

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. 23-1384, 23-1592, 23-1594)**

**BRIEF FOR WEST VIRGINIA GOVERNOR
JAMES C. JUSTICE II AS *AMICUS CURIAE*
IN SUPPORT OF APPLICANT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE*..... 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

 I. SECTION 324 IS A VALID EXERCISE OF CONGRESSIONAL
 AUTHORITY 3

 II. THE STAYS SHOULD BE VACATED BECAUSE THE ENACTMENT OF
 SECTION 324 RENDERED THE PETITIONS IN THE FOURTH CIRCUIT
 MOOT..... 6

CONCLUSION..... 8

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Federal Power Commission v. Hope Natural Gas Co.</i> , 320 U.S. 591 (1942)	3
<i>Federal Power Commission v. Natural Gas Pipeline Co.</i> , 315 U.S. 575 (1943)	3
<i>Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.</i> , 460 F.3d 13 (D.C. Cir. 2006)	7
<i>James v. Hodel</i> , 696 F. Supp. 699 (D.D.C. 1988).....	8
<i>Patchak v. Zinke</i> , 138 S. Ct. 897 (2018) (Breyer, J., concurring)	4, 5, 6
<i>Robertson v. Seattle Audubon Society</i> , 503 U.S. 429 (1992)	4, 7
<i>Trainmen v. Toledo, P. & W.R. Co.</i> , 321 U.S. 50 (1944)	5
<i>United States v. Heinszen</i> , 206 U.S. 370 (1907)	4
<i>United States v. Klein</i> , 13 Wall. 128, 20 L.Ed. 519 (1872)	5
Statutes	
Fiscal Responsibility Act of 2023	1
Pub. L. No. 118-5, § 324(b)	2
Other Authorities	
Eric M. Fraser, et al., <i>The Jurisdiction of the D.C. Circuit</i> , 23 Cornell J. L. & Pub. Pol’y 131, 133 (2013)	5
Rule 37.6	1

U.S. Const. art. I § 8	3
U.S. Const., art. II, § 3.....	3

INTEREST OF *AMICUS CURIAE*¹

Amicus is West Virginia Governor James C. Justice II. As the chief executive of the State of West Virginia, *amicus* has great interest in the successful and expedient completion of the Mountain Valley Pipeline. West Virginians have been waiting for this project to be completed for years. There are thousands of jobs and tens of millions of dollars in critically important tax revenue to the State of West Virginia at stake. There are significant property rights and hundreds of millions of dollars in royalty revenues to West Virginia property owners at stake. There is a resource in the ground that has tremendous monetary value to those who own it and those who work it, but only if the gas can be transported to the market. Governor Justice has a vital and powerful interest in seeing West Virginians realize the benefit of this long-delayed project. And so long as the stay orders issued by the Fourth Circuit remain in place, they cannot.

As important as the Mountain Valley Pipeline is for the jobs, royalties, and revenues so important to our economy, however, the natural gas that will be available once this project is completed is of even greater importance to this Nation's energy security, and therefore to this Nation's national security. This interest is paramount.

SUMMARY OF ARGUMENT

Congress has declared that the “timely completion of construction and operation of the Mountain Valley Pipeline is *required in the national interest.*” Fiscal

¹ Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that no counsel for either party authored this brief in whole or in part and no such counsel to either party made a monetary contribution intended to fund the preparation or submission of this brief.

Responsibility Act of 2023 (“FRA” or the “Act”), Pub. L. No. 118-5, § 324(b) (2023) (emphasis added). President Biden signed the FRA into law June 3, 2020, and has joined this *amicus* and other *amici* in asking this Court to vacate the stay orders issued by the Fourth Circuit and allow this vitally important project to continue and finally be completed.

The political branches have spoken clearly and emphatically: “timely completion” and operation of this vital interstate infrastructure project, the Mountain Valley Pipeline, “is required in the national interest.” FRA § 324(b). Accordingly, it changed the law applicable to the project to expressly ratify and approve all authorizations, permits, and other approvals that have been issued to complete construction of the project. FRA § 324(c). There can be no doubt that Congress has the authority to change the law applicable to pending cases, even if outcome determinative. The Respondents’ suit here challenges whether the approvals and permits issued by various agencies are within those agencies’ statutory authority. The FRA unambiguously confers statutory authority on those approvals, rendering moot the present lawsuit and depriving the lower courts of jurisdiction to enjoin further work.

Congress was equally clear and emphatic in the FRA that any challenge to Section 324, approving and ratifying all permits and other authorizations needed for the Mountain Valley Pipeline, may be made *only* to the D.C. Circuit Court of Appeals. FRA § 324(e). Again, Congress’ power to restrict and control the jurisdiction of the lower federal courts is unquestioned, particularly where, as here, a statute merely

funnels challenges to a particular court and does not foreclose any venue for judicial review. The Fourth Circuit improperly exercised jurisdiction when it issued its stay orders, and once again halted progress and delayed completion of the long-sought Mountain Valley Pipeline. Those stay orders should be vacated.

ARGUMENT

I. SECTION 324 IS A VALID EXERCISE OF CONGRESSIONAL AUTHORITY

Congress is granted the Constitutional authority “[t]o regulate Commerce . . . among the several States” U.S. Const. art. I § 8. Further, Congress has the Constitutional authority to create laws and statutes which the Executive Branch must then “faithfully execute[].” U.S. Const., art. II, § 3. It is beyond cavil that regulation of natural gas is within Congress’ interstate commerce power. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 581 (1943). Insofar as various Executive Branch agencies exercise regulatory authority over this industry, they are acting pursuant to authority delegated by Congress. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 617 (1942).

Congress has exercised its authority by enacting Section 324 of the Act to allow for the more efficient execution of the permitting process for the Mountain Valley Pipeline, specifically, due to its impact on the national energy landscape.

For years prior to passage of Section 324, various regulatory bodies thoroughly reviewed and vetted the project, and issued permits and other authorizations as they

deemed appropriate. During that time, various groups sought to frustrate, delay, and make more expensive the completion of the Mountain Valley Pipeline by filing actions in the Fourth Circuit seeking to invalidate the permits issued. As a result of these challenges, certain necessary permits were vacated and remanded to the agencies multiple times. The present action involves challenges to the *third* iteration of agency authorizations.

Finally, Congress took action to ensure the expeditious completion of the project, explicitly ratifying and approving all manner of authorizations necessary for the project, and directing the various regulatory agencies with responsibilities for the project to “continue to maintain such authorizations . . . necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline.” FRA § 324(c)(1).

Congressional authority to ratify actions of such regulatory agencies of the Executive Branch is amply supported by this Court’s precedents. *See United States v. Heinszen*, 206 U.S. 370, 382-383 (1907); *Patchak v. Zinke*, 138 S. Ct. 897, 911 (2018) (Breyer, J., concurring).

While Congress may not compel a court’s “findings or results under old law,” it may change that law, thus changing the applicable standard by which the judiciary reviews an action. *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 438 (1992); *see also Patchak*, 138 S. Ct. at 905 (plurality op.). In crafting Section 324, Congress was deliberate in ratifying those Executive Branch authorizations and compelled

agencies to maintain those authorizations “[n]otwithstanding any other provision of law.” FRA § 324(c).

Congress also acted within its authority by directing, clearly, that any challenges to Section 324 must be made to the D.C. Circuit Court of Appeals. The D.C. Circuit “shall have original and exclusive jurisdiction over any claim” challenging Section 324. FRA § 324(e)(2). “So long as Congress does not violate other constitutional provisions, its ‘control over the jurisdiction of the federal courts’ is ‘plenary.’” *Patchak*, 138 S. Ct. at 906 (plurality op.) (quoting *Trainmen v. Toledo, P. & W.R. Co.*, 321 U.S. 50, 63-64 (1944)).

The D.C. Circuit is often granted jurisdiction over matters of national import, including “certain substantive areas of the law, notably those areas involving ‘national subjects,’ such as immigration and foreign relations, but also over controversies that are more likely than others to have a ‘national effect.’” Eric M. Fraser, et al., *The Jurisdiction of the D.C. Circuit*, 23 Cornell J. L. & Pub. Pol’y 131, 133 (2013).

Nor is this a case where Congress has used its power over jurisdiction to accomplish indirectly what it cannot do directly. *Cf. United States v. Klein*, 13 Wall. 128, 20 L.Ed. 519 (1872). In *Klein*, this Court held that Congress could not use a targeted rescission of jurisdiction to change the legal effect of an Executive Branch pardon, something it lacked the constitutional authority to do directly. *Id.* Here, however, Congress plainly has the authority to prescribe new outcome-determinative law concerning federal approval of the pipeline, and it has merely exercised its power

over jurisdiction to direct challenges to that approval to the court that most commonly hears disputes concerning projects and programs of national interest.

The Act applies to an open-ended class of disputes—all pending and future legal challenges to the pipeline—and does not single out any particular litigant or matter. Nor does it foreclose all avenues for judicial consideration of this case. It merely funnels them to a particular forum. Thus, it does not run afoul of any plausible construction of the limits on Congress’ power to control federal court jurisdiction. *Cf. Patchak*, 138 S. Ct. at 921 (Roberts, C.J., dissenting).

Congress made clear that the completion of the Mountain Valley Pipeline is in the national interest, and conferred original and exclusive jurisdiction to the D.C. Circuit—where jurisdiction over controversies likely to have a “national effect” often vests. Congress’ actions were within its authority and well grounded in precedent and prior practice for such matters of national importance.

II. THE STAYS SHOULD BE VACATED BECAUSE THE ENACTMENT OF SECTION 324 RENDERED THE PETITIONS IN THE FOURTH CIRCUIT MOOT.

As discussed above, the Act unequivocally provides for the authorization of all necessary permits and other authorizations for the completion and initial operation of the Mountain Valley Pipeline project.

Accordingly, the stays issued by the Fourth Circuit should be vacated as the underlying actions are mooted by Congress’s ratification of the agency processes

challenged before the Fourth Circuit. Section 324(c) unequivocally ratifies all permits and authorizations necessary to complete and initially operate the Pipeline. And Section 364(f) explicitly provides that Section 324 “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 stake statement, or other approval for the Mountain Valley Pipeline.” FRA § 364(f) (emphasis added).

The issue raised by Respondents is whether the agencies’ approvals of the pipeline were within the scope of the authority delegated by Congress under prior statutory standards. Those standards have been superseded in relevant part by the FRA, and Congress has declared that the permits and authorizations currently issued are fully authorized under current law. *Robertson*, 503 U.S. at 438. “If Congress approved an agency program, how can it be that a court should review the program to determine if it complies with federal law?” *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19 n.7 (D.C. Cir. 2006).

The stays issued by the Fourth Circuit have been explicitly superseded by Section 324 as they are inconsistent with the issuance of the authorizations and permits required to continue progress toward completion of the Mountain Valley Pipeline.

Further, “[o]nce 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). And any challenge to the statute itself, here, must be made to the D.C. Circuit, which Circuit “shall have original and exclusive jurisdiction over any claim alleging the invalidity of [Section 324] or that an action is beyond the scope of authority conferred by [Section 324].” FRA § 324(e).

Thus, the only remaining question is one that the FRA places squarely within the exclusive jurisdiction of the D.C. Circuit. The dispute in the Fourth Circuit is moot, and that court has no jurisdiction to proceed further or to issue the challenged stays. The stays should therefore be vacated.

CONCLUSION

Amicus requests that the stays issued by the Fourth Circuit, which are the subject of this Emergency Application, be vacated. The Mountain Valley Pipeline is a project of the highest importance for the stability, reliability, and security of energy production in the United States. The completion and operation of the Mountain Valley Pipeline project is in the interests of the people of West Virginia and in the national interest, and Congress has declared that any dispute about the statutory authority of the project to move forward should come to an expeditious end so the project can be completed. This Nation’s energy security and therefore national security require the stay orders issued by the Fourth Circuit be vacated so that the Mountain Valley Pipeline may be timely completed and brought into operation, as explicitly directed by the United States Congress in Section 324 of the FRA.

Respectfully submitted,

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