No. 23A35

IN THE

Supreme Court of the United States

MOUNTAIN VALLEY PIPELINE, LLC,
Applicant,

v.

THE WILDERNESS SOCIETY, et al.,
Respondents.

MOUNTAIN VALLEY PIPELINE, LLC,
Applicant,

v.

APPALACHIAN VOICES, et al.,
Respondents.

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

BRIEF FOR SENATOR JOE MANCHIN III AS *AMICUS CURIAE* IN SUPPORT OF APPLICANT

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INTEREST OF *AMICUS CURIAE* [1]

Amicus is the senior Senator from West Virginia and the Chairman of the Committee on Energy and Natural Resources of the United States Senate. Under the Standing Rules of the Senate, the Committee on Energy and Natural Resources has legislative and oversight jurisdiction over, among other matters, energy policy, energy regulation and conservation, and natural gas production and distribution. Senate Rule XXV 1.(g)(1). As Chairman of the Committee on Energy and Natural Resources, *Amicus* takes a keen interest in the nation's energy security and independence, the development of our energy resources, and the permitting of natural gas pipelines, including the Mountain Valley Pipeline, which is the subject of the emergency application to vacate.

Amicus was one of the main authors and the principal proponent of section 324 of the Fiscal Responsibility Act of 2023, Public Law 118-5, § 324, 137 Stat. 10, 47-48 (2023) (FRA), the provision of law underlying the Applicant's emergency application to vacate the stays of the United States Court of Appeals for the Fourth Circuit. *Amicus* strongly supports the application to vacate the stays.

[1] No counsel for a party authored this brief in whole or in part, and no counsel, party, or other person made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Section 324 of the Fiscal Responsibility Act is a valid exercise of Congress's power to regulate interstate commerce rather than an impermissible usurpation of the courts' judicial power. Section 324 constitutes a statutory determination that "the timely completion of construction and operation of the Mountain Valley Pipeline is required in the national interest." FRA § 324(b). It "ratifies and approves all authorizations, permits," and other approvals necessary to complete construction of the pipeline and allow it to begin operation. FRA § 324(c).

In doing so, section 324 changes the law governing completion of the pipeline. It supersedes the statutes pursuant to which the agency authorizations being contested in the Fourth Circuit Court of Appeals were issued, and it replaces them with a new law mandating federal agencies to issue and maintain the authorizations necessary to complete the pipeline. Enactment of section 324 moots the cases pending in the Fourth Circuit and deprives it of jurisdiction to grant the stays the Applicant is asking this Court to vacate. Section 324 is a valid Act of Congress and should be given legal effect.

ARGUMENT

The Applicant, Mountain Valley Pipeline, LLC, is seeking vacatur of two stays ordered by the Fourth Circuit Court of Appeals that block completion of the Mountain Valley Pipeline.

The Mountain Valley Pipeline is being built to carry natural gas from northern West Virginia, where it is found, to southern Virginia, where the gas will enter the existing interstate pipeline system. From there the gas will flow to markets where it is in demand to generate electricity, heat our homes, cook our meals, and power the nation's economy. When completed, the 303.5-mile-long pipeline will be capable of carrying 2 billion cubic feet of natural gas per day.

In enacting section 324, Congress expressly found "that the timely completion of construction and operation of the Mountain Valley Pipeline is required in the national interest." FRA § 324(b).

I. SECTION 324 IS A VALID EXERCISE OF CONGRESS'S LEGISLATIVE POWER

Congress's interest in the Mountain Valley Pipeline stems from the Constitution's Commerce Clause, which gives Congress the power "To regulate Commerce … among the several States…." U.S. Const. Art. I, § 8. The power to regulate interstate commerce is a legislative power, not a judicial one. It "belongs to Congress, not the courts." *Fednav, Ltd. v. Chester,* 547 F.3d 607, 624 (6th Cir. 2008).

Pursuant to the commerce power, Congress passed the Natural Gas Act in 1938 "to regulate the transportation and sale of natural gas in interstate commerce." *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2252 (2021). "The Natural Gas Act declares that 'the business of transporting and selling

natural gas for ultimate distribution to the public is affected with a public interest,' and that federal regulation of interstate commerce in natural gas 'is necessary in the public interest.'" *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 581 (1942) (quoting 15 U.S.C. § 717(a)).

Congress entrusted administration of the Natural Gas Act to the Federal Power Commission, now the Federal Energy Regulatory Commission ("the Commission"). *PennEast Pipeline Co.*, 141 S. Ct. at 2252; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 617 (1944) ("Congress has entrusted the administration of the Act to the Commission, not to the courts"). The Act requires a natural gas company to obtain a certificate of public convenience and necessity from the Commission before it can build a pipeline. 15 U.S.C. §717f(c)(1)(A). And it requires the Commission to find that the pipeline is "required by the present or future public convenience and necessity" before it can issue a certificate. 15 U.S.C. § 717f(e); *PennEast Pipeline Co.*, 141 S. Ct. at 2252.

In accordance with this statutory scheme, the Applicant applied to the Commission for a certificate to build the Mountain Valley Pipeline in 2015. The Commission found "that the public convenience and necessity requires approval of Mountain Valley's proposal" and issued a certificate in 2017. *Mountain Valley Pipeline, LLC,* 161 F.E.R.C. ¶ 61,043, at P 64 (Oct. 13, 2017). Opponents of the pipeline challenged the Commission's action in the District of Columbia Circuit Court of Appeals, which upheld the Commission's action in February 2019. *Appalachian Voices v. FERC,* 2019 WL 847199 (D.C. Cir. Feb. 19, 2019).

In addition to the certificate from the Commission, the Applicant also needed to obtain three separate sets of approvals from other federal agencies. First, it needed a right-of-way from the Bureau of Land Management and approval from the Forest Service for the pipeline to cross the Jefferson National Forest. Second, it needed approval from the Army Corps of Engineers for the pipeline to cross rivers and streams. Third, it needed a biological opinion from the Fish and Wildlife Service that construction of the pipeline would not jeopardize the existence of threatened or endangered species in the pipeline's path.

The Applicant obtained all three authorizations and began construction in February 2018. *Sierra Club v. FERC,* 68 F.4th 630, 637 (D.C. Cir. 2023). One by one, the Fourth Circuit vacated and remanded or stayed all three. The agencies tried a second time. The Fourth Circuit remanded again. The agencies have granted their authorizations a third time, and they are now being challenged. The District of Columbia Circuit has provided an admirable summary of the litigation, *id.* at 638-641, which need not be replicated here.

Suffice it to say, work on the pipeline "has proceeded in fits and starts." *Sierra Club v. FERC,* 38 F.4th 220, 227 (D.C. Cir. 2022). It is now "mostly finished." *Appalachian Voices v. United States Department of the Interior*, 25 F.4th 259, 282 (4th Cir. 2022). Rights-of-way have been condemned, trees have been cleared, and most of the pipeline is in place, except for 3.5 miles through the Jefferson National Forest and the stream crossings, which remain the focus of ongoing litigation.

Faced with what seems to be unending litigation, and with no end in sight, Congress took matters into its own hands by enacting section 324. It "declare[d] that timely completion" of the pipeline "is required in the national interest," FRA § 324(b), superseded the laws the permitting agencies had been proceeding under, "ratifie[d] and approve[d]" all necessary authorizations, *id.* at § 324(c), and limited judicial review. *Id.* at § 324(e).

Precedent for section 324 was set half a century ago, when Congress ordered "the trans-Alaska oil pipeline [to] be constructed promptly without further administrative or judicial delay or impediment." 43 U.S.C. § 1652(a). Indeed, the Trans-Alaska Pipeline Authorization Act served as the principal model for section 324. That Act, like section 324, was enacted "to limit litigation that would further delay construction of the pipeline." *Alyeska Pipeline Service Co. v. United States*, 224 Ct. Cl. 240, 246 (1980).

II. SECTION 324 DOES NOT IMPINGE UPON THE JUDICIAL POWER.

Congress did not take this step lightly. Careful attention was paid to the Court's precedents in this area and great care was taken to frame section 324 so that it would not impinge upon the courts' judicial power.

Past decisions of this Court indicate that Congress "may not usurp a court's power to interpret and apply the law to the [circumstances] before it." *Bank Markazi v. Peterson,* 578 U.S. 212, 225 (2016) (quoting brief of *Amici Curiae*). It

may not, in popular parlance, "enact a statute directing that, in 'Smith v. Jones,' 'Smith wins.'" *Id. at* 225 n.17. But "a statute does not impinge on judicial power when it directs courts to apply a new legal standard to undisputed facts." *Id.* at 230. Congress may change the law that applies to pending litigation, even though the new law alters the outcome in a pending case. *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 438 (1992).

Simply put, Congress impermissibly infringes judicial power "when it 'compel[s] … findings or results under old law.'" *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (quoting *Robertson*, 503 U.S. at 438). But it permissibly exercises legislative power "when it 'changes the law.'" *Id.* (quoting *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218 (1995)).

Section 324 changes the law. Before Congress enacted section 324, the agencies decided whether to grant or deny their authorizations pursuant to the statutes they administered. Section 324 supersedes those laws. It "ratifies and approves all authorizations … necessary for the construction and initial operation" of the pipeline and compels the agencies "to continue to maintain" those authorizations, "[n]otwithstanding any other provision of law." FRA § 324(c).

When Congress directs an agency to a particular action "notwithstanding any other provision of law," it "has amended the law." *Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1174 (9th Cir. 2012) (upholding law ordering removal of gray wolves from the endangered species list and barring judicial review). "On its face, the phrase demonstrates Congress's clear intent to go ahead …, regardless of

… pre-existing legislation." *National Coalition to Save Our Mall v. Norton,* 269 F.3d 1092, 1095 (D.C. Cir. 2001) (upholding the law placing the World War II Memorial on the National Mall and barring judicial review).

Unlike the Gun Lake Trust Land Reaffirmation Act in the *Patchak* case, section 324 does not "target a single party for adverse treatment and direct the precise disposition of his pending case." *Patchak*, 138 S. Ct. at 917 (Roberts, C.J., dissenting). It does not even target the three cases now pending before the Fourth Circuit. It applies equally to any lawsuit whether pending on, or filed after, the date of enactment, in any court, challenging any agency authorization necessary for the construction and initial operation of the pipeline. FRA § 324(e)(1).

Nor does section 324 "foreclose all avenues for judicial review." *Patchak*, 138 S. Ct. at 921 (Roberts, C.J., dissenting). It expressly provides for judicial review, in the District of Columbia Circuit, "over any claim alleging the invalidity of this section" and over any claim "that an action is beyond the scope of authority conferred by this section." FRA § 324(e)(2).

III. SECTION 324 MOOTS THE CASES PENDING IN THE FOURTH CIRCUIT AND DEPRIVES THE FOURTH CIRCUIT OF JURISDICTION.

By changing the applicable law, statutorily ratifying and approving the permits necessary to complete the pipeline, and mandating that the agencies

"continue to maintain" the permits in effect, section 324(c) moots the pending cases challenging the pipeline.

That it because judicial power "extends only to 'Cases' and 'Controversies.' U.S. Cost. Art. III, § 2. That means [a court] can decide a case only if the plaintiff was injured by the defendant and seeks relief from the court that is likely to redress that injury." *Friends of the Earth v. Haaland*, 2023 WL 3144203, at *1 (D.C. Cir. April 28, 2023) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)). The court "must dismiss a case as moot if 'intervening events make it impossible to grant the prevailing party effective relief.'" *Id.* (quoting *Burlington North Railroad Co. v. Surface Transportation Board*, 75 F.3d 685, 688 (1996)).

Congressional legislation ratifying an agency's action moots a challenge against the agency. Petitioners' quarrel is no longer with the agencies but with the statute. "Once Congress has … ratified agency action by statute, even if that action had been arbitrary and capricious, judicial review requires a challenge to the statute itself." *James v. Hodel*, 696 F. Supp. 699, 701 (D.D.C. 1988).

Moreover, section 324 deprives the Fourth Circuit of jurisdiction over the cases challenging the pipeline. Unlike the Gun Lake Act before the Court in the *Patchak* case, section 324 "clearly … imposes a jurisdictional restriction." *Patchak*, 138 S. Ct. at 919 (Roberts, C.J., dissenting). It expressly states that "no court shall have jurisdiction to review any" agency action authorizing construction and initial operation of the pipeline. FRA § 324(e)(1).

Courts do, of course, have jurisdiction to determine if they have jurisdiction, and they have the power to issue stays to maintain the status quo "[p]ending a decision on a doubtful question of jurisdiction." *United States v. United Mine Workers of America*, 330 U.S. 258, 291-292 and n.57 (1947) (citing *United States v. Shipp*, 203 U.S. 563 (1906) (Holmes, J., opinion of the Court)). But, as Justice Frankfurter added, an "explicit withdrawal" of jurisdiction "cannot be defeated … by pretending to entertain a suit … in order to decide whether the court has jurisdiction. In such a case, a judge would not be acting as a court. He would be a pretender to, not a wielder of, judicial power." 330 U.S. at 310 (Frankfurter, J., concurring).

CONCLUSION

For the foregoing reasons, the application to vacate the stays of the agency authorizations should be granted, and the Fourth Circuit should be directed to dismiss the underlying petitions for review.

Respectfully submitted,

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