APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5203

[Filed February 13, 2024]

CLETUS WOODROW BOHON, ET AL.,
APPELLANTS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
APPELLEES

On Remand from the
Supreme Court of the United States

Mia Yugo argued the cause for appellants. With her on the briefs was *John R. Thomas Jr.*

Robert H. Solomon, Solicitor, Federal Energy Regulatory Commission, argued the cause for appellee. With him on the brief were *Matthew R. Christiansen*, General Counsel, and *Scott Ray Ediger*, Attorney.

Jeremy C. Marwell argued the cause for Mountain Valley Pipeline, LLC, appellee. On the brief were *Brian D. O'Neill* and *Wade W. Massie. Michael R. Pincus* entered an appearance.

Before: PILLARD, WILKINS and WALKER, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALKER.

WALKER, *Circuit Judge*: Mountain Valley Pipeline, LLC wants to transport natural gas through the Appalachian Mountains. It sought permission from the Federal Energy Regulatory Commission to build a pipeline that begins in West Virginia and ends some 300 miles later in southern Virginia. Over the objection of several landowners in the pipeline's path, FERC awarded Mountain Valley a certificate to build and operate the pipeline.

Opponents of the pipeline sought a rehearing from FERC. And when that failed, they petitioned for review of FERC's certificate in this court. Among other things, they argued that Mountain Valley could not constitutionally use the certificate to take private property in the path of the pipeline through eminent domain. We denied their petition in *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1-2 (D.C. Cir. Feb. 19, 2019).

The plaintiffs in today's case — including Cletus and Beverly Bohon — did not join that petition or request an agency rehearing. Instead, after we decided *Appalachian Voices*, they sued FERC and Mountain Valley in federal district court. Like the *Appalachian Voices* petitioners, the Bohons raised constitutional challenges to the certificate's authorization for Mountain Valley to use eminent domain and seize their land.

The district court dismissed the Bohons' suit for lack of jurisdiction. When the Bohons appealed the district court's decision, we affirmed. *See Bohon v. FERC*, 37 F.4th 663, 664-65 (D.C. Cir. 2022). We held that § 717r(b) of the Natural Gas Act explicitly denied a district court jurisdiction to review a certificate after a federal court of appeals had considered a petition challenging that certificate. *Id.* at 665. In other words, the Bohons' suit came too late.

Last year, the Supreme Court granted the Bohons' petition for a writ of certiorari, vacated our judgment, and remanded for further consideration given the intervening decision in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023). *See Bohon v. FERC*, 143 S. Ct. 1779 (Apr. 24, 2023) (mem.). We then ordered supplemental briefing about *Axon*'s effects on our earlier judgment.

After a careful review of *Axon* and the parties' briefs, we again conclude that the Natural Gas Act explicitly strips district courts of jurisdiction to review a FERC certificate after a court of appeals receives the record in a suit challenging that certificate. We therefore reinstate our previous judgment affirming the district court. *See, e.g.*, *Oguaju v. United States*, 378 F.3d 1115, 1116-17 (D.C. Cir. 2004).[1]

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[1] Additionally, we sought briefing on the recently enacted Fiscal Responsibility Act. *See* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324, 137 Stat. 10, 47-48. FERC and Mountain Valley argued that the Act moots this case and strips all federal courts of jurisdiction to review Mountain Valley's certificate. *See id.* at § 324(c)(1), (e)(1), 137 Stat. at 47-48. But we need not consider that law's effects (or constitutionality) because we can decide

* * *

We begin with the text of the Natural Gas Act — specifically, 15 U.S.C. § 717r(b). It says that a party challenging a FERC order must first seek a rehearing and may then petition a court of appeals for review. That "court shall have jurisdiction . . . to affirm, modify, or set aside such order in whole or in part." 15 U.S.C. § 717r(b). Crucially for our purposes, "upon the filing of the record with" the court of appeals, that court's jurisdiction over the challenged order "*shall be exclusive*." *Id.* (emphasis added). And subject only to Supreme Court review, that court's decisions are "final." *Id.*

Put differently, district courts are explicitly stripped of their jurisdiction to review a FERC order once the record in a petition challenging that order is filed in a court of appeals. *Cf. Bowles v. Russell*, 551 U.S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.").

That is what happened here. The record in *Appalachian Voices* was filed with our court in 2018. The petitioners there challenged the constitutionality of the FERC certificate injuring the Bohons. In 2020, the Bohons sued, invoking constitutional arguments about the same certificate. But according to 15 U.S.C. § 717r(b), district court jurisdiction to hear challenges

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jurisdictional questions in any order, and we affirm the district court's conclusion that it lacked jurisdiction due to the Natural Gas Act. *See United States v. Johnson*, 254 F.3d 279, 287 n.11 (D.C. Cir. 2001).

to the certificate ended once the record in *Appalachian Voices* had been filed with our court, even though the Bohons were not a party in that earlier case.

The district court was correct to conclude that it lacked jurisdiction. Given the explicit text of the Natural Gas Act, the district court had been divested of jurisdiction for almost two years by the time the Bohons sued to challenge the certificate. 15 U.S.C. § 717r(b).

* * *

In *Axon Enterprise, Inc. v. FTC*, the Supreme Court considered a set of three factors that it first articulated in *Thunder Basin Coal Co. v. Reich* to determine when a statutory scheme implicitly strips a district court of jurisdiction. *See* 598 U.S. 175, 185-86 (2023) (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-13 (1994)). After applying the factors, *Axon* held that there was no implicit jurisdiction stripping of the parties' claims. *Id.* at 195-96.

The Bohons point to superficial similarities between the constitutional challenges to administrative proceedings in their case and in *Axon*. For example, like the review schemes in *Axon*, the Natural Gas Act provides for direct review by a court of appeals of some final agency orders. *See* 15 U.S.C. § 78y(a) (Securities Exchange Act); 15 U.S.C. § 45(c)-(d) (Federal Trade Commission Act); 15 U.S.C. § 717r(b) (Natural Gas Act). And like the Bohons, the parties in *Axon* raised structural constitutional challenges in district court. *See Axon*, 598 U.S. at 181-82.

But there is one unavoidable and critical difference: *Bohon* involves explicit jurisdiction stripping and *Axon* did not. That's because the *Axon* plaintiffs sued *before* there was an agency order to challenge. And at that point in the administrative process, the relevant statutes were *silent* about the district court's jurisdiction. *See id.* In contrast, the Bohons sued *after* there was an agency order to challenge — indeed, after the agency order had already been challenged. The relevant statute was anything but silent by then. It *expressly* says our jurisdiction over the certificate injuring the Bohons is "exclusive."[2] 15 U.S.C. § 717r(b).

To illustrate how dissimilar this case is from *Thunder Basin* and *Axon*, consider that its outcome would not change even if Justice Gorsuch's *Axon* concurrence controlled. He called *Thunder Basin*'s multi-factor balancing approach "sheer incoherence" and would have overruled it entirely. *Axon*, 598 U.S. at 205 (Gorsuch, J., concurring in judgment). But he also said that under the statutes at issue in *Axon*, a district court lacks jurisdiction after an administrative record

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[2] As we noted in our previous opinion, "the Bohons asked the district court to declare . . . that all past certificates (including Mountain Valley's) are void. They also sought an injunction that would prevent FERC from issuing any certificates in the future and would prevent certificate holders like Mountain Valley from exercising their delegated eminent-domain authority." *Bohon*, 37 F.4th at 664-65. But the Bohons cannot challenge the constitutionality of all past (and future) certificates without jurisdiction to challenge the one actually or imminently injuring them — here, Mountain Valley's certificate. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 573-74 (1992). And as explained above, their challenge to that certificate was beyond the jurisdiction of the district court.

reaches a court of appeals. *Id.* at 211 (Gorsuch, J., concurring in judgment). That principle would require us to again do what we did before *Axon* — affirm the district court's dismissal of this suit.

* * *

To sum up, *Axon* clarified how courts should apply *Thunder Basin*'s three factors to assess if a statute implicitly strips jurisdiction over a particular claim. But the outcome of today's case does not depend on statutory implications, *Thunder Basin*'s multi-factor test, or *Axon*'s application of those factors. Instead, this case is controlled by the text of the Natural Gas Act, where Congress explicitly exercised its constitutional power to define the jurisdiction of federal courts. *See Bowles*, 551 U.S. at 212. Nothing in *Axon* requires us to ignore that text or allows us to displace it.

We therefore incorporate by reference the reasoning of our earlier *Bohon* opinion and reinstate our judgment affirming the district court's decision to dismiss this suit.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5203
September Term, 2023

[Filed February 13, 2024]

CLETUS WOODROW BOHON, ET AL.,)
APPELLANTS)
)
v.)
)
FEDERAL ENERGY REGULATORY)
COMMISSION, ET AL.,)
APPELLEES)
)

On Remand from the
Supreme Court of the United States

Before: PILLARD, WILKINS and WALKER, *Circuit Judges*.

J U D G M E N T

This cause came to be heard on remand from the Supreme Court of the United States, vacating this court's judgment and remanding for further consideration given the intervening decision in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023). *See Bohon*

v. FERC, 143 S. Ct. 1779 (Apr. 24, 2023) (mem.). On consideration thereof, it is

ORDERED and ADJUDGED that this court's judgment filed June 21, 2022, affirming the district court's decision to dismiss this suit, be reinstated, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

Date: February 13, 2024

Opinion for the court filed by Circuit Judge Walker.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 22–256

[Filed May 26, 2023]

CLETUS WOODROW BOHON, ET AL., Petitioners v. FEDERAL ENERGY REGULATORY COMMISSION, ET AL.	))))))))

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for writ of certiorari is granted. The judgment of the above court in this cause is vacated with costs, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Axon Enterprise, Inc.* v. *FTC*, 598 U. S. ___ (2023).

IT IS FURTHER ORDERED that the petitioners, Cletus Woodrow Bohon, et al., recover from the Federal Energy Regulatory Commission, et al., Three Hundred Dollars ($300.00) for costs herein expended.

April 24, 2023

Clerk's costs: $300.00

[SEAL]
A True copy SCOTT S. HARRIS

Clerk of the Supreme Court of the United States

/s/ Scott S. Harris

APPENDIX D

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 15, 2021
Decided June 21, 2022

No. 20-5203

[Filed June 21, 2022]

CLETUS WOODROW BOHON, ET AL.,
APPELLANTS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
APPELLEES

On Appeal from the United States District Court
for the District of Columbia
(No. 1:20-cv-00006)

Mia Yugo argued the cause for appellants. With her on the briefs was *John R. Thomas Jr.*

Robert H. Solomon, Solicitor, Federal Energy Regulatory Commission, argued the cause for appellee. With him on the brief were *Matthew R. Christiansen*, General Counsel, and *Scott Ray Ediger*, Attorney.

Jeremy C. Marwell argued the cause for Mountain Valley Pipeline, LLC, appellee. On the brief were *Brian D. O'Neill* and *Wade W. Massie*. *Michael R. Pincus* entered an appearance.

Before: PILLARD, WILKINS and WALKER, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALKER.

Almost five years ago, the Federal Energy Regulatory Commission gave Mountain Valley Pipeline, LLC permission to build a natural-gas pipeline that will run through Cletus and Beverly Bohon's property. The Bohons sued in district court to prevent the pipeline's construction. But the Natural Gas Act creates an exclusive review scheme for challenges to pipeline certificates, one that doesn't allow for the Bohons' district-court filing. We therefore affirm the district court's decision to dismiss it.

I

A

The Natural Gas Act requires any natural-gas company that wants to build a natural-gas pipeline to get FERC's permission. 15 U.S.C. § 717f(c). To do so, the company must prove that its pipeline's service "is or will be required by the present or future public convenience and necessity," and that it complies with all relevant federal, state, and local regulations. *Id.* § 717f(e). If it satisfies the statutory and regulatory requirements, the company receives a "certificate of

public convenience and necessity." *Id.* § 717f(c). With the certificate comes authorization to exercise the federal government's eminent-domain power. *Id.* § 717f(h).

The process of obtaining a certificate includes more than just FERC and the natural-gas company. During the process, the company has to notify interested parties, including landowners in the pipeline's path, to give them the opportunity to object. 18 C.F.R. § 157.6(d). On top of that opportunity to comment during proceedings, the Natural Gas Act also provides detailed instructions to aggrieved parties who want to challenge certificate orders.

First, an aggrieved party must seek rehearing with FERC. 15 U.S.C. § 717r(a). Next, if FERC denies the rehearing application or fails to act on it for thirty days, the aggrieved party can petition for review of the certificate order in a federal court of appeals where the natural-gas company is located or has its principal place of business, or in this Court. *Id.* § 717r(b). When the party files the petition and record, the court where the party filed has "exclusive" jurisdiction "to affirm, modify, or set aside such order in whole or in part." *Id.* That court's judgment "shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification." *Id.*

B

In 2015, Mountain Valley sought FERC's permission to build a 303.5-mile natural-gas pipeline. *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017). It proceeded through FERC's certification

process over the following two years and ultimately received a certificate of public convenience and necessity. *Id.* A number of aggrieved parties (but not Cletus and Beverly Bohon) then sought rehearing before FERC and, from there, petitioned for our review of the certificate order. *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019). We rejected all sixteen of the challenges they presented. *Id.* Our decision (and the parties' decision not to seek certiorari) ended the statutorily prescribed review process. 15 U.S.C. § 717r(b).

A year later, the Bohons and two other families filed this suit against FERC and Mountain Valley in district court. The Bohons own land in the pipeline's path and don't want to sell, so Mountain Valley intends to use the eminent-domain power that its certificate grants. To preempt Mountain Valley's eminent-domain proceeding, the Bohons asked the district court to declare that Congress's delegation to FERC of authority to grant pipeline certificates is unconstitutional and that all past certificates (including Mountain Valley's) are void. They also sought an injunction that would prevent FERC from issuing any certificates in the future and would prevent certificate holders like Mountain Valley from exercising their delegated eminent-domain authority. The district court dismissed their suit because the Natural Gas Act's exclusive review process precluded its jurisdiction.

II

"Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to

consider." *Bowles v. Russell*, 551 U.S. 205, 212 (2007). Typically, parties can "seek review of agency action in district court under any applicable jurisdictional grant." *Jarkesy v. SEC*, 803 F.3d 9, 15 (D.C. Cir. 2015). But when Congress creates a special statutory review scheme, that scheme is presumed "to be the exclusive means of obtaining judicial review in those cases to which it applies." *Id.* (cleaned up). This case turns on whether the Natural Gas Act's special review scheme deprives district courts of jurisdiction to invalidate pipeline certificates. It does.

The relevant section of the Natural Gas Act's review provision reads as follows:

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part . . . . **Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive,** to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by

> the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.

15 U.S.C. § 717r(b) (emphasis added).

That provision makes clear that once the original parties who challenged the Mountain Valley certificate proceeding filed the record in this Court, our jurisdiction became "exclusive." Indeed, the Supreme Court interpreted effectively identical text in the Federal Power Act to prescribe "the specific, complete and exclusive mode for judicial review" of FERC's predecessor's licensing orders. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *see also City of Anaheim v. FERC*, 558 F.3d 521, 523 n.2 (D.C. Cir. 2009) (judicial interpretations of substantially identical provisions in the Federal Power Act and Natural Gas Act apply interchangeably). When, as here, Congress creates an exclusive review scheme, it precludes any other court's jurisdiction over challenges that fit within that scheme. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994).

Therefore, the Bohons may file their suit in district court only if their facial nondelegation challenge falls outside the Natural Gas Act's judicial-review scheme. *See id.* at 212-13. They offer three reasons why it might. First, they argue that the review scheme does not cover *any* facial constitutional challenges. Second, they argue that the *structural* nature of their nondelegation argument takes it out of the review provision's scope. And third, they argue that the Supreme Court's decision last term in *PennEast*

Pipeline Co. v. New Jersey requires us to reverse here. 141 S. Ct. 2244 (2021). All three arguments are unpersuasive.

First, in another statutory context we have cautioned parties against assigning "talismanic significance" to their decision to frame their suit as a facial challenge to the statute's constitutionality. *Jarkesy*, 803 F.3d at 18. And in *Elgin v. Department of the Treasury*, the Court specifically rejected an argument that "facial constitutional challenges to statutes" should receive special solicitude. 567 U.S. 1, 15 (2012). "The mere fact that" the Bohons press "constitutional claims (even facial ones) therefore does not control the preclusion inquiry." *Jarkesy*, 803 F.3d at 25.

Second, the mere fact that the Bohons are challenging FERC's structure does not take their suit outside the Natural Gas Act's review provision. True, we did not apply that review provision in *NO Gas Pipeline v. FERC*, where the petitioners argued that collecting fees from the natural-gas industry biased FERC in favor of approving pipelines. 756 F.3d 764, 768 (D.C. Cir. 2014). But unlike here, that structural-bias claim did not challenge the lawfulness of any pipeline certificate. *Id.* at 769. Instead, the "unique" claim there was "so tangential" to any certificate order that we deemed it "unanchored in pipeline proceedings" altogether. *Id.* And we simultaneously stressed "the narrowness of our jurisdictional holding." *Id.*

The Bohons, by contrast, attack FERC's power to apply the Natural Gas Act and seek to "set aside" existing pipeline certificates. 15 U.S.C. § 717r(b). Those

claims are very much anchored in pipeline proceedings. So they fall squarely within the Natural Gas Act's review scheme.

That difference also sets this case apart from *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). There, the Supreme Court's logic was similar to ours in *NO Gas Pipeline*: The plaintiffs' structural-bias claim was not rooted in any particular Board action, so it fell outside the review framework of 15 U.S.C. § 78y. *Id.* at 490. By contrast, the Bohons' suit directly imperils a specific certificate that FERC granted Mountain Valley.

Finally, the Bohons argue that *PennEast*, requires us to conclude that their suit can proceed in district court. On their reading, *PennEast* held that district courts retain jurisdiction over all nondelegation challenges. That reading is incorrect.

In *PennEast*, New Jersey raised a sovereign-immunity defense against a condemnation of land. 141 S. Ct. at 2253. But even if New Jersey's sovereign-immunity defense had succeeded, it would not have required the district court to "'modify' or 'set aside' FERC's order." *Id.* at 2254 (quoting 15 U.S.C. § 717r(b)). Thus, New Jersey's argument was not "a collateral attack on the FERC order" that the Natural Gas Act's review scheme would have barred. *Id.* In explaining that crucial difference, *PennEast* specifically distinguished a case where a party argued "that a licensee could not exercise the rights granted to it by the license itself." *Id.* Because that is exactly the argument that the Bohons make, *PennEast* only bolsters our conclusion.

* * *

The Natural Gas Act's review scheme precluded district-court jurisdiction over the Bohons' collateral attack on the FERC order. We therefore affirm.

So ordered.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 20-6 (JEB)

[Filed May 6, 2020]

CLETUS WOODROW &	)
BEVERLY BOHON, ***et al.*****,**	)
	)
Plaintiffs,	)
	)
v.	)
	)
FEDERAL ENERGY REGULATORY	)
COMMISSION, ***et al.*****,**	)
	)
Defendants.	)
	)

MEMORANDUM OPINION

This case presents the latest trickle in a veritable flood of litigation relating to Defendant Mountain Valley Pipeline, LLC's proposed construction of a natural-gas pipeline through Virginia and West Virginia. In October 2017, Defendant Federal Energy Regulatory Commission granted MVP a certificate that permitted the company to build the pipeline and enabled it to exercise the agency's eminent-domain authority to do so. That approval has thus far

withstood various administrative challenges as well as review in multiple federal courts of appeals.

Not easily deterred, Plaintiffs — homeowners along the proposed pipeline's path — bring another suit, this one featuring constitutional challenges to FERC's enabling statute, the Natural Gas Act. They seek, among other things, a nationwide injunction ending the existing FERC pipeline-approval process and voiding all pipeline certificates, including the one issued to MVP. The NGA, however, channels review of FERC decisions relating to pipelines — including constitutional claims inhering in those controversies — to the agency, not to a district court. Plaintiffs' attempt to transform their grievance with FERC over the MVP certificate into a facial constitutional challenge cannot save them from the statutorily mandated administrative-review process. The Court will therefore dismiss the case for lack of subject-matter jurisdiction.

I. Background

A. Statutory Background

Congress enacted the NGA, 15 U.S.C. § 717, *et seq*., "with the 'principal purpose' of 'encouraging the orderly development of plentiful supplies of natural gas at reasonable prices.'" Myersville Citizens for a Rural Cmty., Inc. v. FERC, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (alterations omitted) (quoting NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669–70 (1976)). "The Act vests FERC with broad authority to regulate the transportation and sale of natural gas in interstate commerce." Minisink Residents for Envtl. Pres. & Safety v. FERC, 762 F.3d 97, 101 (D.C. Cir. 2014). The

agency's responsibilities include the authorization of interstate natural-gas pipelines, such as the MVP project at issue here. See 15 U.S.C. § 717f(c)).

The "keystone" of FERC's pipeline-authorization process is the so-called "certificate of public convenience and necessity." Bold All. v. FERC, No. 17-1822, 2018 WL 4681004, at *1 (D.D.C. Sept. 28, 2018) (quoting 15 U.S.C. § 717f(d)). These certificates, which permit "the construction or extension of natural gas transportation facilities," are a prerequisite for the construction of any interstate natural-gas pipeline. Myersville, 783 F.3d at 1307 (citing 15 U.S.C. § 717f(c)). According to the NGA, FERC "shall" issue a certificate "to any qualified applicant" upon a finding that "the applicant is able and willing properly to do the acts and to perform the service proposed," and that the proposed service or construction "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). FERC's issuance of a certificate, moreover, conveys the power of eminent domain to its holder. Id. § 717f(h). Armed with that authority, the certificate holder can initiate condemnation proceedings as necessary. Id.

FERC's issuance of a certificate represents the culmination of an extensive application process and sets into motion elaborate review mechanisms. First, in order to receive the certificate, the applicant must submit reams of technical, economic, and environmental information concerning the project. See 18 C.F.R. § 157.6(b) (application content requirements including "detailed cost of service data"). The applicant must also make a "good faith effort to notify all

affected" landowners, towns, communities, and government agencies, and any interested party, including environmental and tribal groups may intervene in the proceeding to file comments of their own. Id. §§ 157.6(d), 157.10. After a lengthy review of these materials — along with the consideration of a number of factors, such as the project's environmental impact and whether its "public benefits" outweigh the "potential adverse consequences" —– the agency may grant the certificate. Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (Sept. 15, 1999), clarified, 90 FERC ¶ 61,128 (Feb. 9, 2000), further clarified, 92 FERC ¶ 61,094 (July 28, 2000) (FERC's policy statement outlining certificate-issuance criteria).

Next, "aggrieved" persons, ranging from the applicants themselves to interested homeowners, advocacy groups, and state and local governments, may challenge FERC's decision or ask for modifications of its order. See 15 U.S.C. § 717r(a). To do so, they must first file for rehearing before the agency. Id. If FERC declines to rehear the matter or issues a final order regarding it, the parties may then file a petition for review in the appropriate court of appeals. Id. Upon the filing of such a petition, the court of appeals retains "exclusive" jurisdiction to affirm, modify, or set aside such an order "in whole or in part." Id. § 717r(b) (emphasis added). The petitioners may not raise new objections to the agency's order in the court of appeals unless "there is reasonable ground for [the] failure" to offer them previously. Id.

B. MVP Project and Related Litigation

This dispute traces its roots to October 2015, when MVP set the above-described process in motion by filing an application with FERC to maintain, construct, and operate a pipeline running from Wetzel County, West Virginia, to Pittsylvania County, Virginia. See Mountain Valley Pipeline, LLC Equitrans, L.P., 161 FERC ¶ 61043 p. 1 (Oct. 13, 2017). After two years of review, including reflection on hundreds of comments from interested parties, FERC issued MVP the coveted certificate of authorization. Id.

Over twenty affected landowners, environmental organizations, and tribal groups sought rehearing of FERC's issuance of the certificate, which the agency rejected in a lengthy opinion affirming its prior conclusions. See Mountain Valley Pipeline, LLC Equitrans, L.P., 163 FERC ¶ 61197 (June 15, 2018). Many of those same parties then petitioned for review in the D.C. Circuit, lodging sixteen different challenges, both statutory and constitutional, relating to the certificate's issuance. See Appalachian Voices v. FERC, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019). The Court of Appeals affirmed the agency's decision and, in doing so, rejected the petitioners' constitutional claims grounded in the Fifth Amendment's Due Process and Takings Clauses. Id. at *2–3.

While the MVP project flowed through the agency and into the Circuit, a separate group of landowners along the pipeline's path brought suit in the Western District of Virginia arguing — as Plaintiffs do here — that the NGA constitutes an impermissible delegation

of legislative authority to the agency. Berkley v. Mountain Valley Pipeline, LLC, No. 17-357, 2017 WL 6327829, at *2 (W.D. Va. Dec. 11, 2017). The district court dismissed the case, concluding that the NGA stripped it of jurisdiction over those claims, id. at *1, and the Fourth Circuit affirmed. See 896 F.3d 624, 627 (4th Cir. 2018), cert. den. sub nom. Berkley v. FERC, 139 S. Ct. 941 (2019).

Finally, and concurrently with the Virginia action, a group of similarly aggrieved landowners — including two of the very same Plaintiffs in this action — filed suit in this district against MVP and FERC, arguing, *inter alia*, that the certificate program created by the NGA delegates legislative power to the agency in violation of the Constitution. See Bold All., 2018 WL 4681004, at *1; see also id. ECF No. 1 (Bold Alliance Complaint), ¶¶ 81–86. The court dismissed the suit for lack of jurisdiction, concluding that the NGA "provides a specific procedural path for review: seeking a rehearing before FERC, followed by filing a petition for review with the appropriate court of appeals," which the plaintiffs could not bypass by framing their claims as constitutional challenges. Bold All., 2018 WL 4681004, at *1.

C. Factual and Procedural History

Ensuring that this new year would not proceed far without its own MVP-related challenge, Plaintiffs — six landowners whose property interests will be affected by the project — filed their Complaint on January 2, 2020. MVP seeks access to almost three acres of Cletus and Beverly Bohon's property in Ellison, Virginia, for the pipeline. See ECF No. 1 (Complaint),

¶ 1. The Bohons have refused to sell, and MVP now seeks to exercise eminent domain over the property. Id. Similarly, the company proposes to exercise its power to construct an easement over Robert and Aimee Hamm's family home on Bent Mountain in Virginia and to take 5.88 acres of land from Wendell and Mary Flora's farmhouse in Franklin County, Virginia. Id., ¶¶ 2–3.

All three counts of the Complaint allege that the NGA is facially unconstitutional, but for purportedly different reasons. Count I alleges that the Act is infirm because Congress has delegated to FERC "legislative power" in granting the agency "unfettered discretion to . . . grant certificates of public convenience and necessity." Id., ¶¶ 40–47. Count II alleges that the NGA improperly allows FERC to transfer its eminent-domain authority to private entities, which violates "the separation of powers and non-delegation doctrine." Id., ¶¶ 48–53. Count III, pled in the alternative to Count II, asserts that the unconstitutionality lies in the Act's delegation to FERC of the legislative power of exercising eminent-domain authority. Id., ¶¶ 54–64.

Plaintiffs' requested relief is breathtaking in scope. They seek a declaration that: (1) the NGA's delegation of eminent-domain authority to FERC or to any private entity "including MVP" is unconstitutional; (2) FERC has no power to issue certificates to applicants seeking to use the power of eminent domain; and (3) all such certificates previously issued are void. Id. at 14–15. They also request an injunction preventing FERC from issuing further certificates and prohibiting the agency or any private entity from exercising eminent-domain

authority. Id. at 15. Defendants FERC and MVP now separately move to dismiss for lack of jurisdiction or, in the alternative, for failure to state a claim, and Plaintiffs oppose those Motions.

II. Standard of Review

Defendants' Motions invoke the legal standards for dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). When a defendant brings a Rule 12(b)(1) motion to dismiss, the plaintiff must demonstrate that the Court indeed has subject-matter jurisdiction to hear his claims. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992); U.S. Ecology, Inc. v. U.S. Dep't of Interior, 231 F.3d 20, 24 (D.C. Cir. 2000). "Absent subject matter jurisdiction over a case, the court must dismiss [the claim]." Bell v. U.S. Dep't of Health & Human Servs., 67 F. Supp. 3d 320, 322 (D.D.C. 2014). "Because subject-matter jurisdiction focuses on the court's power to hear the plaintiff's claim, a Rule 12(b)(1) motion [also] imposes on the court an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001).

In policing its jurisdictional borders, a court must scrutinize the complaint, treating its factual allegations as true and granting the plaintiff the benefit of all reasonable inferences that can be derived from the alleged facts. See Jerome Stevens Pharms., Inc. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005). The court need not rely "on the complaint standing alone," however, but may also look to undisputed facts in the

record or resolve disputed ones. See Herbert v. Nat'l Acad. of Scis., 974 F.2d 192, 197 (D.C. Cir. 1992).

Rule 12(b)(6), conversely, provides for the dismissal of an action where a complaint fails to "state a claim upon which relief can be granted." Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). For a plaintiff to survive a 12(b)(6) motion, the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555–56.

III. Analysis

Defendants initially argue that the Court lacks subject-matter jurisdiction over Plaintiffs' claims. They also assert that the counts are barred by issue preclusion and *res judicata* and that they fail to state plausible claims for relief. As courts must always ensure themselves of their jurisdiction before proceeding to the merits, the Court will begin and end there.

Defendants contend that the text of the NGA explicitly bars federal district courts from reviewing claims of the nature that Plaintiffs bring here — that is, challenges relating to the natural-gas pipeline-certification process. They argue that this jurisdictional mandate is also implicit in the structure of the NGA's review scheme. Plaintiffs acknowledge that the Act

demands administrative review of FERC's individual decisions but counter that it permits immediate Article III adjudication of related constitutional challenges.

At the outset, the Court notes that the heavy weight of precedential authority lies with Defendants on these questions. As discussed in more detail below, a slew of district courts and two courts of appeals have held that federal district courts do not have subject-matter jurisdiction over constitutional challenges to FERC's actions or enabling statute brought by "aggrieved" parties seeking the injunction of a certificate (or, in this case, every FERC certificate). See, e.g., Berkley, 2017 WL 6327829, at *4 ("[P]laintiffs have not cited a single case where a district court exercised jurisdiction over claims — whether characterized as constitutional challenges or otherwise — that would require a modification of a FERC order if the claims were successful."); N.J. Conservation Found. v. FERC, 353 F. Supp. 3d 289, 299 (D.N.J. 2018) ("[T]he law is indeed 'well-settled' that the NGA's exclusivity provision has broad reach over challenges brought against FERC, including constitutional claims."). Not one has held to the contrary.

Most notably, as mentioned above, the Fourth Circuit has affirmed the dismissal for lack of jurisdiction of a suit almost identical to this one — a nondelegation claim brought against FERC and MVP by homeowners along this very pipeline's proposed path. Berkley, 896 F.3d at 627; Berkley, 2017 WL 6327829, at *2. A court in this district has done the same, dismissing constitutional claims against FERC and MVP brought by two of the same Plaintiffs in this

matter. See Bold All., 2018 WL 4681004, at *4. Sometimes there may be cause to stand out from the crowd, but for the reasons that follow, the Court will side with the collective wisdom here. Its discussion begins with an analysis of the express terms of the Act and then considers its implicit meaning.

A. Express Channeling of Review

"Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider." Jarkesy v. SEC, 803 F.3d 9, 15 (D.C. Cir. 2015) (quoting Bowles v. Russell, 551 U.S. 205, 212 (2007)). "If a special statutory review scheme exists, . . . 'it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies.'" Id. (quoting City of Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir. 1979)).

The NGA has such a special statutory-review scheme, and it expressly applies to Plaintiff's claims. As explained above, any person "aggrieved by an order issued by the Commission" may apply for a rehearing. See 15 U.S.C. § 717r. Only once that administrative process has concluded may the "aggrieved" person petition for review "in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or . . . in the United States Court of Appeals for the District of Columbia." Id. § 717r(b). Upon the filing of such a petition, the appellate court shall have "exclusive" jurisdiction to "affirm, modify, or set aside [the] order." Id. Furthermore, the Act's administrative-exhaustion

requirement forecloses the assertion of new claims not previously considered by the agency. Id.

The NGA's jurisdictional provision is broad. The Supreme Court has interpreted an identical provision in the Federal Power Act to "preclude[ ] *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review.'" City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958) (emphasis added). As the Tenth Circuit has commented, one "would be hard pressed to formulate a doctrine with a more expansive scope" than the "inhering in the controversy" standard. Williams Nat. Gas Co. v. City of Oklahoma City, 890 F.2d 255, 262 (10th Cir. 1989) (applying standard to NGA). Courts have therefore concluded that the NGA provides the "exclusive remedy for matters relating to the construction of interstate natural gas pipelines," "nullifying any procedural alternatives an aggrieved party may otherwise have." Adorers of the Blood of Christ v. FERC, 897 F.3d 187, 195 (3d Cir. 2018), cert. denied, 139 S. Ct. 1169 (2019) (rejecting Religious Freedom Restoration Act claim relating to FERC-approved pipeline).

As homeowners along the proposed pipeline, Plaintiffs qualify as "aggrieved parties" under the Act and therefore should have availed themselves of the NGA's review process. Their standing arguments and the fact that they name MVP as a Defendant make clear that their bone of contention is with the agency's decision to permit MVP to exercise eminent domain over their properties. See Bold All., 2018 WL 4681004, at * 5 (reaching same conclusion concerning

nondelegation challenge brought by homeowners affected by MVP project). The remedy they seek entails this Court's "set[ting] aside" FERC's certificate granted to MVP (along with those granted to all other companies), an authority the NGA grants to only the court of appeals reviewing the FERC order. See 515 U.S.C. § 717r. The Act, moreover, explicitly "allows for district court jurisdiction over certain actions, such as condemnation proceedings." Berkley, 896 F.3d at 630 (citing 15 U.S.C. § 717f(h)). Congress therefore knew how to create exceptions to the statutory-review scheme when it wanted to, and "nothing in the Natural Gas Act indicates" that it intended to create other exceptions "except those . . . specifically set out." Id. In sum, Plaintiffs' constitutional challenges "inhere" in their "controversy" with FERC and MVP over the pipeline, and the NGA explicitly places jurisdiction over this controversy with the agency and ultimately the court of appeals.

Plaintiffs rejoin that they may evade the NGA's jurisdictional provision because they are not challenging a particular FERC order but rather Congress's unconstitutional delegation of legislative authority to FERC generally (and, in turn, to MVP) via the NGA. Arguments of this shade have been rejected by every court to have considered them. See, e.g., Bold All., 2018 WL 4681004 at *4 ("Courts have affirmed the exclusive nature of the FERC procedures time and again."); N.J. Conservation Found, 353 F. Supp. 3d at 299 ("[T]he NGA's exclusivity provision has broad reach over challenges brought against FERC, including constitutional claims."). These courts have reasoned that because "exclusive means exclusive," federal

district judges may not exercise jurisdiction over claims formed not as a direct challenge to an agency order but instead seeking to enjoin an order by other means. See Am. Energy Corp. v. Rockies Express Pipeline LLC, 622 F.3d 602, 605 (6th Cir. 2010) (affirming dismissal for lack of jurisdiction under NGA where landowners sued to enjoin building of pipeline and recover tort damages for conversion).

The Act simply does not "bifurcat[e] . . . judicial review along substantive lines," and for good reason. Williams Nat. Gas Co., 890 F.2d at 262. The exhaustion requirement and the granting of "exclusive" jurisdiction over pipeline approvals "would be entirely undermined if unhappy parties could come to district courts, seeking relief under the [Constitution]." Lovelace v. United States, No. 15-30131, 2016 WL 10826764, at *1 (D. Mass. Feb. 18, 2016). To permit parties to reserve constitutional arguments for a later round of litigation "would negate most of the benefits attending the 'exclusive' scheme of review" — namely, finality and avoidance of piecemeal litigation. Williams Nat. Gas Co., 890 F.2d at 262; see also City of Rochester v. Bond, 603 F.2d 927, 936 (D.C. Cir. 1979) (special-review schemes "disfavor bifurcating jurisdiction over various substantive grounds between district court and the court of appeals" because of "likelihood of duplication and inconsistency").

Bifurcation and duplicative litigation are on display here in spades: Plaintiffs bring a suit nearly identical to one already dismissed by a sister court and call on this Court to enjoin a FERC certificate already approved by the Court of Appeals. For these reasons,

Defendants also offer strong arguments that this litigation is precluded by either *res judicata* or issue preclusion. Because it lacks subject-matter jurisdiction over Plaintiffs' claims, the Court need not reach those issues. That they arise, however, speaks to the duplicative nature of collateral constitutional attacks on FERC's pipeline process brought outside of the administrative-review scheme.

B. Implicit Divesting of Jurisdiction

Even if the statute does not expressly divest the Court of jurisdiction over this case, it does so implicitly. See Adorers, 897 F.3d at 195 (finding that NGA both expressly and implicitly precluded exercise of jurisdiction over RFRA challenge). In Thunder Basin Coal Company v. Reich, 510 U.S. 207 (1994), the Supreme Court devised a two-step framework for ascertaining whether a review scheme such as that at issue here "allocate[s] initial review" of a specific claim "to an administrative body." Id. at 212. A court must consider (i) whether "such intent is 'fairly discernible in the statutory scheme,' and (ii) [whether] the litigant's claims are 'of the type Congress intended to be reviewed within [the] statutory structure.'" Jarkesy, 803 F.3d at 15 (second alteration in original) (quoting Thunder Basin, 510 U.S. at 207, 212).

For the reasons described above — namely, the Act's "exclusive" jurisdictional provision and exhaustion requirement — Congressional intent to channel Plaintiffs' claims to the agency-review process is "fairly discernible" in the NGA. See Berkley, 896 F.3d at 629–30 (text and structure of NGA evince congressional intent to remove district-court

jurisdiction over nondelegation-doctrine claim related to pipeline); see also Adorers, 897 F.3d at 195 ("Congress' intent to vest jurisdiction [over RFRA claim relating to pipeline] in circuit courts is 'fairly discernible' in the [NGA]."). The Court will therefore proceed to the second step: whether Plaintiffs' claims are of the type Congress intended to be reviewed within the statutory structure.

To ascertain whether Congress has implicitly channeled review in such a way, courts consider "[i] if 'a finding of preclusion could foreclose all meaningful judicial review'; [ii] if the suit is 'wholly collateral to a statute's review provisions'; and [iii] if the claims are 'outside the agency's expertise.'" Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 489 (2010) (quoting Thunder Basin, 510 U.S. at 212–13). These considerations are not "distinct inputs in a strict mathematical formula" but rather "general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design." Jarkesy, 803 F.3d at 17. The Court will take each one in turn.

1. *Meaningful Judicial Review*

First, and crucially, a finding of preclusion here does not foreclose "all meaningful judicial review" of claims of the nature Plaintiffs assert. On the contrary, the Act expressly provides for judicial review. See 15 U.S.C. § 717r(b). As many others have done, Plaintiffs could have participated in the MVP-certification process, requested rehearing by the agency, and ultimately appealed to the Circuit, raising constitutional challenges. See Appalachian Voices,

2019 WL 847199, at *2–3 (affirming issuance of certificate to MVP and addressing Fifth Amendment challenges). Plaintiffs' submissions notwithstanding, in deciding petitions for review from agency decisions, the courts of appeals have addressed facial constitutional challenges to a range of statutes, including the NGA. See Metzenbaum v. FERC, 675 F.2d 1282, 1288–89 (D.C. Cir. 1982) (rejecting claim that NGA is facially unconstitutional on petition for direct review from agency); see also Lucia v. SEC, 138 S. Ct. 2044, 2050–51 (2018) (addressing Appointments Clause challenge reviewed by court of appeals after consideration by agency); Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1103–04 (D.C. Cir. 1988) (addressing removal-powers challenge on appeal from agency proceeding); Sorrell v. SEC, 679 F.2d 1323, 1325–26 (9th Cir. 1982) (addressing, on direct review of agency order, challenge that Congress unconstitutionally delegated legislative power to private entity); but see NO Gas Pipeline v. FERC, 756 F.3d 764, 767–69 (D.C. Cir. 2014) (dismissing for lack of jurisdiction claim that Federal Budget Act unduly influences FERC decisionmaking because, unlike the claims here, challenge concerned Budget Act and petitioner did not qualify as "aggrieved party" under NGA).

Plaintiffs counter that because FERC itself is not authorized to render a decision on their constitutional claims in the first instance, they are "deprived of meaningful review" even if a court of appeals can ultimately consider them. They are mistaken. The Supreme Court and D.C. Circuit have made clear that a constitutional challenge does not retain such

"talismanic significance." Jarkesy, 803 F.3d at 18. As the Circuit answered this question in Jarkesy: "Because [the plaintiff's] constitutional claims, including his non-delegation challenge . . . , can eventually reach 'an Article III court fully competent to adjudicate' them, it is of no dispositive significance whether the [agency] has the authority to rule on them in the first instance during the agency proceedings." Id. at 19 (emphasis added); see also Elgin v. U.S. Dep't of Treasury, 567 U.S. 1, 17 (2012) (constitutional claims "could be 'meaningfully addressed in the Court of Appeals,'" even if agency could not adjudicate them in first instance) (quoting Thunder Basin, 510 U.S. at 215); Berkley, 896 F.3d at 631 ("FERC's inability to resolve Plaintiffs' constitutional claims does not mean that the statutory scheme deprives Plaintiffs of meaningful judicial review.").

2. *Wholly Collateral*

Next, Plaintiffs' claims are not "wholly collateral" to the Natural Gas Act's review scheme because, as explained above, they "inhere in the controversy" over the MVP Project. As the Fourth Circuit reasoned in Berkley, the homeowners' constitutional claims supply "the means by which they seek to vacate the granting of the Certificate to Mountain Valley Pipeline." 896 F.3d at 632. Should Plaintiffs be "successful on [their] constitutional claims, the FERC order would necessarily be invalidated." N.J. Conservation Found., 353 F. Supp. 3d at 307; see also Elgin, 567 U.S. at 21–22 (where plaintiff's constitutional claims were "vehicle" by which they sought to reverse agency decision, they were not "wholly collateral" to

statutory-review scheme). In this way, then, they cannot be considered "wholly collateral" to the statutory-review process.

Plaintiff attempts to rebut this conclusion by relying on two cases. Neither is persuasive. In Free Enterprise, the plaintiffs brought an Appointments Clause challenge to the Public Company Accounting Oversight Board established by the Sarbanes-Oxley Act directly in federal district court. See 561 U.S. at 488–90. The Supreme Court held that though the Act created an administrative-review structure, the suit was "wholly collateral" to that scheme, and the district court thus had jurisdiction to consider it. This was so because the plaintiffs' constitutional claim was entirely unrelated to any particular action taken by the Board. Id. Indeed, the plaintiffs there would likely have needed to "bet the farm" and incur a sanction from the Board in order to gain access to that administrative-review scheme. Id. at 490 (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (2007)). Not so here where Plaintiffs could have availed themselves of the agency and ultimately the D.C. Circuit.

Similarly, our Court of Appeals has held that the NGA's judicial-review provision did not apply to a "structural-bias" claim brought by environmentalists asserting that the Budget Act impermissibly encourages FERC to approve natural-gas pipelines. Del. Riverkeeper Network v. FERC, 895 F.3d 102, 107 (D.C. Cir. 2018). While the Circuit did not rely on the Thunder Basin analysis, this systemic challenge to the Budget Act's influence on FERC was unrelated to a FERC Order and was in fact collateral to the NGA

itself. Id.; see also NO Gas Pipeline, 756 F.3d at 769 ("Insofar as [the plaintiff] sets forth a statutory quarrel, its complaint is against the Budget Act and the financial structure that it creates."). The Circuit's "narrow[ ] jurisdictional holding" in Delaware Riverkeeper therefore has no application here. Id.

In sum, the NGA does not channel every person with standing to challenge the statute to FERC, only those "aggrieved by" a specific pipeline-certification issuance who have access to the administrative-review scheme in the first instance.

3. *Outside the Agency's Expertise*

Finally, as to the third factor, "agency expertise may be brought to bear" on Plaintiffs' claims, even though they are constitutional in nature. Am. Fed'n of Gov't Employees, AFL-CIO v. Trump, 929 F.3d 748, 760 (D.C. Cir. 2019) (quoting Jarkesy, 803 F.3d at 29). Plaintiffs argue the converse, noting that FERC retains neither the authority to strike down the NGA on constitutional grounds nor the ability to meaningfully analyze constitutional claims. Yet "an agency's relative level of insight into the merits of a constitutional question is not determinative" in answering this question. Id. at 761 (quoting Jarkesy, 803 F.3d at 28–29). Even though FERC cannot rule on the constitutionality of the NGA, its expertise can "be brought to bear" on "many threshold questions that may accompany a constitutional claim." Elgin, 567 U.S. at 22–23 (quoting Thunder Basin, 510 U.S. at 214–15).

As the Circuit has confirmed, first, the agency "could offer an interpretation of [a statute] in the

course of the proceeding that might answer or shed light on [a] non-delegation challenge." Jarkesy, 803 F.3d at 29. "After all, there are precious few cases involving interpretation of statutes authorizing agency action in which [Article III] review is not aided by the agency's statutory construction." Am. Fed'n of Gov't Employees, 929 F.3d at 761 (quoting Jarkesy, 803 F.3d at 29). Put differently, before it strikes down a statute on the ground that it unconstitutionally delegates legislative power, the court of appeals would likely benefit from the agency's elaboration on how it perceives and exercises that power.

Alternatively, agency review could "'obviate the need to address' broad constitutional and statutory claims" because the agency might resolve the case on "other grounds." Id. (quoting Jarkesy, 803 F.3d at 29). For example, if Plaintiffs had raised their constituitonal claims to the agency in the context of challenging the MVP certificate, FERC might have mooted them by modifying the pipeline order. Allowing a litigant to instead "make an end run" around the "statutory review process" with constitutional claims would therefore "run counter to important principles of judicial restraint." Jarkesy, 803 F.3d at 24 (quoting Storm, Ruger & Co. v. Chao, 300 F.3d 867, 876 (D.C. Cir. 2002)). "[C]ourts generally avoid ruling on constitutional grounds when possible," but "an exception to an otherwise exclusive scheme for constitutional challenges in general, or facial attacks on a statute in particular . . . [,] would encourage respondents in administrative enforcement proceedings to frame their challenges to the Commission's actions in those terms." Id. at 25. District courts would be

forced to proceed full steam ahead and issue nationwide injunctions blocking entire federal regulatory programs because there would be no other way to resolve the claims. See Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (cautioning district courts against issuing nationwide or "universal" injunctions, particularly "without considering their authority to grant such sweeping relief").

Because FERC's expertise can be "brought to bear" on Plaintiffs' constitutional claims, the Court thus sees "no reason to conclude that Congress intended to exempt" the claims from the statutory scheme. Jarkesy, 803 F.3d at 23 (quoting Elgin, 567 U.S. at 23). The Court's finding that the NGA strips it of jurisdiction over Plaintiffs' claims is thus confirmed.

* * *

When Congress creates an intricate statutory-review process that incorporates agency consideration and ultimately an avenue to petition an Article III court, we assume it wants that scheme to control. Id. at 15 (quoting City of Rochester, 603 F.2d at 931). This case is no exception. The NGA's review provisions apply in full force to Plaintiffs' claims, a mandate both explicit in its text and implicit in the review structure it creates. Indeed, this litigation reveals some of the foresight behind Congress's channeling of review to the agency in this way. Plaintiffs have attempted to bifurcate review between Article I and Article III tribunals and circumnavigate the statutory scheme to achieve remedies that would apply nationwide. The Court will decline Plaintiffs' invitation to upend

federal-energy regulation in such dramatic fashion and dismiss their claims because it lacks jurisdiction to consider them.

IV. Conclusion

For the foregoing reasons, the Court grants Defendants' Motions to Dismiss. A separate Order so stating will issue this day.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: May 6, 2020

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 20-6 (JEB)

[Filed May 6, 2020]

CLETUS WOODROW &
BEVERLY BOHON, *et al*.,

Plaintiffs,

v.

FEDERAL ENERGY REGULATORY
COMMISSION, *et al*.,

Defendants.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. Defendant Mountain Valley Pipeline, LLC's Motion to Dismiss is GRANTED;

2. Defendant Federal Energy Regulatory Commission's Motion to Dismiss is GRANTED; and

3. The case is DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: May 6, 2020

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Case No. _______________

[Filed January 2, 2020]

CLETUS WOODROW AND)
BEVERLY ANN BOHON,)
6210 Yellow Finch Lane)
Elliston, Virginia 24087)
)
WENDELL WRAY AND)
MARY MCNEIL FLORA,)
150 Floradale Farms Lane)
Boones Mill, Virginia 24065)
)
and)
)
ROBERT MATTHEW AND)
AIMEE CHASE HAMM,)
10420 Mill Creek Road)
Bent Mountain, Virginia 24059)
)
Plaintiffs,)
)
v.)
)
FEDERAL ENERGY REGULATORY)
COMMISSION)

Serve:	)
888 First Street, NE	)
Washington, DC 20426	)
and	)
NEIL CHATTERJEE	)
in his official capacity as Chairman of the	)
Federal Energy Regulatory Commission,	)
Serve:	)
888 First Street, NE	)
Washington, DC 20426	)
	)
and	)
MOUNTAIN VALLEY PIPELINE, LLC	)
Serve:	)
Registered Agent:	)
CT CORPORATION SYSTEM	)
4701 Cox Rd Ste 285	)
Glen Allen, VA, 23060 – 6808	)
Defendants.	)
	)

COMPLAINT

COME NOW the Plaintiffs, Cletus Woodrow and Beverly Ann Bohon (the "Bohons"), Wendell Wray and Mary McNeil Flora (the "Floras"), and Robert Matthew and Aimee Chase Hamm (the "Hamms"), by counsel, and file this Complaint against the Defendants, the Federal Energy Regulatory Commission ("FERC") and Mountain Valley Pipeline, LLC ("MVP"). In support thereof, the Plaintiffs allege as follows:

PARTIES

1. The Bohons are residents of Montgomery County, Virginia, and own two tracts of land sought by MVP (Montgomery County Tax Map Parcel No. 030271 and MVP Parcel No. VA-MN-5233, and Montgomery County Tax Map Parcel No. 017761 and MVP Parcel No. VA-MO-022). MVP seeks to take approximately 0.19 and 2.74 acres of land in Elliston, VA, owned by the Bohons for the MVP pipeline project. The property is at the base of Poor Mountain. Cletus, a bluegrass musician, lives on Yellow Finch Lane with his wife, Beverly. The property contains springs that water vegetable gardens and a weeping cherry tree, affectionately known as "Miss Magnificent," a memorial to Cletus' late father. The MVP project will bisect the Bohons' property and cause damage. Because the Bohons have refused to willingly sell their property interests by contract, MVP seeks to exercise its power of eminent domain under the NGA.

2. The Floras are residents of Franklin County, Virginia (Tax Map Parcel No. 0380002000 and MVP Parcel No. VA-FR-017.21). Wendell Wray, a retired Franklin County Sheriff's Deputy, and Mary McNeil, a retired Roanoke County schoolteacher, live on a fourth generation family farm. Wendell has lived on this land his entire life, and Wendell and Mary have lived there together as a married couple for over 40 years. The old family farmhouse and outbuildings, as well as the Floras' ranch home are situated downstream from the pipeline. The farm is approximately 53 acres. MVP seeks to take 5.88 acres of land for its pipeline project. MVP's taking has caused and will continue to cause

damage to the Floras' land. Because the Floras have refused to sell their property interests to MVP, MVP seeks to take the land by exercising its power of eminent domain under the NGA.

3. The Hamms are residents of Roanoke County, Virginia, and own 7.852 acres of land on Bent Mountain (Tax Map No. 110.00-1-56.1 and described in deed recorded as Instrument No. 200405721). The Hamms maintain their custom-built family home on the secluded land, which they share with seven horses, six dogs, and several children. MVP seeks to take an access easement of 0.15 acres via eminent domain proceedings in federal court. This easement will cause damage to the Hamms' land and involve transformation of the property, including excavation and widening of the road. The Hamms have refused to willingly sell their property interests by contract to MVP and MVP therefore seeks to take the land by exercising its power of eminent domain under the NGA.

4. Defendant FERC is a federal agency that regulates the interstate transmission of electricity, natural gas, and oil. FERC also reviews proposals to build liquefied natural gas terminals and interstate natural gas pipelines and grants certificates of convenience and public necessity to applicants it deems qualified to develop such projects. FERC is headquartered at 888 First Street, N.E., Washington, D.C. 20426. FERC's Chairman, Neil Chatterjee, performs his official duties at FERC's headquarters in Washington, D.C.

5. Defendant MVP is a limited liability company duly organized and existing under the laws of the State

of Delaware. MVP is a joint venture between affiliates of EQT Midstream Partners, LP; NextEra Energy US Gas Assets, LLC; WGL Midstream, Inc.; Vega Midstream MVP LLC; and RGC Midstream, LLC. MVP is authorized to conduct business in the Commonwealth of Virginia. MVP's principal office is located at 625 Liberty Avenue, Suite 1700, Pittsburgh, Pennsylvania 15222-3111.

JURISDICTION AND VENUE

6. Under 28 U.S.C. §1331, this Court has subject matter jurisdiction over this action because it arises under federal law—namely, Articles I, II, and III of the Constitution of the United States, the non-delegation doctrine, the separation of powers doctrine, and 15 U.S.C. § 717 *et seq*., the Natural Gas Act of 1938 ("NGA").

7. Under 28 U.S.C. § 1391, venue is proper because a substantial part of the events or omissions giving rise to the claim occurred in this district, Director Chatterjee of FERC performs his official duties in this district, and both defendants are subject to the court's personal jurisdiction with respect to the actions raised herein.

8. In addition, while actions challenging ***agency*** decisions must be appealed within the agency until all available remedies therein are exhausted, actions centering wholly on the constitutionality of ***Congress's*** actions and Congressional legislation may only be brought in federal district court. *Delaware Riverkeepers Network v. FERC*, 895 F.3d 102, 107 (D.C. Cir. 2018);

NO Gas Pipeline v. FERC, 756 F.3d 764 (D.C. Cir. 2014).

STATEMENT OF FACTS

9. Congress, a ***legislative*** body of the federal government sitting in Washington, D.C., passed the NGA in 1938.

10. In 1947, Congress amended the NGA to enable "the Commission"[1] to issue a "certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas." 15 U.S.C. § 717f.

11. Under the NGA, the recipient of a certificate of public convenience and necessity ("holder") also acquires the right of eminent domain. 15 U.S.C. § 717f(h).

FERC's Creation as An Arm of the Executive Branch

12. FERC, a federal agency, is an arm of the ***executive*** branch of the federal government composed of "up to five commissioners who are appointed by the President of the United States with the advice and consent of the Senate."

13. As FERC's commissioners are unelected, FERC is an unelected regulatory body.

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[1] The "Commission" refers to the Federal Energy Regulatory Commission ("FERC"), which is the successor to the Federal Power Commission.

14. Article I of the United States Constitution vests all legislative powers in Congress. Thus, only the legislative branch of government can create laws. Because FERC is not part of the legislative branch, FERC has no authority to create law.

Congress's Delegation of Power to FERC Via The NGA

15. In passing the NGA, Congress delegated to FERC massive authority to exercise legislative power to determine when the right of eminent domain should be conveyed to an applicant without drafting legislation to guide FERC in carrying out Congress's will.

16. Instead, Congress deferred entirely to FERC, allowing the agency to unilaterally create and impose its own standards, tests, and rules for determining who can sell or transport natural gas, how much they can charge for their products and services, and to whom they can sell them.

17. For example,

a. Under 15 U.S.C. § 717b(a), no entity may import or export natural gas without first obtaining FERC's permission. FERC is unilaterally empowered to determine whether doing so would be "consistent with the public interest" and to impose conditions for approval that FERC "find[s] necessary or appropriate."

b. Under 15 U.S.C. § 717c(a), FERC is empowered to declare unlawful any rate or regulation affecting rates that FERC determines are not "just and reasonable." Congress provides no

criteria in the NGA to guide FERC in determining what rates are "just and reasonable."

c. Under 15 U.S.C. § 717d(a), FERC may order a natural-gas company to change the rate it charges for transporting or selling natural gas if FERC determines that the rate is "unjust, unreasonable, unduly discriminatory, or preferential . . . ."

d. Under 15 U.S.C. § 717f(a), FERC may order a natural-gas company to "extend or improve its transportation facilities," connect those facilities with those of other natural-gas distributors, and sell natural gas to those natural-gas distributors if FERC unilaterally determines that "no undue burden will be placed upon such natural-gas company thereby" and that complying with FERC's orders would not "impair [the natural-gas company's] ability to render adequate service to its customers." Again, Congress provided no criteria by which FERC should evaluate what constitutes an "undue burden" or "adequate service."

18. Most significantly here, 15 U.S.C. § 717f(e) delegates to FERC Congress's legislative powers by empowering FERC to issue "certificates of public convenience and necessity" to entities wishing to construct or extend natural-gas facilities. As discussed, *infra*, these certificates are used by natural-gas companies to exercise eminent domain authority under 15 U.S.C. § 717f(h).

19. Congress did not provide FERC with any fixed standard or even an "intelligible principle" to guide FERC in determining whether or under what

conditions to grant a certificate to an applicant. Instead, Congress directed FERC to issue certificates to those applicants whom ***FERC*** determines are "qualified" and "able and willing… to perform the service proposed" and to obey FERC's rules so long as ***FERC*** determines that the proposed service "is or will be required by the present or future public convenience and necessity."

20. Instead of defining what a "qualified" applicant looks like (i.e., "A qualified applicant shall meet hypothetical requirements *A, B*, and *C* . . ."), Congress stated that an applicant is "qualified" based on its willingness and ability to comply with "the requirements, rules, and regulations **of the Commission**" (as opposed to requirements or standards set forth by Congress). 15 U.S.C. § 717f(e) (emphasis added).

21. ***FERC's*** test that it created to determine which applicant is "qualified" to receive a certificate is outlined in FERC's "Statement of Policy." *See* **Exhibit A**.

22. FERC created this test without any guidance from Congress. Congress, in other words, provided FERC with no test or fixed standards to guide FERC in developing its criteria for deciding which applicants are qualified to exercise the inherently coercive power of eminent domain.

The Delegation of Eminent Domain Power to Private Entities Such As MVP

23. An applicant who meets FERC's internally designed tests for public convenience and necessity obtains from FERC a Certificate, which conveys the power of eminent domain to the applicant as follows:

> **When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct**, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, **it may acquire the same by the exercise of the right of eminent domain** in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

15 U.S.C. § 717f(h) (emphasis added).

24. Thus, in situations where landowners refuse to sell their property interests to certificate holders, the NGA empowers such holders to forcibly "take" the landowners' property against their will through eminent domain proceedings in federal court, even in circumstances where, as here, the taking is for private gain.

25. Eminent domain power is traditionally an inherently coercive governmental power by which the sovereign forcibly seizes or "takes" private property without the landowner's consent for the sake of the "public good" (i.e., "public use").

26. Eminent domain power is a legislative power.

27. MVP applied for and obtained a Certificate of Public Convenience and Necessity from FERC. FERC issued the Order on October 13, 2017, permitting MVP to construct, maintain, and operate a natural gas pipeline along a route selected by MVP.

28. The Plaintiffs own property along that route and are unwilling to convey their property interests to MVP.

29. Because MVP has not been able to convince the Plaintiffs to convey their property interests willingly by contract, MVP has filed actions seeking to exercise its unlawfully delegated "right" of eminent domain to forcibly take the Plaintiffs' property against their wishes.

30. On October 24, 2017, MVP filed an action to condemn an easement along the approved route under section 7 of the NGA. While the route has gone through several changes since the initial proposal and certification, the pipeline's planned construction, operation, and maintenance impacts the property interests of all the Plaintiffs.

Revival of the Federal Non-Delegation Doctrine.

31. The federal non-delegation doctrine has been dormant (but not dead) for 84 years.

32. However, as recently as June 2019, the United States Supreme Court recognized that despite the rarity of its invocation to invalidate legislation, the non-delegation doctrine remains a valid principle of constitutional law on the federal level. *See Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (where the plurality noted that "The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.") (Kagan, J., joined by Ginsberg, J., Breyer, J., and Justice Sotomayor).

33. The three-member dissent in *Gundy* also recognized the existence, validity, and importance of the non-delegation doctrine as follows:

> While it's been some time since the Court last held that a statute improperly delegated the legislative power to another branch—thanks in no small measure to the intelligible principle misadventure—the Court has hardly abandoned the business of policing improper legislative delegations. When one legal doctrine becomes

> unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. And that's exactly what's happened here. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names.

Id. at 2141 (Gorsuch, J., dissenting, joined by Thomas, J. and Chief Justice Roberts).

34. The non-delegation doctrine is derived from Articles I, II, and III of the United States Constitution, which establish and define the separation of powers between the three branches of government. *Id.* at 2123 ("Article I of the Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.' §1. Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch 'powers which are strictly and exclusively legislative.' *Wayman v. Southard,* 23 U.S. 1, 10 Wheat. 1, 42-43, 6 L. Ed. 253 (1825)").

35. The non-delegation doctrine prohibits Congress from delegating power to an executive agency without constitutionally adequate limitations or standards restricting the delegation.

36. The test currently used to determine whether the delegation is overly broad and unconstitutional is the "intelligible principle" test. *Gundy,* 139 S. Ct. at 2123 ("The constitutional question is whether Congress has supplied an intelligible principle to guide the

delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.") (Kagan, J.).

37. Three other Justices in *Gundy* also recognized the validity of the non-delegation doctrine, but held that the intelligible principle standard was far too lenient.[2] That group of Justices would instead impose stricter standards on Congressional delegations of power. *See Gundy*, 139 S. Ct. at 2135.

38. Because the ninth Justice, Justice Kavanaugh, did not take part in the decision, Justice Alito also applied the intelligible principle standard, but indicated a willingness to revisit the issue in a future case with a full Court. *Id*. at 2131 ("If a majority of this Court were willing to reconsider the approach we have

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[2] *Id*. at 2139 (Gorsuch, J., dissenting)

> Still, it's undeniable that the "intelligible principle" remark eventually began to take on a life of its own. We sometimes chide people for treating judicial opinions as if they were statutes, divorcing a passing comment from its context, ignoring all that came before and after, and treating an isolated phrase as if it were controlling. But that seems to be exactly what happened here. For two decades, no one thought to invoke the "intelligible principle" comment as a basis to uphold a statute that would have failed more traditional separation-of-powers tests. In fact, the phrase sat more or less silently entombed until the late 1940s. Only then did lawyers begin digging it up in earnest and arguing to this Court that it had somehow displaced (*sub silentio* of course) all prior teachings in this area.

taken for the past 84 years, I would **<u>support</u>** that effort.") (Alito, J., concurring) (emphasis added).

39. Justice Kavanaugh has since indicated that he would join Justice Alito and the *Gundy* dissent to form a majority to revisit the proper test to apply in non-delegation challenges. *Paul v. United States*, 589 U.S. __ (2019) (cert denied).

<u>COUNT I: FACIAL CONSTITUTIONAL CHALLENGE TO *CONGRESS'S* OVERLY BROAD DELEGATION OF LEGISLATIVE POWER TO FERC</u>

40. Plaintiffs repeat and re-allege paragraphs 1-39 of this Complaint as if fully set forth herein.

41. The delegation of legislative power by Congress to FERC via 15 U.S.C. § 717f of the NGA was and is overly broad under Articles I, II, and III of the Constitution of the United States of America, the non-delegation doctrine, and the separation of powers doctrine derived therefrom.

42. This delegation of power by Congress to FERC is facially unconstitutional because Congress did not provide sufficiently definite guidance to FERC to enable FERC to determine whether and how to grant certificates of public convenience and necessity to applicants.

43. By delegating to FERC unchecked and unfettered discretion to determine whether to grant certificates of public convenience and necessity, Congress has unlawfully delegated to FERC the legislative power to create law without sufficient

guidance, limitations, or criteria from Congress to ensure that FERC is doing Congress's will and not its own.

44. The delegation of legislative power by Congress to FERC does not meet the intelligible principle test currently used to determine whether delegations of power to executive agencies are constitutional.

45. Even if the delegation of power by Congress to FERC meets the intelligible principle test, that test is itself unconstitutional under Articles I, II, and III of the Constitution (separation of powers doctrine), which impose stricter standards on the scope of delegations to executive agencies.

46. Instead of imposing its own criteria and congressional standards for determining which applicants are worthy of wielding such an inherently coercive power, Congress broadly delegated that legislative authority to FERC—an unaccountable, unelected executive agency—thus allowing Congress to distance itself from potential political uproar resulting from unpopular takings of private property.

47. Because the delegation of legislative power by Congress to FERC via 15 U.S.C. § 717f of the NGA was and is overly broad and unconstitutional, FERC has no authority to create policies or tests to determine how and when to issue certificates to applicants seeking to invoke the power of eminent domain. All such certificates already issued are void *ab initio*.

COUNT II: FACIAL CONSTITUTIONAL CHALLENGE TO *FERC'S* SUB-DELEGATION OF EMINENT DOMAIN POWER TO PRIVATE ENTITIES, INCLUDING MVP

48. Plaintiffs repeat and re-allege paragraphs 1-47 of this Complaint as if fully set forth herein.

49. Counts II and III are pleaded in the alternative.

50. 15 U.S.C. § 717f(h) empowers FERC to delegate to private entities, such as MVP, Congress's power of eminent domain.

51. This delegation of delegated powers to private entities violates the separation of powers and non-delegation doctrines and is therefore facially unconstitutional. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 405-06 (1928) ("*Delegata potestas non potest delegari,*" meaning "one to whom power is delegated cannot himself further delegate that power.").

52. *Even if* the power of eminent domain were not legislative power, it would still be an inherently public power that cannot be sub-delegated to a private actor.

53. Because all sub-delegations of eminent domain power by FERC via 15 U.S.C. § 717f(h) of the NGA are facially unconstitutional, FERC has no authority to issue certificates to applicants seeking to invoke the power of eminent domain and all such certificates already issued are void *ab initio*.

COUNT III: FACIAL CONSTITUTIONAL CHALLENGE TO *CONGRESS'S* DELEGATION OF EMINENT DOMAIN POWER TO PRIVATE ENTITIES, INCLUDING MVP

54. Plaintiffs repeat and re-allege paragraphs 1-47 of this Complaint as if fully set forth herein.

55. Counts II and III are pleaded in the alternative.

56. Pleading, in the alternative, that 15 U.S.C. § 717f delegates the public power of eminent domain ***directly*** from Congress to the applicant (i.e., from Congress directly to a private actor, such as MVP, as opposed to delegating it first to FERC and then to a private entity), such a direct delegation of eminent domain power by Congress to any private entity is facially unconstitutional.

57. Eminent domain power is legislative power. *See, e.g.*, I William Blackstone, *Commentaries on the Laws of England,* *135.

58. The delegation of legislative power by Congress to a private entity is facially unconstitutional. *See, e.g., DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 62 (2015) ("When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with 'legislative Powers.' Art. I, §1. Nor are they vested with the 'executive Power,' Art. II, §1, cl. 1, which belongs to the President.") (Alito, J., concurring) (discussing the non-delegation doctrine's prohibition on delegations of governmental powers to private entities).

59. The exercise of eminent domain power is particularly obnoxious when a private entity seeks to exercise that power for private gain.

60. Eminent domain, by its very nature, is the forcible taking of private property by the sovereign—a process in which the individual's sacred right to property is sacrificed for the public good.

61. The power of eminent domain is thus an inherently coercive, governmental power, much like the power to tax. It is a public power inherent to the sovereign and enforced by the power to seize land by force in the absence of the landowner's consent.

62. Due to the very public nature of the power of eminent domain, it is inherently incompatible for it to be exercised by a private entity.

63. Thus*, even if* the power of eminent domain were not legislative power, it would still bean inherently public, coercive governmental power that could not be delegated to a private actor.

64. Congress's delegation of this inherently coercive and public power of eminent domain to any private actor violates the non-delegation doctrine and is therefore facially unconstitutional. All such certificates already issued to private actors are void *ab initio*.

WHEREFORE, the Plaintiffs respectfully pray that this Court enter a declaratory judgment in their favor against the Defendants declaring that Congress's overly broad delegation of legislative powers to FERC was and is facially unconstitutional; that any delegation of eminent domain power (whether via a

sub-delegation from FERC or a direct delegation from Congress) to any and all private actors, including MVP, is facially unconstitutional; that FERC has no authority to issue certificates to applicants seeking to invoke the power of eminent domain to take property; and that all such certificates already issued are void *ab initio;* further, that this Court enter an injunction preventing FERC from acting upon its delegated powers and issuing certificates and preventing certificate-holders from exercising the power of eminent domain using void certificates; as well as any other relief that this Court deems just and proper.

Respectfully submitted this 2nd day of January, 2020

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APPENDIX H

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 1

Section 1.

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. art. II, § 1, Clause 1

Section 1.

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

U.S. Const. art. III, § 1

Section 1.

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

15 U.S.C. § 717r(b)

(b) Review of Commission order
Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to

affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

28 U.S.C. § 1331 - Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Fiscal Responsibility Act, Section 324

PUBLIC LAW 118–5—JUN. 3, 2023
137 STAT. 47

SEC. 324. EXPEDITING COMPLETION OF THE MOUNTAIN VALLEY PIPELINE.

(a) DEFINITION OF MOUNTAIN VALLEY PIPELINE.—In this section, the term "Mountain Valley Pipeline" means the Mountain Valley Pipeline project, as generally described and approved in Federal Energy Regulatory Commission Docket Nos. CP16–10, CP19–477, and CP21–57.

(b) CONGRESSIONAL FINDINGS AND DECLARATION.—The Congress hereby finds and declares that the timely completion of construction and operation of the Mountain Valley Pipeline is required in the national interest. The Mountain Valley Pipeline will serve demonstrated natural gas demand in the Northeast, Mid-Atlantic, and Southeast regions, 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.

(c) APPROVAL AND RATIFICATION AND MAINTENANCE OF EXISTING AUTHORIZATIONS.—Notwithstanding any other provision of law—

(1) Congress hereby ratifies and approves all authorizations, permits, verifications, extensions, biological opinions, incidental take statements, and any other approvals or orders issued pursuant to

Federal law necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline; and

(2) Congress hereby directs the Secretary of the Army, the Federal Energy Regulatory Commission, the Secretary of Agriculture, and the Secretary of the Interior, and other agencies as applicable, as the case may be, to continue to maintain such authorizations, permits, verifications, extensions, biological opinions, incidental take statements, and any other approvals or orders issued pursuant to Federal law necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline.

(d) EXPEDITED APPROVAL.—Notwithstanding any other provision of law, not later than 21 days after the date of enactment of this Act and for the purpose of facilitating the completion of the Mountain Valley Pipeline, the Secretary of the Army shall issue all permits or verifications necessary—

(1) to complete the construction of the Mountain Valley Pipeline across the waters of the United States; and

(2) to allow for the operation and maintenance of the Mountain Valley Pipeline.

(e) JUDICIAL REVIEW.—

(1) Notwithstanding any other provision of law, no court shall have jurisdiction to review any action taken by the Secretary of the Army, the Federal Energy Regulatory Commission, the Secretary of

Agriculture, the Secretary of the Interior, or a State administrative agency acting pursuant to Federal law that grants an authorization, permit, verification, biological opinion, incidental take statement, or any other approval necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline, including the issuance of any authorization, permit, extension, verification, biological opinion, incidental take statement, or other approval described in subsection (c) or (d) of this section for 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.

(2) The United States Court of Appeals for the District of Columbia Circuit shall have original and exclusive jurisdiction over any claim alleging the invalidity of this section or that an action is beyond the scope of authority conferred by this section.

(f) EFFECT.—This section supersedes any other provision of law (including any other section of this Act or other statute, any regulation, any judicial decision, or any agency guidance) that is inconsistent with the issuance of any authorization, permit, verification, biological opinion, incidental take statement, or other approval for the Mountain Valley Pipeline.

APPENDIX I

Joe Manchin
OpEd

MAY 20, 2023

PERMITTING REFORM NECESSARY FOR AMERICA'S FUTURE

America's permitting process is broken, consumed by bureaucratic delays and endless litigation at every turn. Our inability to permit projects in West Virginia and across the country on a timely basis is not only harming our energy security and ability to provide for ourselves, it's also hurting our national security and ability to reduce our reliance on foreign adversaries who do not share our values. We only have to look at Putin's ability to cripple much of Europe by cutting off Russia's energy exports to see what happens if we continue down this road of, or open up the door to, dependence on countries like China, Russia, Iran, and other bad actors for our energy.

For years, I have been working in a bipartisan way to address our country's broken permitting system. Over the past year, as West Virginia's senior senator and the chairman of the Senate Committee on Energy and Natural Resources, I have been proud to reignite and lead the effort on bipartisan, comprehensive permitting reform, and I continue to work with the president and congressional leaders to secure the enactment of commonsense permitting reforms. Because of the

crippling impacts of a broken system, I continue to urge my colleagues to come together around a bipartisan solution as quickly as possible.

Last summer, after securing a commitment to get permitting reform done, I introduced legislation that would enable the United States to build the infrastructure we need to ensure our energy and national security. Throughout the fall, I worked with a bipartisan group of senators to make adjustments that incorporated feedback from my Republican colleagues. As a result of these compromises, 40 Democrats and seven Republicans voted to include my comprehensive, and truly bipartisan, energy permitting reform legislation in the 2022 National Defense Authorization Act. Notably, that legislation was also supported by the chairman and ranking member of the Senate Environment and Public Works Committee.

While we need 60 votes in the U.S. Senate to enact a law, when you can get 47 bipartisan senators to agree on anything, it's a sure sign that Congress knows there's a problem we need to fix. That's why I have reintroduced that legislation, the Building American Energy Security Act of 2023, to restart conversations around permitting reform. As the only comprehensive Senate permitting bill to have received bipartisan support, it is a great starting point.

For generations, West Virginians have been proud to punch above our weight to mine the coal that forged the steel that built the tanks and ships that powered our nation to greatness. West Virginia coal miners and their families have sacrificed so that our country could industrialize and grow to become the superpower of the

world. An improved permitting process will ensure West Virginia is able to continue reliably powering the rest of the nation like we have proudly done for hundreds of years.

As all four Federal Energy Regulatory Commission commissioners testified before the Senate Energy Committee, we cannot eliminate coal today or in the near future if we want to have a reliable electric grid. I also continue to work to ensure that newer energy industries like hydrogen and advanced nuclear see the tremendous benefits that investing in West Virginia will provide.

It's for that reason that I provided $8 billion for hydrogen hubs through my committee, ensuring that one must be in the Appalachian region, and have authored bipartisan laws to help bring advanced nuclear to re-power coal plants that have closed and provide jobs and economic opportunities to these communities. But this is all for nothing if we can't get our permitting processes to work for us, not against us.

Unfortunately, in West Virginia, we've seen up close the consequences of our broken permitting system through the drawn-out permitting process for the Mountain Valley Pipeline. With only 20 miles left until the pipeline is finally finished, the project has been undergoing litigation and permitting re-dos for more than eight years, including six Environmental Impact Studies and nine court cases in the Fourth Circuit.

This delay is preventing 2 billion cubic feet of natural gas per day from entering the market that would help keep global supply and demand balanced, bring in $40

million annually in new tax revenue for West Virginia and bring in more than $300 million more per year in royalties for West Virginia landowners. That's on top of the approximately 2,500 construction jobs that are on hold while the Mountain Valley Pipeline is litigated over and over again.

And MVP is just the tip of the iceberg. All across our great nation, all types of energy and mineral projects — including fossil fuels like natural gas, oil, and coal, but also wind and solar and critical minerals projects that will be needed for new energy technologies of the future — are tied up in unnecessary litigation and a disjointed, lengthy and repetitive permitting process that subjects vital projects to rounds and rounds of red tape and reviews that only solidify our reliance on foreign supply chains.

As chairman of the Senate Energy and Natural Resources Committee, I held a hearing last week to look at opportunities for Congress to reform the permitting process and it became clear: just as we did with the Bipartisan Infrastructure Bill, we all need to sit down and negotiate in good faith to do what our country needs and craft a truly bipartisan permitting reform bill instead of focusing on whose name is on the bill.

To continue making the case to the administration and congressional leaders, I will hold more sector-specific energy permitting hearings in the weeks ahead to learn more about the issues these projects face and inform our work. Make no mistake, actually getting something done will require compromise and prioritization. Many ideas that are priorities for some senators are strongly

opposed by others. But we cannot let the pursuit of the perfect bill mean we fail once again in getting a good, impactful bill signed into law.

Americans of all walks of life expect the lights to turn on when we flip the switch. We expect the gas station to be able to sell us fuel to get to work. And why shouldn't we? America is the superpower of the world, the richest nation in history, and yet, our electric grid and the reliable energy supply that all Americans count on is being threatened because it takes five, 10, or even 15 years to build the infrastructure we need to produce and transport energy across our great nation. Without comprehensive permitting reform we risk jeopardizing the energy security our country needs to be the superpower of the world.

Let me be clear: the road ahead to enact meaningful permitting reforms is not easy, but if we put partisan politics aside and truly work on behalf of all West Virginians and the American people, like they deserve, then we can find a solution that strengthens our energy security and ensures America remains a global energy leader.

By: Senator Joe Manchin
Source: Wheeling Intelligencer