ORAL ARGUMENT TO BE SET ON FIRST APPROPRIATE DATE

No. 20-5203

In the United States Court of Appeals
for the District of Columbia Circuit

Cletus Woodrow Bohon; Wendell Flora; Robert Matthew Hamm; Beverly Ann Bohon; Mary Flora; Aimee Chase Hamm,
Plaintiffs-Appellants
v.
Federal Energy Regulatory Commission; Willie Phillips, In his official capacity as Chairman of the Federal Energy Regulatory Commission; Mountain Valley Pipeline, LLC,
Defendants-Appellees

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

SUPPLEMENTAL BRIEF OF LANDOWNERS ON *AXON* AND THE DEBT BILL

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SUMMARY OF ARGUMENT

The Constitution bows to no one—not to Congress, not to the President, and not to the courts. This nation was built on the principle of limited government, and the Constitution is in place to shield the individual—to protect Cletus, whose property sits at the base of Poor Mountain, Virginia—from government encroachment. No branch of government is above the Constitution, nor exempt from its requirements. The Framers structured the republic to guard against tyranny. To secure individual liberty, the Framers ensured that no branch could exempt itself from constitutional scrutiny. Thus, the Framers made the Constitution the supreme law of the land and each branch subservient to it. Congress cannot exempt its laws from constitutional scrutiny any more than the President could deploy soldiers to bar the courthouse doors to stop judges from reviewing the constitutionality of executive action. Congress makes the law, but Congress did not make the Constitution. Congress, like the President and the courts, is a *creature* of the Constitution and subservient to it. Congress, the President, and the Supreme Court serve the People, not the other way around; they perform constitutional duties bestowed upon them at the Convention. Their power is limited for a reason, and always subject to the Constitution. To this, there is no exception.

This Non-Delegation Doctrine case should be promptly remanded to the district court for trial on the merits for three reasons: **(1)** The Supreme Court, in a 9-0 decision, has already held that structural separation of powers cases such as this one must be initiated in the district court, where Landowners filed suit, not with the agency; **(2)** the plain language of the Debt Ceiling Bill does not apply to Landowners' Non-Delegation Doctrine case; and **(3)** to the extent this Court finds that the Debt Ceiling Bill applies (it does not), the Debt Ceiling Bill is unconstitutional because it (a) violates the separation of powers under Articles I-III, and (b) exempts Congress's favorite citizens (a federal agency and a wealthy corporation) from the Constitution—a "special status" Congress is powerless to prescribe, and one which violates the Constitution's absolute prohibition on titles of nobility, degrees of citizenship, unequal protection of law, and *ex post facto* laws.

PROCEDURAL HISTORY

On January 6, 2023, the U.S. Supreme Court granted Landowners' Emergency Motion to Hold their Non-Delegation Doctrine case pending the decision on § 1331 jurisdiction in *Axon Enter. V. FTC*, 143 S. Ct. 890 (2023). MVP opposed the hold and filed supplemental briefing erroneously arguing the cases were "unrelated." But the Court held the case for *Axon* and, in so doing, rejected MVP's argument that Landowners' case and *Axon* were "unrelated."

On April 14, 2023, the Supreme Court released a unanimous 9-0 decision in *Axon*, reversing the Ninth Circuit and affirming the Fifth Circuit on the question of whether district courts retain § 1331 jurisdiction over separation of powers claims.

On April 17, 2023, in light of *Axon*, Landowners filed a Motion asking the Supreme Court to lift the hold and grant summary disposition. Once again, MVP, this time joined by FERC, filed more briefs erroneously arguing that *Axon* and this case were "unrelated," that cert should not be granted, and that Landowners' case should be dismissed. But, on April 24, 2023, the Supreme Court *granted* Landowners' Petition for Writ of Certiorari, lifted the hold, and granted summary disposition to Landowners. In so doing, the Supreme Court once again rejected FERC's and MVP's lengthy—but flawed—arguments that the § 1331 jurisdiction issue in Landowners' separation of powers case and *Axon* were "unrelated."

On May 26, 2023, the Supreme Court issued its mandate granting Landowners' petition for writ of certiorari, vacating the judgment, awarding costs to Landowners, and remanding this Non-Delegation Doctrine case for further proceedings in light of *Axon*.

On June 3, 2023, after remand, Congress enacted and the President signed into law the Fiscal Responsibility Act of 2023 (FRA, Public Law 118-5) (hereinafter "the Debt Bill"), which lifted the limit on the federal debt to avoid default. Included in the Debt Bill was section 324, an unrelated provision which

approves environmental permits for the Mountain Valley Pipeline and strips appellate jurisdiction from the Fourth Circuit over MVP permit challenges. The Debt Bill reserves jurisdiction for challenges *to the Debt Bill* for the D.C. Circuit.

The Debt Bill has no application to this constitutional Non-Delegation Doctrine case, nor could it. But Landowners address it nonetheless, noting that MVP is grasping at straws in a futile effort to wiggle out of the resounding jurisdictional mandate in *Axon*.

ARGUMENT

1. *Axon* rejected Appellees' claims concerning § 1331 jurisdiction.

a. The Supreme Court in *Axon* unanimously held that district courts retain § 1331 jurisdiction over structural separation of powers claims, such as this one.

Axon sinks the Appellees' case on § 1331 jurisdiction. Recognizing that, MVP now shifts its focus entirely, claiming this Court need not address *Axon* at all because the Debt Bill—a law that plainly has no application to this Non-Delegation Doctrine challenge—cures the congressional defect in the Natural Gas Act. That argument is equally unavailing.

In *Axon Enter. v. FTC,* 143 S. Ct. 890 (2023), the Court addressed two cases in which the parties filed constitutional challenges to an agency's authority in district court (instead of the agency or the court of appeals). The statutes at issue in *Axon* and *Cochran* were the Securities Exchange Act and the FTC Act. 15

U.S.C. §78a *et seq*. (Exchange Act); 15 U.S.C. §41 *et seq*. (FTC Act). In each case, the Act authorized the agency to raise statutory violations (a.k.a. "enforcement actions") either in district court or in an administrative proceeding adjudicated by an ALJ. *Axon,* 143 S. Ct. at 898. A party that lost with the ALJ could appeal the decision to the agency which then issues a final order.

But Cochran and Axon "sidestepped" the exclusive review schemes that routed challenges to agency orders first to the agency and then to the court of appeals. *Id.* at 897 ("Seeking to stop the administrative proceedings, they instead brought their claims in federal district court."). Despite the "exclusive" scheme, the Court unanimously held such schemes do not apply to separation of powers claims. Rather, the Court reasoned only the district court has original jurisdiction to hear such claims. Justice Kagan explained:

> The question presented is whether the district courts have jurisdiction to hear those suits—and so to resolve the parties' constitutional challenges to the Commissions' structure. **The answer is yes**. The ordinary statutory review scheme does not preclude a district court from entertaining these extraordinary claims.

Id. (emphasis added). This is so because the court of appeals is only bestowed with appellate jurisdiction under the review scheme, which is limited to "affirming, setting aside, or modifying" the agency's order. *Id*. at 898.

The appellate court's jurisdiction, in other words, does not extend to adjudication of separation of powers claims because the agency cannot adjudicate

those claims. Those claims must be initiated in district court pursuant to § 1331 original jurisdiction. While the court of appeals can set aside an agency order (on appeal), that does not correct the underlying constitutional defect in the enabling legislation. *Id*. at 903-04 ("The court could of course vacate the FTC's order. But Axon's separation-of-powers claim is not about that order"). Thus, the Court reasoned that when parties raise a sweeping separation of powers challenge to the agency's very existence—to its authority to act at all—merely setting aside the agency's order does not provide the relief being sought. Accordingly, the court of appeals has no jurisdiction to hear separation of powers challenges on appeal from an agency decision. Those claims must be initiated in district court.

b. The *Axon* Court adopted the "nature of the claim" test that Landowners advanced to illustrate why agencies cannot correct separation of powers violations.

The relevant test, as advanced by Landowners and adopted by the Court in *Axon*, is not whether an agency order exists or affects the parties, or whether the court of appeals can set it aside. The proper question is: "*What is the nature of the claim?*" If the agency can correct the problem alleged (meaning if the injury is something the agency can fix, i.e., by reinstating backpay, moving a pipeline route, imposing fines for permit violations, modifying an order, etc.), then the challenge must be brought initially to the agency because the agency can remedy the harm. If, however, the agency cannot cure the defect, the challenge must be initiated in

district court. The "nature of the claim" is the test for determining jurisdiction. As Justice Kagan explains:

> What makes the difference here is the nature of the claims and accompanying harms that the parties are asserting. Again, Axon and Cochran protest the "here-and-now" injury of subjection to an unconstitutionally structured decisionmaking process.

Id. at 904. Determining jurisdiction thus "requires considering **the nature of the claim**, **not the status (pending or not) of an agency proceeding**." *Id*. at 905 (emphasis added).

In their Petition for Certiorari to the Supreme Court, Landowners advanced the test later adopted in *Axon*. *See* Landowners' Petition for Writ of Certiorari at 11 ("It is the **nature of the claim,"** Landowners wrote, **"not the procedural posture** or identity of the property owner, that determines the district court's original jurisdiction") (emphasis added). The FTC in *Axon* rejected that test, just as FERC did here, arguing the existence of an agency proceeding and order deprived the district court of jurisdiction. *Id*. at 905. However, the Supreme Court unanimously held the nature of the claim is dispositive and the existence of an order completely irrelevant. *Id*.

Just as Axon's separation of powers claim is not about the FTC order, neither is Landowners' separation of powers claim here about FERC's order. All three claims—Cochran's, Axon's, and Landowners'—would involve subjection to unconstitutional agency authority if district court jurisdiction was foreclosed.

Because that type of injury cannot be remedied by the agency, it must be raised in district court.

c. The Supreme Court rejected agency claims of "expertise" to evaluate separation of powers violations.

Consistent with Landowners' arguments here,[1] the Court rejected the agency's claims that it has "special expertise" to adjudicate separation of powers challenges, noting "**The Commission knows a good deal about competition policy, but nothing special about the separation of powers**." *Id.* at 905 (emphasis added). "For that reason, we observed two Terms ago, 'agency adjudications are generally ill suited to address structural constitutional challenges'—like those maintained here." *Id.* (quoting *Carr v. Saul*, 593 U. S. __, 141 S. Ct. 1352, 209 L. Ed. 2d 376 (2021) (slip op., at 9). Likewise, here, FERC knows "nothing special" about the Non-Delegation Doctrine and has openly admitted it cannot adjudicate separation of powers challenges to its authority and existence. *See* 161 FERC ¶ 61,043 (2017); *see also* Landowners' Petition for Writ of Certiorari at 20 (citing FERC's Certificate Order to MVP where FERC admits:

[1] *See* Landowners' Cert Petition 17-20 (explaining the difference between the *Thunder Basin Coal Co. v. Reich* and *Elgin v. Dep't of Treasury* line of cases, where the agency could apply its special technical, scientific, or fact-finding expertise to correct the error alleged and the *Free Enterprise v. Public Co. Accounting Oversight Bd.* line of cases, including *Johnson v. Robison, Cirko v. Commissioner of Social Security,* and similar cases, where courts have repeatedly explained the agency has no expertise because "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Id.* at 19.).

"[S]uch a question is beyond our jurisdiction: only the Court can determine whether Congress' action in passing section 7(h) of the NGA conflicts with the Constitution.").

2. The Debt Bill is expressly limited to permitting issues and has no application to Landowners' structural challenge to the unconstitutional delegation of power in the Natural Gas Act.

Since 2018, the Fourth Circuit has repeatedly sided with environmental groups challenging permits MVP was required to obtain to complete construction. (*See* **Exhibit 1**, at 2-3.) In May 2022, MVP asked the Fourth Circuit to appoint a different panel to hear the myriad of environmental permit challenges filed in that court. (*See id., generally*.) When that effort failed, MVP's champion, Sen. Joe Manchin, extracted a promise as part of the 2022 Climate Bill to streamline permit approvals and route environmental challenges exclusively to this Court. (*See* **Exhibit 2**.) However, that promise proved elusive and the Fourth Circuit continued ruling against MVP in permit challenges. (*See* **Exhibit 3**.) Sen. Manchin called the Fourth Circuit's decision "to side with activists" opposing necessary permits "infuriating." (**Exhibit 4**.)

On May 20, 2023, Sen. Manchin issued a statement titled "Permitting Reform Necessary For America's Future" that bemoaned "[o]ur inability to permit projects in West Virginia and across the country on a timely basis …." (**Exhibit 5**.) He highlighted his efforts to "address our nation's broken permitting system" and

secure "comprehensive permitting reforms." *Id*. Sen. Manchin recounted how he "secur[ed] a commitment to get permitting reform done" in 2022 and referred to his proposed legislation as "the only comprehensive Senate permitting bill to have bipartisan support …." *Id*. Sen. Manchin cited various forms of the word "permit" 21 times in this two-page statement. *See id.* Days later, Sen. Manchin successfully lobbied his colleagues to add language to the Fiscal Responsibility Act of 2023 to eliminate permitting roadblocks to MVP. That provision requires agencies to grant all permits and approvals needed to complete and operate MVP, maintain those permits and approvals, and strips all courts of jurisdiction to review agency action. FRA § 324(c-d). It also grants this Court "original and exclusive jurisdiction" over any challenges to the validity of *this* provision. FRA § 324(e).

MVP now seeks to weaponize this provision against Landowners to deny this Court jurisdiction in a completely unrelated structural challenge to the unconstitutional delegation of power contained in the Natural Gas Act, 15 U.S.C. § 717 *et seq*. This Court should reject that attempt for five reasons.

First, the language in the Debt Bill clearly limits its application to permitting hurdles and *agency* action, not structural constitutional challenges such as this. Section 324(c) discusses permits, extensions, verifications, biological opinions, incidental take statements, and other approvals or orders needed for the

construction and operation of the pipeline – the objects of Sen. Manchin's frustration. It does not address constitutional challenges to *Congressional* action. This language plainly targets the environmental permitting cases pending in the Fourth Circuit, not this Non-Delegation Doctrine case in the D.C. Circuit. If Congress wanted the Debt Bill to exempt itself from constitutional scrutiny (which is constitutionally impermissible), Congress could have easily stated that intention. It did not. Section 324(c) has no application to this case.

Second, section 324(e) does not strip any court of jurisdiction over this separation of powers case. The text reads, "no court shall have jurisdiction to review any **action taken by**" various federal and state agencies. But Landowners are not challenging actions taken by FERC or MVP. As in *Cochran* and *Axon*, Landowners are challenging unconstitutional congressional action. Section 324(e) does not address that subject. The entire Debt Bill is about authorizing approvals for environmental permits MVP has been losing in the Fourth Circuit. It has nothing to do with this Non-Delegation Doctrine case.

Third, the jurisdictional mandate in section 324(e)(2) pertains to challenges to the Debt Bill. Landowners' challenge is to the Natural Gas Act, not the Debt Bill. Section 324(e)(2) is designed to strip the Fourth Circuit of jurisdiction over permitting cases. This Non-Delegation Doctrine case has nothing to do with environmental permits and is already in the D.C. Circuit, not the Fourth Circuit.

Fourth, the Debt Bill does not impact Landowners' standing. Landowners have alleged a structural constitutional defect in FERC's enabling legislation. That defect will remain no matter where the pipeline is routed, how many environmental permits are granted or denied, or whether the order authorizing this particular project is set aside or not. The Debt Bill does not cure the constitutional defect in the NGA. Because that defect remains, so too does the injury. Per the Supreme Court's holding in *Axon*, that type of structural challenge must be initiated in district court. MVP's arguments to the contrary are a last-ditch effort to escape the Supreme Court's resounding mandate in *Axon*, which plainly directs this case to trial.

Fifth, Congress's declaration in section 324(b) that the Mountain Valley Pipeline is "required in the national interest" has no application to this Non-Delegation Doctrine case. Declaring that the taking is in the "national interest" might implicate the Fifth Amendment's "public use" requirement.[2] But this case arises under Articles I-III, *not* the Fifth Amendment. Congress could not exempt itself from the Non-Delegation Doctrine any more than the President or this Court could avoid complying with any other provision of the Constitution.

[2] Even then, the property owner could still file suit alleging that public use has not been met and seeking judicial review of his or her Fifth Amendment rights. This suit, however, is not about the Fifth Amendment.

3. The Debt Bill is unconstitutional.

a. The Debt Bill violates the separation of powers under Articles I-III.

The Founders are rolling in their graves. The idea that Congress can "exempt itself" from the Constitution, run roughshod over the private property rights of individual citizens, and eliminate all judicial review of its unconstitutional actions is indefensible. The Constitution suffers no favorites: Cletus Bohon of Poor Mountain, Virginia, is not a second-class citizen to FERC or MVP. The Framers designed the Constitution for the precise purpose of protecting Cletus[3] and his property from government overreach. Congress cannot manipulate jurisdiction to target and deprive Cletus of his constitutional rights whilst elevating its favorites above the Constitution, where even Congress does not sit. *See Patchak v. Zinke*, 138 S. Ct. 897, 915 (2018) (Roberts, C.J., dissenting).

While §324 of the Debt Bill clearly has no application to Landowners' structural challenge to FERC's enabling legislation, it would be unconstitutional even if it were so applied. To understand the holding in *Patchak*, we must begin with *United States v. Klein,* 80 U.S. 128 (1871). In *Klein*, an administrator sought to recover proceeds from the sale of cotton captured during the Civil War under a statute authorizing recovery so long as the owner proved his "loyalty" during the

[3] Cletus Bohon is the first named plaintiff in this case; any reference to "Cletus" herein applies equally to the other five named landowners, including Beverly Bohon, Aimee and Matthew Hamm, and Wendell and Mary Flora.

rebellion. *Klein*, 80 U.S. at 139-40. After the Court of Claims ruled in the plaintiff's favor, reasoning his presidential pardon and oath of allegiance had the effect of forgiving all disloyal acts, Congress passed a new law stripping the court of jurisdiction over such claims, declaring that pardons were proof of disloyalty, and ordering dismissal of such suits. *Id*. at 143.

But the Supreme Court looked at Congress's motive when it removed the court's jurisdiction and held that the law was unconstitutional. Although the Court acknowledged Congress's "complete control" over the "organization and existence" of inferior courts, it held that Congress cannot manipulate its control over that jurisdiction as a means to bypass the Constitution—an impermissible "end." *Id*. at 145. Even though the law *appeared* to do "nothing more" than strip jurisdiction, the Court examined Congress's true intent when it stripped the court of jurisdiction. The Court concluded that the law "shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end." *Id*. (emphasis added). The Court held the law's "great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have." *Id*. In doing so, Congress's true motive was to bypass the separation of powers and infringe on the President's pardon power and the court's power to declare the effect of that pardon. The *Klein* Court, in other words, asked *why* Congress targeted this group of citizens and suddenly stripped a federal court—its

own creation—of jurisdiction. Absent an unconstitutional motive, such action is always permissible. But *Klein* shows us the improper motive taints what would otherwise be legitimate congressional action and renders it unconstitutional.[4]

In *Patchak v. Zinke*, the Court held Congress acts within its legislative power when it does "'nothing more' than strip jurisdiction over 'a particular class of cases.'" *Patchak v. Zinke*, 138 S. Ct. at 909 (quoting *Klein,* 80 U.S. at 145). *Patchak* held Congress could effectively direct results when the affected authority was a creature of Congress's own creation. In *Patchak* it was the Indian Reorganization Act. 138 S. Ct. at 910. The Court noted there was no allegation of a constitutional violation, as was present in the separation of powers challenge in *Klein*. *Id*. at 909.

And yet, the *Patchak* majority overlooked a critical component of the holding from *Klein*: "nothing more." Targeting specific cases to produce a specific result to favor a particular party is the "something more" that *Klein* forbade. When Congress strips jurisdiction with that improper motive, it debases its legitimate lawmaking function by transforming generally applicable law into an aristocracy with titles of nobility. Thus, Congress's intent is of vital importance. Congress *can* strip inferior courts of appellate jurisdiction unless its motive for doing so is to

[4] This principle is consistent with other Supreme Court cases, such as *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993), holding that otherwise permissible legislation is unconstitutional when aimed at a particular group to deprive them of constitutionally protected rights.

violate or bypass the Constitution. The test, then, for determining whether a jurisdiction-stripping statute is constitutional is to discern Congress's intent when it stripped jurisdiction.

Here, if Congress truly intended the Debt Bill to apply to Landowners' challenge, then it was enacted to achieve the same impermissible end sought in *Klein*: to bypass the separation of powers inherent in the Constitution.[5] In both cases, Congress's true intent is not merely to strip the court of jurisdiction and 'nothing more;' rather, its intent is to violate the Constitution and bypass the separation of powers in order to achieve its desired outcome. As the Court in *Klein* explained, Congress cannot strip jurisdiction "*because and only because* [the court's] decision, in accordance with settled law, must be adverse to the government and favorable to the suitor." *Klein,* 80 U.S. at 147. (emphasis added). Yet, that is exactly what Congress is doing here. *Axon* directs this case to trial and Congress is trying to bar it. Indeed, the constitutional violation here is far more egregious than in *Patchak* because Landowners have raised their claims under the Constitution, not under a law passed by Congress. Thus, Congress here is not just trying to bypass *any* generally applicable law; it is bypassing the Constitution. And that is never permissible.

[5] James Madison wrote, "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control." The Federalist No. 47, at 303 (citing 1 Montesquieu, The Spirit of the Laws).

b. The Debt Bill cannot target Landowners and exempt MVP and FERC from generally applicable law, nor violate the absolute prohibition on titles of nobility, degrees of citizenship, unequal protection of law, and *ex post facto* laws.

To be enforceable, law must be generally applicable. Section 324 is not. William Blackstone, whose work profoundly influenced the Founders, defined "law" as a generally applicable "rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." 1 William Blackstone, Commentaries on the Laws of England 44 (1765). The basic concept of the "rule of law" has been understood, as the Supreme Court explained, "since Greek and Roman times to mean that a ruler must be subject to the law in exercising his power and may not govern by will alone." *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 70 (2015) (Alito, J., concurring) (citing M. Vile, Constitutionalism and the Separation of Powers 25 (2d ed. 1998); 2 Bracton, De Legibus et Consuetudinibus Angliae 33 (G. Woodbine ed., S. Thorne transl. 1968)). The Framers incorporated these basic principles into the Constitution. The prohibition on titles of nobility in Art. I, § 9, Cl 8, is one such example where the Framers rejected a system of government that bestowed special privileges on favored parties.[6] Variations of this principle were repeated many times in our nation's

[6] *See* 3 Joseph Story, Commentaries on the Constitution of the United States 215 (1833) ("[The Title of Nobility] clause seems scarcely to require even a passing notice. As a perfect equality is the basis of all our institutions, state and national, the prohibition against the creation of any titles of nobility seems proper, if not

history. In the Fourteenth Amendment, which promises "equal protection" of the laws, we see a basic prohibition on degrees of citizenship. *See, e,g., Zobel v. Williams*, 457 U.S. 55, 70 (1982) (Brennan, J., concurring) (noting that the Equal Protection Clause does not tolerate "degrees of citizenship" because "equality of citizenship is the essence in our Republic" and states may not "divide citizens into expanding numbers of permanent classes."). For similar reasons, bills of attainder and *ex post facto* laws are likewise prohibited under Art. I, § 9, Cl 3 because they, too, violate these basic precepts upon which the nation was built.

By targeting MVP for special treatment and exempting it from laws that bind all other citizens, the Debt Bill *effectively* bestows a special status on MVP, which violates all of these basic tenets of equality reflected in the Equal Protection Clause of the Fourteenth Amendment and the prohibition on titles of nobility in Art. I. If the bill truly does what MVP claims, then it exempts MVP from the Constitution. Apparently, the separation of powers applies to everyone *except* Congress and its favored litigants. All other pipeline companies in America must comply but MVP is exempt. All other citizens whose land is taken can raise structural constitutional challenges. But Cletus cannot because, on MVP's view, Congress has declared that Cletus suddenly has no constitutional rights and that

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indispensable . . . ."); *see also* The Federalist No. 39, James Madison declaring that the prohibition was "absolute" and applicable "both under the federal and State governments;" *accord* The Federalist No. 84 (Alexander Hamilton).

Congress is above the Constitution. Finally, if the bill does what MVP claims it does, then it is also retroactive legislation which violates the general prohibition on *ex post facto* laws under Art. I, § 9, Cl 3. The land has already been condemned. Landowners have already filed suit and invoked the Non-Delegation Doctrine. Now, MVP claims that Congress is retroactively applying a new set of rules—designed only for Cletus—which were not in place at the time of the taking. This is precisely the type of unfairness and inequality the Founders sought to prevent.

CONCLUSION

This Non-Delegation Doctrine case should be promptly remanded for trial because (1) the Supreme Court in *Axon* already rejected Appellees' claims and unanimously held that district courts retain § 1331 jurisdiction over separation of powers cases, remanding this case in light thereof; (2) the Debt Bill is limited to permitting issues and has no application to Landowners' structural challenge to the unconstitutional delegation of power in the Natural Gas Act; and (3) the Debt Bill is unconstitutional.

While the Debt Bill has no application to Landowners' structural challenge to FERC's enabling legislation, it would be unconstitutional even if it were so applied. Congress can strip inferior courts of appellate jurisdiction *unless* its motive for doing so is to violate or bypass the Constitution. Congress's intent is of vital importance. If Congress's intent was to do nothing more than reorganize or

manage case distribution, then removing jurisdiction is constitutional. But if Congress's intent was to create degrees of citizenship—to confer or target one party for preferential treatment and strip another of constitutional rights pursued in that very court—then Congress's true intent is to violate the Constitution. That is never permissible. In such instances, Congress is not merely exempting its favored party from the scrutiny of an appellate court; Congress is exempting it from the Constitution. This effectively confers special privileges to certain parties while relegating others to second-class citizens.

Congress has no power to exempt itself—or others—from the Constitution. To hold otherwise would be to unite those powers which the Framers kept separate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), and the Court's per curiam order of July 7, 2023, the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 4,760 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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ADDENDUM

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No. 21-2425

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SIERRA CLUB, ET AL.,
Petitioners,

v.

STATE WATER CONTROL BOARD, ET AL.,
Respondents,

and

MOUNTAIN VALLEY PIPELINE, LLC,
Intervenor.

MOUNTAIN VALLEY PIPELINE, LLC'S
MOTION FOR RANDOM PANEL ASSIGNMENT

This Court almost always assigns judges to cases randomly. There are exceptions, but the Court's rules certainly do not contemplate the assignment of the same judges to every case involving one specific private party, even if those cases cover one large, multi-state project. Yet that is precisely the practice the Court has adopted for Mountain Valley Pipeline, LLC ("Mountain Valley")—for the last four years, the Court has consistently assigned the same three judges to numerous, diverse cases involving different state and federal authorizations for Mountain Valley in all but two instances.[1] This Court has thereby created "both the appearance and the fact

[1] In 2018, Judge Traxler presided over two cases involving Mountain Valley in place of Judge Wynn.

of presentation of particular types of cases to particular judges" in violation of Internal Operating Procedure 34.1. What's worse, it has done so in circumstances where Internal Operating Procedure 34.1 would not dictate nonrandom assignment. Mountain Valley therefore respectfully asks the Court to correct this departure from its own procedures and randomly assign judges to the merits panel for this case. For all of the reasons outlined below, Mountain Valley further requests that this motion be referred to a randomly assigned three-judge panel for disposition pursuant to Local Rule 27(e) or referred to the Court en banc.

Pursuant to Local Rule 27(a), counsel for Mountain Valley informed counsel for Petitioners and counsel for the State Respondents of its intent to file this motion. The State Respondents take no position on the motion. Petitioners advised that they intend to file a response to the motion.

BACKGROUND

1. Over the last four years, only four of the Court's 18 sitting judges have heard any of the myriad petitions challenging different federal and state authorizations for Mountain Valley and the former Atlantic Coast Pipeline ("ACP").[2] In May 2018, Chief Judge Gregory and Judges Wynn and Thacker first

[2] This accounting excludes the many condemnation-related pipeline cases involving Mountain Valley that the Court has decided. While Chief Judge Gregory and judges Wynn and Thacker have heard many of those cases, Judge Harris has also participated on occasion. *See, e.g.*, *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197 (4th Cir. 2019);

heard a challenge to federal authorizations for ACP. *See Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260 (4th Cir. 2018). That same week, Chief Judge Gregory and Judge Thacker—this time sitting with Judge Traxler—heard two challenges to authorizations issued to Mountain Valley. *See Sierra Club v. State Water Control Bd.*, 898 F.3d 383 (4th Cir. 2018); *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018).

Since that first court week, only Chief Judge Gregory and Judges Wynn and Thacker have heard "pipeline cases." *See Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635 (4th Cir. 2018); *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 154 (4th Cir. 2018), *rev'd and remanded sub nom. United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837 (2020); *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746 (4th Cir. 2019); *Defs. of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339 (4th Cir. 2019); *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020); *Wild Va. v. U.S. Dep't of the Interior*, No. 19-1866 (4th Cir. Oct. 11, 2019).

2. Since the summer of 2020, when ACP folded in the face of rising delays and cost in part due to decisions of this Court, the Court has largely assigned this special panel to cases involving Mountain Valley. *See Sierra Club v. U.S. Army*

Mountain Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P'ship, 918 F.3d 353 (4th Cir. 2019); *Mountain Valley Pipeline, LLC v. 0.15 Acres of Land by Hale*, 827 F. App'x 346 (4th Cir. 2020).

Corps of Eng'rs, 981 F.3d 251 (4th Cir. 2020); *Wild Virginia v. United States Forest Serv.*, 24 F.4th 915 (4th Cir. 2022); *Appalachian Voices v. United States Dep't of Interior*, 25 F.4th 259 (4th Cir. 2022). The Court automatically assigned the same panel to hear the challenge to North Carolina's denial of a permit for the separate Mountain Valley Southgate project. *See Mountain Valley Pipeline, LLC v. N. Carolina Dep't of Env't Quality*, 990 F.3d 818 (4th Cir. 2021).

3. In the twelve consolidated petitions challenging different authorizations for Mountain Valley and ACP, this special panel has vacated or stayed all but two.[3] It has done so despite purporting to apply the Administrative Procedure Act's deferential standard of review in each case, which constrains courts to set aside only arbitrary and capricious agency action. *See, e.g.*, *Appalachian Voices*, 912 F.3d at 753.[4]

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[3] *See* Nos. 21-1039, 20-2159, 20-2039(L), 19-1866, 19-1152, 18-2090, 18-1173(L), 18-1144, 18-1082(L) (ECF Nos. 82 & 94), 18-1077(L), 17-2406(L), 17-2399(L). The Court has uniformly affirmed district court decisions related to condemnations for the Mountain Valley project.

[4] The panel's record translates to a 17% success rate for pipeline approvals since 2018. By contrast, one study calculated a 92% agency win rate in arbitrary-and-capricious challenges before the Supreme Court between 1983 and 2014. *See* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1358, 1407 (2016). Another study found that appeals court judges "voted to validate EPA decisions 72 percent of the time" under arbitrary-and-capricious review between 1996 and 2006. Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 778–79 (2008); *see also* Richard J. Pierce & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 515 (2011)

4. The public has certainly noticed these exceptional results and has zeroed in on the peculiarity that each case involving an authorization for Mountain Valley draws the same three-judge panel.

After the panel vacated the latest round of authorizations, the Roanoke Times observed that "[a] federal appellate court based in Richmond — *and in particular, three judges on the 15-member court* — has been perhaps the sharpest thorn in the side of a joint venture of five energy companies that make up Mountain Valley Pipeline LLC." Laurence Hammack, *With Construction at a standstill, Mountain Valley Pipeline looks for solutions*, ROANOKE TIMES, Mar. 20, 2022, https://tinyurl.com/55jujvxx (emphasis added). "Chief Judge Roger Gregory and judges Stephanie Thacker and James Wynn have presided over 12 cases in which environmental groups challenged permits issued to Mountain Valley and the Atlantic Coast Pipeline." *Id.* The same publication reported this year that the panel's "overall record has evoked a saying among pipeline opponents: 'May the Fourth be with you.'" Laurence Hammack, *Another Mountain Valley Pipeline permit struck down by federal court*, ROANOKE TIMES, Feb. 3, 2022, https://tinyurl.com/5n6macfe.[5]

("Courts at all levels of the federal judiciary uphold agency actions in about 70% of cases" regardless of the standard of review).

[5] *See also* Valerie Banschbach & Jessica L. Rich, PIPELINE PEDAGOGY: TEACHING ABOUT ENERGY AND ENVIRONMENTAL JUSTICE CONTESTATIONS 117 (2021) (after the panel "pulled MVP's permits from the FS, BLM, and COE" and "took similar actions against ACP, even ruling that natural gas pipelines cannot cross the Appalachian Trail in national forests without an Act of Congress,"

And, "[o]ddly, [pipeline opponents'] repeated challenges keep landing before the same Fourth Circuit three-judge panel of Roger Gregory, James Wynn and Stephanie Thacker even though cases are supposed to be assigned to judges at random." The Editorial Board, *Green Judges vs. American Gas*, WALL STREET JOURNAL, May 6, 2022, https://tinyurl.com/2p97a4zs.

ARGUMENT

5. This Court's internal operating procedures, which aim to "achieve total random selection" in assigning mature cases to three-judge panels, dictate random assignment in this case. Fourth Circuit I.O.P. 34.1. The Court makes an exception to random assignment only when judges "have had previous involvement with the case . . . through random assignment" to either (1) a "prior appeal in the matter" or (2) a "preargument motion." *Id.* Neither exception applies here.

First, this case is a new matter. The petitioners here challenge Virginia's certification of Mountain Valley's waterbody crossings under Clean Water Act section 401. *See generally* Pet'rs' Opening Br., ECF No. 69. This certification represents an entirely new agency action. The special pipeline panel has not heard a challenge to any previous individual Virginia section 401 certification for

"[o]pponents began signing emails, 'May the Fourth be with you'"); Sarah Vogelsong, *Federal court again yanks two Mountain Valley Pipeline approvals*, VIRGINIA MERCURY, Jan. 25, 2022, https://tinyurl.com/245w6xkp ("This is the second time the Fourth Circuit has rejected permits from the Forest Service and BLM for the national forest crossing.").

waterbody crossings, and this case does not return to the Court following remand of any prior decision. Indeed, the only common element between this case and previous challenges is the involvement of the same private party, Mountain Valley. That connection falls outside of the Court's narrow exception to random assignment for returning cases. *See* Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 86 (2017) ("[O]ne [Fourth Circuit] judge stated that the panels were all randomly created in his circuit except if cases were coming back following a remand either to the district court or from the Supreme Court.").

Second, the Court has not randomly assigned the special pipeline panel to a preargument motion in this case. If the panel has already participated, its involvement could not have been random.

Because neither exception applies here, the Court's operating procedures compel random assignment. Any nonrandom assignment that has already occurred in this new matter violates the Court's own procedures and should be disregarded.

6. Beyond contradicting specific provisions of this Court's operating procedures, assignment to the same panel would create "both the appearance and the fact of presentation of particular types of cases to particular judges." Fourth Circuit I.O.P. 34.1.

As detailed above, two judges have heard every single one of the 13 consolidated Fourth Circuit cases considering permitting decisions for interstate

natural gas projects over the past four years. *See supra* ¶¶ 1–2. A third judge has heard 11 of those cases. *Id.* These three judges have sat on pipeline cases regardless of the specific project—whether Mountain Valley, ACP, or Mountain Valley Southgate—and regardless of the procedural history—whether an entirely new challenge or one returning to the Court following remand to a federal or state agency. The participation of the same three-judge panel in all of these cases has already created the appearance of a special "pipeline panel" within the broader Court. Future assignment of pipeline cases to this same panel—without regard to procedural posture—would only solidify that impression.

Perhaps more troubling, for the last two years, the "pipeline panel" has become the "Mountain Valley panel." The same three judges have heard all four of the consolidated petitions implicating the project during that time period. *See supra* ¶ 2.[6]

7. Nonrandom assignment of this case would also violate the second rationale the Court provides for varied panel assignment: "to assure the opportunity for each judge to sit with all other judges an equal number of times." Fourth Circuit I.O.P. 34.1; *see also* Levy, 103 CORNELL L. REV. at 89 (quoting a Fourth Circuit

[6] And the panel has stayed or vacated all three authorizations it reviewed during that period. *See also* Petition for Rehearing En Banc, Case No. 21-1039(L), ECF No. 94 (outlining the panel's track record and specific errors in the panel's most recent decisions); Petition for Rehearing En Banc, Case No. 20-2159, ECF No. 95 (same).

judge as stating "that . . . the court's practice of equalizing co-sits [is] consistent with the court's general ethos of civility"). Even excluding condemnation cases, Chief Judge Gregory and judges Wynn and Thacker have sat together six separate times over the last four years to hear challenges to pipeline authorizations alone. Given simple time restraints, the continual reconstitution of this panel for complex administrative cases necessarily reduces the opportunities for these judges to sit with other members of the Court, while ensuring that they spend a disproportionate amount of time sitting and deciding cases together.

8. Continued nonrandom assignment to the same panel will undermine public trust in the judicial process. If the assignment process appears "deliberate in some fashion," the Court risks the impression "that the process ha[s] been rigged." Levy, 103 CORNELL L. REV. at 101 (describing the comments of a Fourth Circuit judge); *id.* (noting that random assignment helps safeguard "the public's perception of the judiciary's legitimacy").

The public has already taken note of the anomalous results that pipeline opponents have achieved before the "pipeline panel." *See supra* ¶ 4. And for good reason. The statistics on the panel's arbitrary-and-capricious review rate raise a large red flag. So too does the Supreme Court's near-unanimous reversal of one of the panel's 2018 decisions. *See Cowpasture*, 140 S. Ct. 1837. And the opinions the panel has issued so far this year only advance the perception of a deck stacked

against large infrastructure projects generally and one private party specifically.[7] This consistent track record leads Mountain Valley and the public more broadly to perceive that "the process ha[s] been rigged."

9. The perception created by this Court's deliberate formation of a special "pipeline panel"—actually, a "Mountain Valley panel"—threatens public confidence in the Court's legitimacy. Contrary to the Court's own rules, Mountain Valley and members of the public, currently expect the same panel on any pipeline case before this Court. That threat far outweighs any efficiencies the panel's familiarity with the project offers in this challenge to a new, un-remanded administrative decision.

CONCLUSION

For the foregoing reasons, Mountain Valley respectfully requests that the Court randomly assign this case to a three-judge panel.

Dated: May 16, 2022

Respectfully submitted,

/s/ George P. Sibley, III

[7] *See* Petition for Rehearing En Banc, Case No. 21-1039(L), ECF No. 94; Petition for Rehearing En Banc, Case No. 20-2159, ECF No. 95.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This motion contains 2,316 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

/s/ George P. Sibley, III
Counsel for Mountain Valley Pipeline, LLC

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2022, I electronically filed the foregoing **Motion for Random Panel Assignment** with the Clerk of Court using the CM/ECF System which will automatically send e-mail notification of such filing to all counsel of record.

/s/ George P. Sibley, III
Counsel for Mountain Valley Pipeline, LLC

Environment

Joe Manchin's Price for Supporting the Climate Change Bill: A Natural Gas Pipeline in His Home State

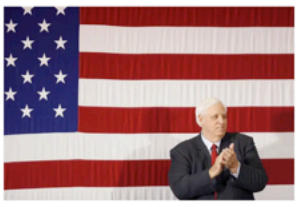
To accommodate the West Virginia senator, Democratic leadership agreed to legislation streamlining permits for the often-stalled Mountain Valley Pipeline and removing jurisdiction from a court that keeps ruling against the project.

West Virginia Sen. Joe Manchin in the U.S. Capitol in July. J. Scott Applewhite/AP Photo

by Ken Ward Jr. and Alexa Beyer, Mountain State Spotlight

Aug. 5, 2022, 5 a.m. EDT

Co-published with Mountain State Spotlight



The New Power Brokers: West Virginia's Natural Gas Industry

Coal, long West Virginia's most dominant industry, is ailing. Natural gas is taking over, as a powerful economic and political force. Is the state making the same mistakes again with a different fossil fuel?

This article was produced for ProPublica's Local Reporting Network in partnership with Mountain State Spotlight. Sign up for Dispatches to get stories like this one as soon as they are published.

From his Summers County, West Virginia, farmhouse, Mark Jarrell can see the Greenbrier River and, beyond it, the ridge that marks the Virginia border. Jarrell moved here nearly 20 years ago for peace and quiet. But the last few years have been anything but serene, as he and his neighbors have fought against the construction of a huge natural gas pipeline.

Jarrell and many others along the path of the partially finished Mountain Valley Pipeline through West Virginia and Virginia fear that it may contaminate rural streams and cause erosion or even landslides. By filing lawsuits over the potential

impacts on water, endangered species and public forests, they have exposed flaws in the project's permit applications and pushed its completion well beyond the original target of 2018. The delays have helped balloon the pipeline's cost from the original estimate of $3.5 billion to $6.6 billion.

But now, in the name of combating climate change, the administration of President Joe Biden and the Democratic leadership in Congress are poised to vanquish Jarrell and other pipeline opponents. For months, the nation has wondered what price Democratic West Virginia Sen. Joe Manchin would extract to allow a major climate change bill. Part of that price turns out to be clearing the way for the Mountain Valley Pipeline.

"It's a hard pill to swallow," said Jarrell, a former golf course manager who has devoted much of his retirement to writing protest letters, filing complaints with regulatory agencies and attending public hearings about the pipeline. "We're once again a sacrifice zone."

The White House and congressional leaders have agreed to step in and ensure final approval of all permits that the Mountain Valley Pipeline needs, according to a summary released by Manchin's office Monday evening. The agreement, which would require separate legislation, would also strip jurisdiction over any further legal challenges to those permits from a federal appeals court that has repeatedly ruled that the project violated the law.

The provisions, according to the summary, will "require the relevant agencies to take all necessary actions to permit the construction and operation of the Mountain Valley Pipeline" and would shift jurisdiction "over any further litigation" to a different court, the D.C. Circuit Court of Appeals.

In essence, the Democratic leadership accepted a 303-mile, two-state pipeline fostering continued use of fossil fuels in exchange for cleaner energy and reduced greenhouse emissions nationwide. Manchin has been pushing publicly for the pipeline to be completed, arguing it would move much needed energy supplies to market, promote the growth of West Virginia's natural gas industry and create well-paid construction jobs.

"This is something the United States should be able to do without getting bogged down in litigation after litigation after litigation," Manchin told reporters last week.

He did not respond to questions from Mountain State Spotlight and ProPublica, including about the reaction of residents along the pipeline route.

ProPublica and Mountain State Spotlight have been reporting for years on how a federal appeals court has repeatedly halted the pipeline's construction because of permitting flaws and how government agencies have responded by easing rules to aid the developer.

The climate change legislation, for which Manchin's vote is considered vital, includes hundreds of millions of dollars for everything from ramping up wind and solar power to encouraging consumers to buy clean vehicles or cleaner heat pumps. Leading climate scientists call it transformative. The Sierra Club called on Congress to pass it immediately. Even the West Virginia Environmental Council urged its members to contact Manchin to thank him.

"Senator Manchin needs to know his constituents support his vote!" the council said in an email blast. "Call today to let him know what climate investments for West Virginia means to you!"

But even some residents along the pipeline route who are avidly in favor of action against climate change say they feel like poker chips in a negotiation they weren't at the table for. And they are anything but happy with Manchin. "He could do so much more for Appalachia, a lot more than he is, but he's chosen to only listen to industries," farmer Maury Johnson said.

It's not clear exactly when the Mountain Valley Pipeline became a focal point of the efforts to win Manchin's vote on the climate change legislation. Reports circulated in mid-July that the White House was considering giving in to some Manchin demands focused on fossil fuel industries. That prompted some environmental groups to urge Biden to take the opposite route, blocking the pipeline and other pro-industry measures.

Pipeline spokesperson Natalie Cox said in an email that it "is being recognized as a critical infrastructure project" and that developers remain "committed to working diligently with federal and state regulators to secure the necessary permits to finish construction." Mountain Valley Pipeline LLC, the developer, is a joint venture of Equitrans Midstream Corp. and several other energy companies.

The company "has been, and remains, committed to full adherence" with state and

federal regulations," Cox added. "We take our responsibilities very seriously and have agreed to unprecedented levels of scrutiny and oversight."

The White House and Senate Democratic Leader Chuck Schumer's office did not respond to requests for comment.

Mountain Valley Pipeline is one of numerous pipelines proposed across the region, reflecting an effort to exploit advances in natural gas drilling technologies. Many West Virginia business and political leaders, including Manchin, hope that natural gas will create jobs and revenue, offsetting the decline of the coal industry.

To protect the environment, massive pipeline projects must obtain a variety of permits before being built. Developers and regulators are supposed to study alternatives, articulate a clear need for the project and outline steps to minimize damage to the environment.

In Mountain Valley Pipeline's case, citizen groups have successfully challenged several of these approvals before the 4th U.S. Circuit Court of Appeals. In one widely publicized ruling involving a different pipeline, the panel alluded to Dr. Seuss' "The Lorax," saying that the U.S. Forest Service had failed to "speak for the trees" in approving the project. The decision was overturned by the U.S. Supreme Court, but not before the project was canceled.

The 4th Circuit has ruled against the Mountain Valley Pipeline time and again, saying developers and permitting agencies skirted regulations aimed at protecting water quality, public lands and endangered species. In the past four years, the court has found that three federal agencies — the U.S. Forest Service, the U.S. Army Corps of Engineers and the Interior Department's Bureau of Land Management — illegally approved various aspects of the project.

While those agencies tweaked the rules, what Manchin's new deal would do is change the referee. In March, Manchin told the Bluefield Daily Telegraph that the 4th Circuit "has been unmerciful on allowing any progress" by Mountain Valley Pipeline.

Then, in May, lawyers for the pipeline petitioned the 4th Circuit to assign a lawsuit by environmental advocates to a new three-judge panel, instead of having it heard by judges who had previously considered related pipeline cases. Among other things, the attorneys cited a Wall Street Journal editorial, published a week earlier, declaring that the pipeline had "come under a relentless siege by green groups and activists in judicial robes."

Lawyers for the environmental groups responded in a court filing that Mountain Valley Pipeline LLC was just "dissatisfied that it has not prevailed" more often and was unfairly lobbing a charge that the legal process was rigged. The 4th Circuit rejected the company's request.

It is unclear whether this pending case, which challenges a water pollution permit issued by West Virginia regulators, would be transferred if the Manchin legislation

issued by West Virginia regulators, would be transferred if the Manchin legislation becomes law.

Congress has intervened in jurisdiction over pipeline cases before. In 2005, it diverted legal challenges to decisions on pipeline permits from federal district courts to the appeals court circuit where the projects are located. The move was part of a plan encouraged by then-Vice President Dick Cheney's secretive energy task force to speed up project approvals. (Under the Constitution, Congress can determine the jurisdiction of all federal courts except the U.S. Supreme Court.)

Besides the pipeline, Manchin has cited other reasons for his change of heart on the climate change bill. He has emphasized that the bill would reduce inflation and pay down the national debt.

PROPUBLICA
Federal Regulators Are Rewriting Environmental Rules So a Massive Pipeline Can Be Built

Approval for the pipeline may not be a done deal. Both senators from Virginia, where the pipeline is also a hot political issue, are signaling that they don't feel bound by Manchin's agreement with the leadership. Manchin's own announcement said that Democratic leaders have "committed to advancing" the pipeline legislation — not that the bill would pass. Regional and national environmental groups are walking a fine line. They support the climate change legislation while opposing weakening the permit process.

The pipeline's neighbors say they'll keep fighting, but they recognize that the odds are against them. "You just feel like you're not an equal citizen when you're dealing with Mountain Valley Pipeline," Jarrell said.

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Mountain Valley loses another permit needed to complete pipeline

Laurence Hammack Apr 3, 2023 5

Less than a week after the Mountain Valley Pipeline moved one step closer to completion, it suffered another step backward Monday.

A federal appeals court threw out a water quality certification from the West Virginia Department of Environmental Protection, an authorization needed by the natural gas pipeline to cross streams and wetlands in the state where it starts.

Mountain Valley's past violations of erosion and sedimentation control regulations figured prominently in a decision by a three-judge panel of the 4th U.S. Circuit Court of Appeals.

"Although the Department acknowledged MVP's violation history, it failed to dispel the tension between MVP's checkered past and its confidence in MVP's future compliance," Chief Judge Roger Gregory wrote in the unanimous decision.

Last Wednesday, the same panel upheld a similar decision by the Virginia Department of Environmental Quality and the State Water Control Board that allowed the company to move forward with its plans to cross streams and wetlands in Southwest Virginia.

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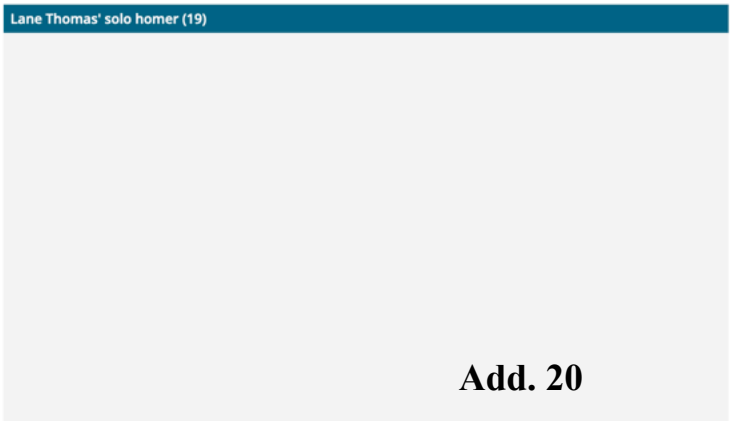


Certification from both states — through which the 303-mile pipeline runs — is required before the U.S. Army Corps of Engineers can issue a final approval for water body crossings.

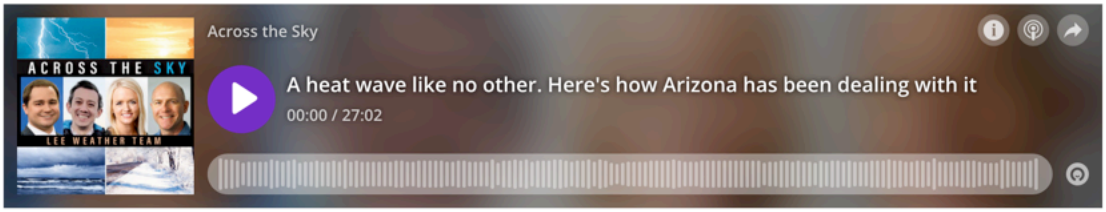
"This should be a huge blow to the project," said David Sligh, conservation director for Wild Virginia, one of the environmental groups that have filed repeated legal challenges against permits issued for the pipeline.

Mountain Valley, however, indicated that it will seek a renewed certification from West Virginia.

The company "will continue to work with the agency on a path forward to completing this critical infrastructure project safely and responsibly," Mountain Valley spokeswoman Natalie Cox wrote in an email Monday.

Construction of the $6.6 billion project is nearly 94% done, she said, and Mountain Valley still expects to finish the job by year's end.

But the Fourth Circuit's decision Monday was just the latest in a series of rejections of government permits that have already delayed the project's completion by more than four years.



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Fall of 2021 marked the last time there was active construction of the pipeline, although erosion and sedimentation control efforts have continued since then on the otherwise dormant right of way.

In early 2022, during a winter break from construction, the Fourth Circuit rejected two other approvals — one for the pipeline to cross through a section of the Jefferson National Forest and the other an opinion by the U.S. Fish and Wildlife Service that endangered species of fish and bats would not be jeopardized by the work.

Mountain Valley says it expects to have a new permit from the U.S. Forest Service by summer. The Fish and Wildlife Service issued a revised biological opinion last month that again found no significant threat to endangered species.

Yet environmental groups are threatening more litigation against the latest permits.

Monday's decision involving the West Virginia water quality certification also complicates the Army Corps' pending consideration of water crossing permits in both states. Mountain Valley plans to either dig through or burrow under the remaining streams and wetlands. More than half of nearly 1,000 water body crossings have been completed, the company says.

Opponents hope the latest court defeat will seal the project's fate.

"After countless violations of environmental safeguards and clean water protections, we know that MVP can't be trusted to comply with the most basic standards of reasonable conduct," said Patrick Grenter, director of the Sierra Club's Dirty Fuels Campaign.

"This project is already more than three years behind schedule, and billions over budget," Grenter said. "With continuous legal setbacks, it has never been more clear that investors should stop throwing money at this doomed project and walk away."

Since crews began to clear land and dig ditches for the buried pipeline in early 2018, there have been problems with muddy runoff from construction sites situated precariously on mountainsides and stream banks.

DEQ has cited Mountain Valley with more than 350 violations of erosion and sedimentation control regulations on a portion of the pipeline that crosses through Southwest Virginia, passing north of Blacksburg and south of Roanoke.

In West Virginia, environmental regulators fined Mountain Valley a combined $569,000 for failing to maintain storm water control measures in 2019 and 2021.

Considering the past record, Gregory wrote, the state did not do enough to prevent additional problems that may occur, should construction resume.

"Without substantive assurance that MVP will comply with those policies," he wrote in a 34-page opinion, "the department's sanguine outlook is troubling — especially given MVP's prior violations."

APRIL 04, 2023

MANCHIN STATEMENT ON 4TH CIRCUIT COURT DELAY OF MOUNTAIN VALLEY PIPELINE

Charleston, WV — Today, U.S. Senator Joe Manchin (D-WV), Chairman of the U.S. Senate Energy and Natural Resources Committee, released the below statement on the decision by the U.S. 4th Circuit Court of Appeals to further delay construction of the Mountain Valley pipeline.

"It is infuriating to see the same 4th Circuit Court panel deal yet another setback for the Mountain Valley Pipeline project and once again side with activists who seem hell-bent on killing any fossil energy that will make our country energy independent and secure. This pipeline is more than 90% constructed with 283 miles already laid, and once through the red tape can bring an additional 2 billion cubic feet per day of natural gas onto the market within months. This project has been through three rounds of water quality permitting but activist groups continue to litigate the last 20 miles, standing in the way of restoring land to its natural beauty, getting more product to market to bolster our energy security and bring down prices, and allowing West Virginians to benefit from the natural resources they own. As OPEC and Putin continue to manipulate energy to suit their agendas, the United States must step up to the plate to get more of our abundant natural resources – which are among the cleanest produced in the world – to market, both for our own energy security and that of our friends and allies around the world."

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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 bureaucratic 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**

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