No. 23-1053

In the
Supreme Court of the United States

CLETUS WOODROW BOHON, BEVERLY ANN BOHON, WENDELL WRAY FLORA, MARY MCNEIL FLORA, ROBERT MATTHEW HAMM AND AIMEE CHASE HAMM,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION AND MOUNTAIN VALLEY PIPELINE, LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Supreme Court

BRIEF OF YOUNG AMERICA'S FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

Young America's Foundation ("YAF") is a 501(c)(3) nonprofit educational organization whose mission is to educate and inspire young Americans with the ideas of individual freedom, free speech, free enterprise, and traditional values. YAF is all too familiar with the importance of the right to seek judicial review, as YAF occasionally must seek such redress for constitutional violations on high school and college campuses when school administrators infringe upon individual rights. *See, e.g., University At Buffalo Young Americans For Freedom, et al. v. University At Buffalo Student Association Inc., et al.*, Case 1:23-cv-00480-LJV (U.S.D.C., W.D. N.Y., filed June 1, 2023). Furthermore, YAF believes that private property is inextricably intertwined with individual liberty. To deprive an individual of his or her private property jeopardizes personal liberties; therefore, such deprivations must be carefully scrutinized. The growth of government does not diminish but emphasizes the Court's duty to enforce Article III rights and principles of accountability for those in power. YAF files this amicus in support of the Petitioners.

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[1] Pursuant to SUP. CT. R. 37.2, amicus certifies that notice was provided to all parties of record of YAF's intention to file this brief on April 15, 2024, 10 days prior to the brief due date. In accordance with SUP. CT. R. 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

I. SUMMARY OF ARGUMENT

Non-Delegation is an essential component of the Separation of Powers doctrine. It ensures that each branch of government acts within its own sphere of power, and it ensures that one branch of government does not accumulate the power of the other branches of government. Specifically, as it relates to legislative power, non-delegation promotes accountability of Congress to the electorate, and it prevents Congress from allowing Article I powers to be exercised by the Executive. Petitioners' challenge implicates these important constitutional issues and thus deserves to be heard in an Article III Court. Agency review should not be permitted in this case because the agency does not have the requisite knowledge or expertise to resolve the Petitioners' constitutional claim.

Indeed, the alleged obstacles to hearing Petitioners' claim in federal court, whether it be statutory restrictions on jurisdiction or the FERC's statutory review scheme itself, do not apply in this case. This Court in *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023), provided lower courts a clear roadmap for analyzing a claim like the Petitioners'. Working through that legal framework yields a simple result: Petitioners are permitted to bring their challenge directly in federal court because Congress has not stripped the federal courts of jurisdiction over such constitutional claims and the claim itself does not directly implicate a specific agency action. In short, the courthouse doors remain open to Petitioners'

claim that Congress has run afoul of its constitutional limitations in delegating legislative authority to the FERC.

II. ARGUMENT

I. The Non-Delegation Doctrine Is An Essential Component To The Separation Of Power Doctrine, Which Serves to Safeguard And Protect The Personal Liberties Of The People.

Separation of Powers is one of the tools utilized by the Framers of the Constitution to protect the personal liberties of the People from an overbearing federal government. The Framers provided several warnings regarding the dangers of the powers of the various branches of government collecting under a single roof. As Madison famously opined, "[t]he accumulation of all powers, legislative, executive, and judicial, in the same hands, . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 249 (James Madison) (George W. Carey & James McClellan ed., 2001). Relying on Montesquieu, Madison continued: "There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates." *Id.* at 250. The danger being that a single person or body enacting and enforcing the law would be more apt to enact a tyrannical law and execute the law in a tyrannical manner. *See Id.* at 251.

To prevent such a concentration of power from occurring, each branch of government was vested with authority to act in individual spheres of

government. *See* U.S. CONST. art. 1, § 1, cl. 1 (vesting all legislative authority to Congress); U.S. CONST. art. 2, § 2, cl. 1 (vesting all executive authority in the President); U.S. CONST. art. 3, § 1 (vesting all judicial power in the Supreme Court and inferior Courts). "These grants are exclusive" such that "[w]hen the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it." *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring).

This exclusive grant of power was understood to mean that Congress could not divest itself of its powers that are legislative in nature. As John Locke noted, "[t]he Legislative can have no power to transfer their authority of making laws, and place it in other hands." JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 75 (C.B. Macpherson ed. 1960). Madison added that "The magistrate in whom the whole executive power resides cannot of himself make a law . . . ." THE FEDERALIST NO. 47 at 251 (James Madison) (George W. Carey & James McClellan ed., 2001). This understanding of Separation of Powers has generally prevailed throughout this Court's jurisprudence.[2]

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[2] *See Wayman v.* Southard, 23 U.S. 1, 42 (1825) ("It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative"); *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power of the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution"); *A.L.A. Schechter Poultry Corp. v. United*

Non-delegation of legislative authority also ensures that Congress remains accountable to the People for legislative enactments that negatively impact the People. Non-delegation prevents lawmakers from shielding themselves from unpopular legislative decisions—by simply allowing an agency to make those decisions. As Justice Gorsuch has aptly pointed out: "nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials." *National Federation of Independent Business v. OSHA*, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring); *see also Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting). Allowing Congress to delegate the rule-making authority to agencies

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States, 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested"); *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("[T]he system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another Branch") (internal quotations omitted); *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) ("Chief among these freedoms from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers"); *Association of American Railroads*, 575 U.S. at 68-69 (Thomas, J., concurring) ("Congress improperly 'delegates' legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power . . . there are certain core functions that require the exercise of legislative power . . . ."); *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) ("[I]t would frustrate the system of government ordained by the Constitution if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.") (internal quotations omitted).

tempts Congress to resolve important "pressing social problem[s] by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measure he chooses to pursue."[3] *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). This lack of accountability could not have been what was envisioned by the Framers of the Constitution.

The lack of accountability is even clearer in the case presented by the Petitioners. In this case, it is not an agency of the executive that is acting to condemn the property of the Petitioners. Under the Natural Gas Act ("NGA") Congress delegated authority to the Federal Energy Regulatory Commission ("FERC") to determine when the power to condemn property should be given to a private entity. The FERC then gave that authority to the Mountain Valley Pipeline ("MVP") company, in the

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[3] It is not lost upon the authors how easily Justice Gorsuch's words could be applied in the context of the Petitioners case. Congress in passing the Natural Gas Act delegated expansive powers to the executive to determine which private entities have the power to condemn private property for the transportation of natural gas in interstate commerce. *See* 15 U.S.C. §717f. This presents a solution to the important social problem of ensuring that citizens have the natural gas needed for their homes and vehicles. However, if Petitioners—whose land has been condemned by a private company under the authority of FERC due to the power delegated to FERC by Congress—call their Congressperson to complain about the condemnation of their property. The Congressperson is able; in a Pontius Pilate-esque manner; to wash their hands of the matter by claiming it's the Agency's conduct that has condemned the Petitioners land not Congress. Thus, shielding Congress from the political backlash that could arise from the situation the Petitioners find themselves in.

Petitioners' case, to condemn property. MVP then acted upon that authority and condemned Petitioners' property. Who are Petitioners to turn to when a Private Company condemns their property, under the authority of an executive agency, which was acting under the improperly and unconstitutionally delegated authority of Congress? The answer can only be an Article III Court.

II. It Is The Role Of An Article III Court To Determine Whether Congress Has Improperly Delegated Its Legislative Power To An Executive Agency.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the law to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This promise of judicial review has been limited by Congress in cases involving review of agency action. The D.C. Circuit below made the determination that District Court review of Petitioners challenges was precluded because the NGA stripped the District Court of authority to hear the case; as it involved the review of a FERC certificate; or put otherwise agency action. This is very similar to the determination of the lower courts in the consolidated cases of *Axon Enter. v. FTC*. The lower courts in those cases held that the administrative review schemes "divest[] district court jurisdiction" over "structural constitutional claims." *Axon Enter. v. FTC*, 598 U.S. 175, 184 (2023). The claims brought forth by the litigants in those cases were "constitutional challenges to the commissions

structure." *Id.* at 180. In reviewing those decisions this court held "The ordinary statutory review scheme does not preclude a district court from entertaining these extraordinary claims." *Id.* In rejecting the argument of the FTC this court reasoned "the commission knows a good deal about competition policy, but nothing special about the separation of powers." *Id.* at 194.

Here, the Petitioners bring forth the exact type of claim as the litigants in *Axon Enter.* and thus, the District Court should not be precluded from hearing this challenge. The Petitioners have made a Constitutional challenge to Congress' delegation of power to the FERC. This type of challenge pursuant to *Marbury v. Madison* and *Axon Enter. v. FTC* should be heard in a District Court. It would be improper to divest the district court of jurisdiction in this case in favor of administrative review. *See* discussion *infra* Part III. The same rationale of this court in *Axon Enter.* can also be said of the FERC: "the commission knows a great deal about [energy] policy, but nothing special about the separation of powers." *Id.*

Article III jurisdiction is of vital importance in the Petitioners' case given the important private property rights that are at stake. As Justice Thomas has explained: "At the heart of this liberty were the Lockean private rights: life, liberty, and property. If a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free." *Association of American Railroads*, 575 U.S. at 76 (Thomas, J.,

concurring) (citations omitted).[4] The protection of private property rights is one of the cornerstones of Liberty and a free society. *See* JOHN ADAMS, THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851) ("[p]roperty must be secured or liberty cannot exist"); THE FEDERALIST NO. 54, at 285 (James Madison) (George W. Carey & James McClellan ed., 2001) ("Government is instituted no less for protection of the property, than of the persons, of individuals"). When a person's private property is deprived by an unconstitutional act of Congress, an Article III court is the proper jurisdiction for the petitioner to bring forth the grievance. "The check the judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review." *Association of American Railroads*, 575 U.S. at 75 (Thomas, J., concurring) (internal quotations omitted). It is this check that the Petitioners seek in this case. It is this check that was denied to the Petitioners by the D.C. Circuit Court's ruling. This court should grant the Petition to correct the D.C. Circuit's erroneous interpretation of *Axon Enter.* and give the Petitioners their day in court.

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[4] *See also Axon Enter.*, 143 S. Ct. at 907 (Thomas, J., concurring) ("when private rights are at stake, full Article III adjudication is likely required. Private rights encompass the three absolute rights, life, liberty, and property….") (internal quotations omitted); *Calder v. Bull*, 3 U.S. 386, 388 (1798) ("…or a law that takes property from A and gives it to B: It is against all reason and justice…").

III. No Statute Strips the Federal Courts of Jurisdiction Over Petitioners' Constitutional Claim.

This Court in *Axon* recognized two legislative means by which an individual can challenge an agency action. *Axon*, 598 U.S. at 185. First, Congress could pass a traditional grant of jurisdiction, such as 28 U.S.C. § 1331 for claims "arising under" federal law or the U.S. Constitution. *Id.* This permits a challenge to be brought directly in federal court. *Id.* Second, Congress could create a statutory scheme, either implicitly (through the scheme's structure) or explicitly (stripping the federal courts of jurisdiction), requiring litigants to bring their grievances through the administrative process. *Id.* Normally, claims arising from an agency action are reviewed pursuant to the statutory scheme that gave rise to them. However, "a statutory review scheme . . . does not necessarily extend to every claim concerning agency action." *Id.*

Assuming for present purposes that FERC's statutory scheme is at least implicated in the instant case,[5] two questions present themselves: (1) whether

[5] It should be stated that neither the authors nor Petitioners believe that that the FERC's statutory scheme is truly implicated for the purposes of the constitutional claim before the Court. The D.C. Circuit disagreed. *Bohon v. FERC*, 92 F.4th 1121, 1123 (D.C. Cir. 2024) ("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."). Thus, assuming without conceding the point, the authors address the ostensibly implicated statutory questions.

Petitioners' constitutional claim are completely barred from the federal courts by a jurisdiction-stripping statute; and (2) if Petitioners' constitutional claim is not barred, whether it is subject to the agency's statutory review scheme or can be brought directly in federal court.

A. Petitioners' constitutional claim is not barred by a jurisdiction-stripping statute.

Petitioners' claim is not barred by a jurisdiction-stripping provision because no such provision applies in this case. There are two provisions that ostensibly rise to potentially bar Petitioners' constitutional claim. The first provision, as analyzed by the D.C. Circuit below, is 15 U.S.C. § 717r(b). However, § 717r(b) is not a jurisdiction-stripping statute, but rather a part of the FERC's statutory scheme. It reads in relevant part: "Upon the filing of such petition such court [of appeals] 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." 15 U.S.C. § 717r(b); *see also Allegheny Def. Project v. FERC*, 964 F.3d 1, 4 (D.C. Cir. 2020) ("A party, including an affected homeowner, who seeks to challenge the Commission's certificate order (or any other order) must first seek rehearing before the Commission as a precondition to obtaining judicial review."). Contrary to how most traditional jurisdiction-stripping statutes read, § 717r(b) reads more like a statutory grant of authority. Indeed, this Court has previously recognized this section as granting authority—not

stripping jurisdiction. *See, e.g., Panhandle E. Pipe Line Co. v. Fed. Power Comm'n*, 324 U.S. 635, 639 (1945) ("The general grant of authority in [§ 717r(b)] to all the courts of appeal suggest that the question of which one should exercise the power in a particular case is a question of venue [and not jurisdiction].").

Further, § 717r(b) applies to grievances of an agency "order," or an agency action, [6] not a constitutional challenge regarding Congress' delegation of authority to that agency. This Court has previously recognized that "Congress has entrusted the administration of the Act to the Commission, not to the courts. *Apart from the requirements of judicial review* it is not for us to advise the Commission how to discharge its functions. *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 617–18 (1944) (emphasis added). Here, however, the question is regarding the constitutional propriety of FERC's authority, generally, not a particular order of the Commission, specifically. Such a constitutional claim implicates the Court's power of judicial review and is precisely the type of action that falls outside the purview of § 717r(b).

This naturally begs the question: how does the Court determine whether the Petitioners' claim asserts a cause of action arising under the

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[6] The NGA clarifies in § 717*o* what constitutes an agency "order" or "act[ion]": "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter." 15 U.S.C. § 717o . Thus, the terms "order" and "action" are broad, and encompass a wide range of agency action taken pursuant to implementing the NGA.

Constitution or arising out of the statutory scheme? This Court in *Dalton* addressed the important distinction between these two types of claims in the context of the Defense Base Closure and Realignment Act of 1990 ("NBCRA"). *Dalton v. Specter*, 511 U.S. 462 (1994). In *Dalton*, the President instructed the Secretary of Defense to close the Philadelphia Naval Shipyard pursuant to the administrative review process under the NBCRA. *Id.* at 464. Shipyard employees and unions filed suit directly in federal court pursuant to the Administrative Procedures Act, contending *inter alia* that the President violated the substantive and procedural requirements of the NBCRA. *Id.* at 466.

Looking, in part, to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court concluded that the petitioner's challenge to the President's authority was a statutory one, requiring the litigants to traverse the agency's statutory scheme until a "final agency action" was reached. *Dalton*, 511 U.S. at 472 (citing *Youngstown*, 343 U.S. at 585–87). This Court distinguished *Youngstown* on the grounds that it implicated broader constitutional questions—not questions regarding the scope of statutory authority. *Id.* The Court reinforced this point by looking to *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935), noting that the Court there

> struck down an Executive Order promulgated under that Act *not* because the President had acted beyond his statutory authority, *but rather because the Act unconstitutionally delegated Congress' authority* to the President. As

> the Court pointed out, we were "not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presumptions attaching to executive action. To repeat, we are concerned with the question of the delegation of legislative power." *Respondents have not alleged that the 1990 Act in itself amounts to an unconstitutional delegation of authority to the President.*

Dalton, 511 U.S. at 473, n.5 (citations omitted) (emphasis added). Therefore, since it was a statutory question regarding the President's authority under the NBCRA, and not a question regarding the proper exercise of Congress' power under the Constitution, this Court found jurisdiction in the federal courts lacking. *Id.* at 476–77.

Here, however, Petitioners contend that the FERC is, indeed, operating pursuant to an unconstitutional delegation of authority from Congress. This is directly analogous to the government action in *Panama*, in that the claim transcends the agency (or presidential) action itself, challenging the constitutionality of the delegation of authority from one branch of government to another. Put another way, it is dissimilar to the plaintiffs' claims in *Dalton*, who merely took issue with the President's actions within the administrative process itself. Here, a specific agency action is precisely *not* what Petitioners are attempting to challenge. Rather, Petitioners contend that in delegating the authority

utilized in this case to the FERC, Congress has violated the Constitution.

The second potentially jurisdiction-stripping provision, which was not addressed at all by the D.C. Circuit below, is §324 of the Fiscal Responsibility Act. Section 324(e)(1) provides that:

> 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, ...

FISCAL RESPONSIBILITY ACT OF 2023, PL 118-5, June 3, 2023, 137 Stat 10.[7] Admittedly, unlike § 717r(b), § 324 is much more akin to a traditional jurisdiction-stripping statute. However, use of traditional canons of statutory construction quickly

[7] Interestingly, § 324(e)(2) provides that the D.C. Circuit "shall have original and exclusive jurisdiction over any claim alleging the invalidity of this section or that an action is beyond the scope of authority conferred by this section." It would be a curious thing for Congress to bar constitutional challenges against an agency while nonetheless permitting constitutional challenges against the statute effectuating the prohibition.

place Petitioners' constitutional claim outside the provision's scope.

Interpreting § 324 is straightforward. "As usual, [the Court's] job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" *Wisconsin Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979). The plain language of § 324 articulates that the scope of the provision applies to "action taken by" various executive agents, from the FERC to various federal Secretaries. A notable omission is Congress. Here, Petitioners seek to challenge Congress' delegation of authority from itself to the FERC as an unconstitutional shift of legislative power. Any reference to such a claim does not present itself in the plain text of the § 324.

Further, "[a]s in all statutory construction cases, [the Court] assume[s] that the ordinary meaning of the statutory language accurately expresses the legislative purpose." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)) (cleaned up). *Cf. Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'").

Here, even assuming arguendo that § 324 did apply to Petitioners' constitutional claim, it simply operates to direct litigants back to the already

provided statutory scheme for reviewing agency action. *See, e.g., Axon*, 598 U.S. at 187 (overviewing the decision in *Thunder Basin* and noting that the "the [litigant was directed] back to the statutory review scheme" when jurisdiction was found lacking). Indeed, the plain language of § 324, including within its circumscription "any lawsuit pending in a court as of the date of enactment of this section," demonstrates that Congress was orchestrating a consolidation of all challenges to agency action back to the special statutory scheme it had already created. Indeed, legislative history shows that the point of § 324 was to streamline challenges to permitting (what would be considered quintessential agency action) by making sure litigants went to the agency first—not the federal courts.[8] But again, all of this occurs against the

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[8] For example, prior to voting, Senator Capito spoke in opposition to striking the provision, referencing permitting specifically, stating:

> Madam President, I rise in opposition to the Senator's amendment. This Mountain Valley Pipeline is an important infrastructure. It has been vetted numerous times. It has permitting-all permits that are from the Virginia Department of Environmental Quality, the Fish and Wildlife, and the Bureau of Land Management. *These are all permits through both administrations-both the Biden and Trump administrations-that have already been offered. They are in a judicial hellhole right now where they can't get out.* This is absolutely essential to the eastern seaboard.

169 Cong. Rec. S1882-01, 169 Cong. Rec. S1882-01, S1890 (emphasis added)

backdrop of complete statutory silence in § 324 regarding constitutional claims against the delegation of authority from Congress to the FERC.

What is more, "as a general matter, when a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299 (2001) (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Here, Respondents contend that § 324 should be interpreted as stripping the federal courts of judicial power to review constitutional challenges to Congress' delegation of authority. However, reading § 324 as a jurisdiction-stripping provision enacted by Congress to prevent judicial review of Congress' own constitutionally suspect actions (*i.e.,* its unconstitutional delegation of legislative authority to an administrative agency) clearly invokes "the outer limits of Congress' power," both substantive (under the Separation of Powers doctrine) and procedurally (under Congress' power to regulate the jurisdiction of the federal courts under Article III). [9] *See, e.g.,*

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[9] *See generally* Lawrence Gene Sager, CONSTITUTIONAL LIMITATIONS ON CONGRESS' AUTHORITY TO REGULATE THE JURISDICTION OF THE FEDERAL COURTS, 95 HARV. L. REV. 17, 70 (1981) ("Congress' authority to shape federal jurisdiction cannot extend to shaving off discrete and disfavored constitutional claims with deep prejudice to judicially protected rights. Certainly Congress is not empowered to burden the exercise of a constitutional right—not, at least, without a compelling justification. To the extent that local officials interfere with the exercise of rights, those claiming the rights may require judicial assistance; if constitutional claimants are deprived of timely and

Buckley v. Valeo, 424 U.S. 1, 132 (1976) (citing *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316 (1819)) ("But Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction."). Thus, it is required that Congress provide an explicit exclusion of Petitioners' instant constitutional claim in the text of § 324—which, again, is noticeably absent.

Lastly, it should be noted that this Court has never upheld, nor does it appear Congress has ever attempted to enact, a complete and indefinite bar on any constitutional claim remotely resembling the Petitioners' in this litigation. *See, e.g., Wilkinson v. Garland*, 144 S. Ct. 780, 792 (2024) (holding § 1252(a)(2) of the Immigration and Nationality Act properly strips the federal courts from scrutinizing "agency fact-finding" and not constitutional questions under its plain language); *Nasrallah v. Barr*, 590 U.S. 573, 580 (2020) (surveying three federal statutes, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Foreign Affairs Reform and Restructuring Act of 1998, and the REAL ID Act of 2005, each of which provide judicial review of constitutional or legal challenges to final agency

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effective judicial relief, the exercise of their rights is burdened. But suggestive as these observations are, they fail to capture fully the vice of selectively depriving the federal courts of jurisdiction over discrete and disfavored claims of constitutional right. Such deprivations would not only burden the exercise of constitutional rights; they would also provoke official assaults on those rights, while seriously reducing the capacity of the entire legal system to adjudicate and enforce them fairly.").

actions at some stage in the administrative process); *I.N.S. v. St. Cyr*, 533 U.S. 289, 326 (2001) (holding that AEDPA and IIRIRA did not strip the federal courts of jurisdiction over habeas petitions).

In sum, neither the plain language of the statutory provisions addressed above, nor this Court's jurisprudence, provides a basis for the contention that Petitioners' constitutional claim against Congress' delegation of legislative authority to the FERC is barred from proceeding in a federal court.

B. Petitioners' constitutional claim is not subject to the FERC's statutory review scheme.

Since Petitioners' constitutional claim against the FERC's authority is not barred by any jurisdiction-stripping statute, the focus then shifts to whether the claim should be brought directly in the federal courts or routed through the FERC's administrative review process. Simply because the FERC addresses challenges pursuant to a statutory review scheme, such a scheme "does not necessarily extend to every claim concerning agency action." *Axon*, 598 U.S. at 185. The framework set out by this Court in *Axon* then asks: "whether the particular claims brought were of the type Congress intended to be reviewed within this statutory structure." *Id.* at 186 (quotation marks omitted).

To answer this question, three factors were articulated from this Court's decision in *Thunder Basin*: "First, could precluding district court jurisdiction foreclose all meaningful judicial review of the claim? Next, is the claim wholly collateral to the

statute's review provisions? And last, is the claim outside the agency's expertise?" *Id.* (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994)) (cleaned up). When each of these questions is answered in the affirmative, the Court finds that Congress did not intend to limit federal court jurisdiction over the claim. *Id.* (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010).

The Court need not labor over these questions, as it is readily apparent that Petitioners' constitutional claim compels an affirmative response to each one. In short, the FERC is not equipped, nor does it have proper authority, to say whether Congress violated the Constitution in delegating authority to it. Indeed, the agency's sole area of expertise is in the field of its own administrative actions—energy regulation—which is not being challenged here. Indeed, Petitioners' claim raises a pure question of administrative and constitutional law, wholly collateral to the agency's review process, and outside the FERC's area of expertise. To preclude federal jurisdiction, in favor of the FERC's statutory scheme, would be to compel the farcical and circular result of having the FERC review the constitutionality of the very Act of Congress granting it the authority to make the determination in the first place.

Stated differently, the constitutional claim asserted is not one where the FERC can "effectively fill[] in for the district court, with the court of appeals providing judicial review." *Id.* at 185. It in no way relates to "considerations of agency policy," but rather turns on questions of "administrative and

constitutional law." *Id.* at 188 (citing *Free Enter. Fund*, 561 U.S. at 491). To borrow a phrase from Chief Justice John Marshall, it is emphatically the province and duty of the federal courts—not a federal agency—to say what the law is. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Here, no obstacle, statutory or otherwise, prevents the federal courts from carrying out that venerable duty and answering Petitioners' constitutional question.

III. CONCLUSION

The Petitioners' constitutional claim, raising the important doctrines of Separation of Powers and non-delegation, can be properly litigated only in an Article III court. Given the absence of a jurisdiction-stripping statute, and the inapplicability of the statutory review scheme, the federal courts are the only proper forum to address Petitioners' constitutional challenge. This is further borne out by the fact that the agency in question, the FERC, is not equipped to decide questions of its own constitutionality, untethered from a specific agency action. To the contrary, this Court's longstanding jurisprudence has been, and remains, that it is the province of the federal courts to interpret the Constitution. This Court should reaffirm that jurisprudential maxim and permit Petitioners' constitutional claim to move forward in federal court.

Respectfully submitted,

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