well: many of the petitioners in No. 23-1384 are engaged in a deliberate effort to circumvent Congress's assignment of exclusive jurisdiction to the D.C. Circuit to adjudicate the constitutionality of Section 324. As explained, many of those same petitioners have pending in the D.C. Circuit a challenge to a separate FERC authorization for the Pipeline. See p. 29, *supra.* MVP moved to dismiss the petition for review on the ground that Section 324 precludes it. Petitioners could have challenged Section 324's constitutionality in opposing that motion. Instead, they sought voluntary dismissal of their petition for review, citing only reasons of judicial economy and making no mention of the Fourth Circuit action in which they seek to join issue on Section 324's constitutionality. It is manifestly appropriate to resort to mandamus to ensure that those machinations do not succeed.

Thus, it is well within this Court's authority to invoke mandamus to order the Fourth Circuit to dismiss the petitions for review. If, however, this Court determines that mandamus is not appropriate, then MVP respectfully requests that this Court construe this application as a petition for a writ of certiorari, grant the petition, and summarily order the Fourth Circuit to dismiss

the petitions for review. See 28 U.S.C. § 1254(1) (this Court has jurisdiction to review orders of the court of appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree"); *Fed. Power Comm'n* v. *Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 330-331 (1976) (reviewing on certiorari interlocutory order of the court of appeals ordering agency to conduct an investigation). To be sure, certiorari review of an interlocutory order is an extraordinary remedy. But here, as in *Transcontinental Gas*, the Fourth Circuit's stay orders are causing immediate harm, and "any review by this Court of the propriety of the order[s] must be immediate to be meaningful." *Id*. at 331. Congress has made clear that there is a paramount national interest in expeditious completion of the Pipeline. And Congress was equally clear that the Fourth Circuit may not exercise jurisdiction to consider the petitions for review challenging the recent approvals issued by the Forest Service, BLM, and the Fish and Wildlife Service. This Court can order dismissal on the straightforward ground that the Fourth Circuit lacked jurisdiction to adjudicate the constitutionality of Section 324, and therefore was bound to respect Section 324's unambiguous elimination of its jurisdiction to proceed. A ruling on those grounds would leave the constitutionality of Section 324 to be determined in a case brought before the D.C. Circuit, as Congress prescribed, in a proceeding brought by petitioners or others.

CONCLUSION

For the foregoing reasons, the application to vacate the stays of the challenged agency authorizations pending adjudication of the petitions for review should be granted and the stays vacated. The Court may also treat this application as a petition for writ of mandamus and issue an order directing the Fourth Circuit to dismiss the petitions for review.

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Respectfully submitted,

/s/ *Donald B. Verrilli, Jr.*

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