

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

No. 20-5203

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CLETUS WOODROW BOHON, *ET AL.*,  
*Appellants,*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *ET AL.*  
*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT  
OF COLUMBIA, HON. JAMES E. BOASBERG, No. 20-CV-6

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**SUPPLEMENTAL BRIEF OF APPELLEE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**INTRODUCTION**

Pursuant to this Court’s June 8, 2023 and July 7, 2023 Orders, Defendant-Appellee Federal Energy Regulatory Commission hereby files its supplemental brief addressing the implications of *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890 (2023), and the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324, 137 Stat 10 (“Act”).

On June 21, 2022, this court correctly affirmed the district court’s determination that it lacked jurisdiction. *See Bohon v. FERC*, 37 F.4th

663 (D.C. Cir. 2022). The Supreme Court’s recent decision in *Axon* does not compel a different result. Rather, *Axon* further supports this Court’s lack-of-jurisdiction determination because *Axon* explained that Congress “may substitute” the general grant of district court jurisdiction (28 U.S.C. § 1331) by “explicitly” adopting “an alternative scheme of review.” 143 S. Ct. at 900. That is precisely what this Court found Congress had done in the Natural Gas Act. *See Bohon*, 37 F.4th at 665.

In *Bohon*, this Court found that the Natural Gas Act “makes clear” that the earlier direct review of the Commission’s Mountain Valley Pipeline orders, in the court of appeals, pursuant to 15 U.S.C. § 717r, was “exclusive.” 37 F.4th at 665; *see also id.* (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958)). Accordingly, *Axon*, a case analyzing whether Congress had *implicitly* adopted an alternative scheme of review, does not undercut this Court’s analysis.

Even if there were doubt about *Axon*’s implications, recently enacted legislation specifically addressing the Mountain Valley Pipeline independently compels dismissal of this case for lack of jurisdiction. *See Act* § 324.



## BACKGROUND

Plaintiffs in this case, Cletus and Beverly Bohon and two other families (the “Bohons”), are homeowners along the path of the Mountain Valley Pipeline. They filed this action in federal district court, seeking a declaratory judgment that the Natural Gas Act, 15 U.S.C. § 717f, unconstitutionally delegates eminent domain authority. *See* Complaint, JA 9. As remedy, the Bohons sought declaration that the Commission has no authority to issue certificates under the Natural Gas Act to applicants seeking to use the power of eminent domain and that the certificate issued to Mountain Valley Pipeline and all such certificates previously issued are void. *See id.* at 14-15, JA 22-23; *see also* Memorandum Opinion at 6 (district court decision describing requested relief as “breathtaking in scope”), JA 273.

The district court dismissed the action, finding lack of jurisdiction. *See* Memorandum Opinion, JA 268. The Bohons appealed to this Court, and—following briefing, supplemental briefing, and oral argument—this Court affirmed the district court on June 21, 2022. *See Bohon*, 37 F.4th 663.

The Bohons petitioned for a writ of certiorari. The Supreme Court granted the petition and remanded to this Court for further consideration in light of its recent *Axon* decision. *See Bohon v. FERC*, No. 22-256, 2023 WL 3046112 (U.S. Apr. 24, 2023).

## ARGUMENT

### **I. *Axon* does not undercut this Court’s determination that the Natural Gas Act *explicitly* divests district court jurisdiction over the Bohons’ claims.**

In *Axon*, targets of two separate administrative agencies (the Federal Trade Commission and the Securities Exchange Commission) sidestepped ongoing administrative agency proceedings by bringing suits in the district courts to halt the administrative proceedings. *See* 143 S. Ct. at 897. These plaintiffs challenged the administrative proceedings by raising constitutional separation-of-powers issues stemming from tenure protections enjoyed by the agencies’ administrative law judges. *See id.* These challenges were “fundamental, even existential,” that “maintain in essence that the agencies, as currently structured, are unconstitutional in much of their work.” *Id.* at 897. Key to understanding the implications of *Axon* here, the plaintiffs argued that the constitutional violation existed by “being

subjected to . . . an illegitimate proceeding [that] caus[ed] legal injury” independent of the agency outcome. *Id.* at 898. That is, it was the very fact of the proceedings themselves that brought about the alleged constitutional violation.

The issue for the Court was to “decide where [the challenges] may be heard,” i.e. in a district court or in a court of appeals after the administrative proceedings had concluded. *Axon*, 143 S. Ct. at 897. The Court determined that the agencies’ respective statutory authorities did not displace (either explicitly or implicitly) the general 28 U.S.C. § 1331 district court jurisdiction to address particular “here-and-now” constitutional claims related to the *Axon* plaintiffs being subject to an illegitimate proceeding; accordingly, the plaintiffs could proceed in district court. *Id.* at 906. The same result does not follow here.

- A. *Axon* analyzed whether the statutory judicial review schemes *implicitly* displace district court jurisdiction, whereas here this Court’s previous judgment (and the district court before it) determined that the Natural Gas Act *explicitly* displaces district court jurisdiction.**

District courts “may ordinarily hear [challenges to federal agency action] by way of 28 U.S.C. § 1331’s grant of jurisdiction for claims

‘arising under’ federal law.” *Id.* at 900; *see also* 28 U.S.C. § 1331 (providing jurisdiction to resolve “civil actions arising under the Constitution, laws, or treaties of the United States”). But Congress can substitute “for that district court authority an alternative scheme of review.” *Axon*, 143 S. Ct. at 900. That substitution of jurisdiction can be done in one of two ways: (1) explicitly (by using “words that district court jurisdiction will yield”); or (2) implicitly (“by specifying a different method to resolve claims about agency action”). *Id.*

The statutory review provisions in *Axon*, unlike the Natural Gas Act provision at issue in this case, fall into the later, implicit category, which required the Court there to take the next step of evaluating the scope of claims covered by the implicit substitution of district court authority. *See Axon*, 143 S. Ct. at 900 (explaining that the statutory review schemes do not “necessarily extend to every claim concerning agency action”). *Axon* concluded that Congress implicitly substituted district court jurisdiction, meaning the Court was required to apply its three-factor test set out in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and its progeny (*Elgin v. Dep’t of Treasury*, 567 U.S. 1 (2012), and *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S.

477 (2010)), to determine whether the particular separation-of-powers claims at issue were of the type Congress intended to be reviewed within the alternative scheme of judicial review. *See Axon*, 143 S. Ct. at 900-06.

The Court had to determine whether the claims at issue were more like the cases finding displacement of district court jurisdiction (*Thunder Basin* and *Elgin*) or more like the case finding district court jurisdiction to exist (*Free Enterprise Fund*). *See Axon*, 143 S. Ct. at 902-06. Most of the *Axon* opinion is devoted to analysis of whether the Securities Exchange Act and the Federal Trade Commission Act implicitly displaced district court jurisdiction over the particular claims, i.e., whether the claims brought by the plaintiffs were “of the type” intended to be addressed on direct review by the court of appeals. *See id.* at 900. *Axon* concluded that “[a]ll three *Thunder Basin* factors point . . . toward allowing district court review” of the claims. *Id.* at 906.

None of that analysis is applicable in this case where the Natural Gas Act explicitly displaces district court jurisdiction. The Natural Gas Act, unlike the statutory provisions in *Axon*, “makes clear that once the

original parties who challenged the Mountain Valley certificate proceeding filed the record in this Court, [its] jurisdiction became ‘exclusive.’” *Bohon*, 37 F.4th at 665 (quoting 15 U.S.C. § 717r(b) (“jurisdiction” of the court of appeals “shall be exclusive”)); Memorandum Opinion at 3-4, JA 270-71; *see also Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (affirming Commission on all issues presented on direct review by the court of appeals of Commission orders approving Mountain Valley Pipeline).

Unlike *Axon*, there is not a blank slate when interpreting the scope of the Natural Gas Act’s judicial review provisions. In addition to the clear meaning of the Natural Gas Act’s exclusive judicial review provisions, 15 U.S.C. § 717r(b), this Court’s earlier judgment appropriately relied on Supreme Court precedent construing an effectively identical provision of the Federal Power Act, 16 U.S.C. § 825l. *See Bohon*, 37 F.4th at 665 (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958)); *see also City of Anaheim v. FERC*, 558 F.3d 521, 523 n.2 (D.C. Cir. 2009) (explaining that judicial interpretations of substantially identical provisions in the Federal

Power Act and Natural Gas Act apply interchangeably). Unlike the statutory schemes in *Axon*, the Supreme Court has explained that the language of the Natural Gas Act provides for a “specific, complete and exclusive mode for judicial review.” *City of Tacoma*, 357 U.S. at 336; *see also* Memorandum Opinion at 9 (citing *City of Tacoma* and explaining that the Natural Gas Act’s “jurisdictional provision is broad”), JA 276.

The district court similarly found the Natural Gas Act’s jurisdiction-stripping provision to be explicit, not implicit. *See* Memorandum Opinion at 9-12, JA 276-79. In particular, the district court found that the Natural Gas Act’s special statutory-review scheme “expressly applies to [the Bohons’] claims.” *Id.* at 9-10, JA 276-77. The district court correctly found that (1) only once the administrative process has concluded may an “aggrieved” person petition for review in a court of appeals; (2) upon the filing of such a petition, the appellate court shall have “exclusive” jurisdiction to “affirm, modify, or set aside [the] order;” and (3) the Natural Gas Act’s exhaustion provision forecloses raising claims not previously considered. *See id.* at 9 (quoting 15 U.S.C. § 717r(b)), JA 276. This Court agreed. *See Bohon*, 37 F.4th at 666 (explaining that “the mere fact that the Bohons are challenging

FERC's structure does not take their suit outside the Natural Gas Act's review provision;" the Bohons' "claims are very much anchored in pipeline proceedings" and thus "fall squarely within the Natural Gas Act's review scheme"). None of these determinations, based on the specific language of the Natural Gas Act, is inconsistent with *Axon*.

**B. This Court (and the district court before it) gave meaning to the Natural Gas Act's finality provision, whereas the lawsuits in *Axon* were filed before final agency action and were therefore concurrent to ongoing administrative proceedings.**

Moreover, district court litigation in *Axon* began while administrative proceedings were ongoing, meaning there were no final agency orders. *See Axon*, 143 S. Ct. at 898. Rather than assert challenges in the courts of appeals after final agency action, the *Axon* plaintiffs, who were both involuntary respondents in ongoing administrative enforcement actions, charged in district courts that some fundamental aspect of the administrative agencies' structure violates the Constitution; that the violation made the entire proceeding unlawful; and that being subjected to such an illegitimate proceeding causes legal injury (independent of any particular agency rulings). *See id.* at 898.



By contrast, the Bohons here have never been subject to an agency proceeding like the plaintiffs in *Axon*. They only allege injury that resulted *after* the Commission issued final orders addressing the Mountain Valley Pipeline, which were subsequently affirmed by this Court. *See Appalachian Voices*, 2019 WL 847199.

This sequence of events did not go unnoticed by this Court. In its earlier judgment, this Court observed that jurisdiction in the appellate court became exclusive “once” the record was filed. *Bohon*, 37 F.4th at 665; *see also* 15 U.S.C. § 717r(b) (providing that the “judgment and decree” of the court of appeals upon direct review of Commission orders “shall be final”). By waiting until after the Commission issued a certificate for the Mountain Valley Pipeline and after this Court had affirmed the Commission’s orders, the Bohons distinguish themselves from the plaintiffs in *Axon*. Rather than being involuntarily subject to an allegedly illegal administrative process as the *Axon* plaintiffs asserted, the Bohons here merely refused to participate in a voluntary (and constitutional) process set forth by Congress that would have ensured judicial review of all of their claims—“including constitutional” ones. Memorandum Opinion at 1, JA 268; *see also id.* at 4 (recognizing

that *Appalachian Voices* addressed claims grounded in the Fifth Amendment’s Due Process and Takings Clauses), JA 271; *id.* at 11-12 (explaining that bifurcated judicial review, “reserv[ing] constitutional arguments for a later round of litigation,” would negate the finality provision, and that “[b]ifurcation and duplicative litigation are on display here in spades” because the Bohons “call on [the district court] to enjoin a [Commission] certificate already approved by” *Appalachian Voices*), JA 278-79.

“This dispute traces its roots” to the Commission’s Mountain Valley proceeding, Memorandum Opinion at 4, JA 271, and should have been addressed there. Indeed, *Appalachian Voices* was decided almost a year before the Bohons filed this lawsuit in the district court; thus, had the Bohons followed the process set forth by Congress, they likely would have secured a court ruling on their constitutional claims well before the date they filed their lawsuit in the district court. *See also* Memorandum Opinion at 4 (explaining that “affected landowners, environmental organizations, and tribal groups” petitioned for review of the Commission’s Mountain Valley orders, raising “both statutory and constitutional” challenges and resulting in this Court’s *Appalachian*

*Voices* opinion), JA 271; *see also id.* at 10 (finding that the Bohons are “aggrieved parties” under the Natural Gas Act and that “their bone of contention” is with the Commission’s orders, “and therefore should have availed themselves of the [Natural Gas Act’s] review process”), JA 277. This Court agreed. *See Bohon*, 37 F.4th at 666 (explaining that “the Bohons’ suit directly imperils a specific certificate that FERC granted Mountain Valley” and that this Court upheld on direct review).

**C. Even if this were a case where district court jurisdiction is not explicitly displaced, *Axon*’s evaluation of the *Thunder Basin* factors demonstrates that Congress intended the Bohons’ claims to be included in direct review of Commission orders by the court of appeals.**

The district court determined that the Natural Gas Act implicitly displaced its jurisdiction under the three-factor *Thunder Basin* framework only as an alternative reason for dismissal, and this Court did not rely on that rationale. *See Bohon*, 37 F.4th at 665-66; Memorandum Opinion at 12-18, JA 279-85. Accordingly, nothing in *Axon* calls into question this Court’s earlier judgment, and this case need not be resolved based on the *Thunder Basin* three-factor analysis. But even if those factors were relevant to the disposition of this case, *Axon* demonstrates how the Bohons’ case is readily distinguishable.

First, regarding meaningful judicial review, in *Axon* the Court found in favor of allowing district court jurisdiction upon examining the “interaction between the alleged injury and the timing of review.” 143 S. Ct. at 903. The plaintiffs in *Axon* did not challenge final agency decisions; rather, they challenged the constitutional authority of the agencies to conduct proceedings and asserted that “being subjected to such an illegitimate proceeding causes legal injury.” 143 S. Ct. at 898.

By contrast, the Bohons challenge the Commission’s certificate, which was affirmed by this Court. *See Appalachian Voices*, 2019 WL 847199. They dispute the legal consequences of Commission actions, i.e., exercise of eminent domain that occurs after final orders issue (subject to judicial review). Therefore, appellate review of the constitutionality of those consequences following final Commission orders poses no timing problem like in *Axon*. *See Axon*, 143 S. Ct. at 904 (explaining that the plaintiffs “will lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over”); *see also Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 115 (D.C. Cir. 2022) (parties “are required to exhaust even constitutional claims before the agency;” finding 5th, 9th

and 10th Amendment objections to FERC pipeline certificate decision waived by failure to raise them in certificate proceeding) (internal quotation marks omitted).

Second, the Court found that the collateralism factor favored the plaintiffs “because they are challenging the Commissions’ power to proceed at all, rather than actions taken in the agency proceedings.” 143 S. Ct. at 904. *Axon* explained that *Free Enterprise Fund* focused on what the claim was about, i.e., the existence of the agency, not its standards, thereby making it collateral. *See id.* at 905 (citing *Free Enter. Fund*, 561 U.S. at 490). Here, the Bohons are challenging agency action, not the agency’s authority to act in the first instance. *See Bohon*, 37 F.4th at 666 (“By contrast [to *Free Enterprise*], the Bohons’ suit directly imperils a specific certificate that FERC granted Mountain Valley.”); *see also* Memorandum Opinion at 3 (explaining that only when “[a]rmed with” 15 U.S.C. § 717f(h) certificate authority can a pipeline “initiate condemnation proceedings as necessary”), JA 270.

Finally, with regard to expertise, the *Axon* Court found the constitutional issues were not “intertwined with or embedded” in matters on which the agencies have expertise. *See* 143 S. Ct. at 906

(contrasting *Elgin*, where the Court “relied on [agency] expertise on a raft of ordinary employment issues surrounding the employee’s [Constitutional] contention”). *Axon* indicates that no amount of agency expertise could obviate the “here-and-now harm” that comes with being involuntarily subject to an allegedly infirm process. 143 S. Ct. at 906.

But again, the nature of the claim matters. *Axon*, 143 S. Ct. at 906 (emphasizing, “again,” in the context of agency expertise, that the alleged injury is not “this or that ruling but from subjection to all agency authority”). As in *Elgin*, there are “many threshold questions that may accompany a constitutional claim,” the answers to which may “obviate the need to address the constitutional challenge” through Commission interpretation of the Natural Gas Act or a finding that the applicant does not meet the standards for a certificate of public convenience and necessity, 15 U.S.C. § 717f(c). *Elgin*, 567 U.S. at 29; *see also* Memorandum Opinion at 18 (explaining that “FERC’s expertise can be ‘brought to bear’ on [the Bohons’] constitutional claims”) (citing cases), JA 285.

**II. Although jurisdiction was always lacking due to the Natural Gas Act’s exclusive judicial review provisions, Congress recently passed legislation (the Fiscal Responsibility Act of 2023) that not only moots the Bohons’ claims, but also provides an additional, independent reason to dismiss for lack of jurisdiction.**

On June 3, 2023, President Biden signed into law the Fiscal Responsibility Act of 2023 (“Act”), Pub. L. No. 118-5, 137 Stat. 10, A-1. (A copy of Act § 324 is included in the Addendum accompanying this brief at A-1.)<sup>1</sup> The Act declares the “Mountain Valley Pipeline [to be] required in the national interest,” “ratifies and approves” all administrative actions “necessary for the construction and initial operation,” and directs the Commission to “continue to maintain such authorizations.” *Id.* § 324(b), (c)(1), (c)(2). The Act further provides that “no court shall have jurisdiction to review any action” taken by the Commission granting any “approval necessary for the construction” of the pipeline. *See id.* § 324(e)(1); *see also Mountain Valley Pipeline, LLC*, 183 FERC ¶ 61,221 PP 9, 11 & n.20 (June 28, 2023) (“Authorizing Order”) (noting congressional ratification of all issued Federal authorizations for the Mountain Valley Pipeline Project and removal of

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<sup>1</sup> Citations to “A-\_\_\_” refer to the Addendum.

jurisdiction to review Commission authorization), A-1, 5-7. Congress created and imposed these substantive provisions of law “[n]otwithstanding any other provision of law.” Act § 324(c), (d), (e). And Congress further declared that the Act “supersedes any other provision of law” that is “inconsistent with the issuance of any [such] authorization.” *Id.* § 324(f).

**A. In Ratifying the Commission’s approvals, Congress has mooted the Bohons’ claims.**

The Court’s jurisdiction is limited to live cases and controversies. U.S. Const. art. III, § 2. “At any point during a lawsuit, [the Court] must dismiss a case as moot if ‘intervening events make it impossible to grant the prevailing party effective relief.’” *Friends of the Earth v. Haaland*, No. 22-5036, 2023 WL 3144203, \*1 (D.C. Cir. Apr. 28, 2023) (per curiam) (quoting *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 688 (D.C. Cir. 1996)). In particular, “[w]here Congress enacts intervening legislation that definitively resolves the issues a litigant seeks to put before [the Court], the claims are moot and [the Court is] precluded from deciding them.” *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1309 (D.C. Cir. 2004) (per curiam); *see also Am. Bar Ass’n v. FTC*, 636 F.3d 641, 643 (D.C. Cir. 2011) (explaining that it is “well



established that a case must be dismissed as moot if new legislation addressing the matter in dispute is enacted while the case is still pending”). In another case before this Court reviewing Commission orders approving the resumed construction of, and extending completion date for, the Mountain Valley Project, the Commission recently has argued that *Haaland* and *Nuclear Energy Inst.* support dismissal of that case for mootness. See Commission’s July 31, 2023 Notice of Intervening Events and Motion to Dismiss, Doc. No. 2010364 at 7-8, *Sierra Club v. FERC*, 68 F.4th 630, 636 (D.C. Cir. 2023) (No. 20-1512).<sup>2</sup>

The Act provides that “[n]otwithstanding any other provision of law,” “Congress hereby ratifies and approves all authorizations,” “extensions,” “and any other approvals or orders issued pursuant to Federal law necessary for the construction and initial operation at full

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<sup>2</sup> As noted by the Commission in the July 31 Motion, the legal significance of the Act is also being litigated in the Fourth Circuit. See *Appalachian Voices v. Dep’t of Interior*, 4th Cir. Nos. 23-1384, *et al.* In response to Mountain Valley’s emergency application, the Supreme Court vacated two stays of construction entered by the Fourth Circuit after passage of the Act. See July 27, 2023 Order in *Mountain Valley Pipeline, LLC v. Wilderness Soc’y, et al.*, No. 23A35, 2023 WL 4770018 (U.S. July 27, 2023).

capacity of the Mountain Valley Pipeline.” Act § 324(c)(1). The Act further “directs” the Commission “to continue to maintain such authorizations,” “extensions,” and “approvals.” *Id.* § 324(c)(2).

Moreover, shortly after passage of the Act, the Commission found that the Act “ratified” all issued Federal authorizations for the project and that Mountain Valley is “authorized to proceed with all remaining construction associated with the project.” Authorizing Order PP 9-10, A-5-6. The period for seeking agency rehearing of the Authorizing Order has elapsed without the filing of any requests for rehearing; accordingly, the Authorizing Order is no longer subject to challenge. *See* 15 U.S.C. §§ 717r(a)-(b).

Here, passage of the Act and issuance of the now final Authorizing Order, in combination, make it impossible to grant the Bohons effective relief. The Act clearly encompasses the Commission action collaterally attacked by the Bohons, which authorizes the Mountain Valley Project. *See* Act § 324(c)(1); *see also supra* pp. 12-13, 15 (district court finding that “bone of [the Bohons’] contention” is with FERC-issued (and judicially-affirmed) Mountain Valley certificate; this Court’s finding in *Bohon* that the belated district court complaint “imperils” that

certificate). Congress ratified the Commission's prior approvals and directed the Commission to maintain such authorizations. *See id.* §§ 324(c)(1), (2). Those prior approvals include the original certificate issued by the Commission and affirmed by this Court that the Bohons now collaterally attack. *See Bohon*, 37 F.4th at 666 (no jurisdiction “over the Bohons’ collateral attack on the FERC order”); *see also Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017), *order on reh'g*, 163 FERC ¶ 61,197 (2018), *aff'd sub. nom., Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (unpublished). As noted by the Commission, because of the Act (and not because of some provision of the Natural Gas Act that the Bohons allege to be unconstitutional), “Mountain Valley has all necessary authorizations for the Mountain Valley Pipeline Project.” Authorizing Order P 9-10, A-5-6.

The combination of the foregoing events (passage of the Act and subsequent issuance of the now-final Authorizing Order) renders this case moot. Dismissal of the Bohons’ complaint remains appropriate.

**B. The Fiscal Responsibility Act removes statutory jurisdiction to consider the Bohons' claims.**

In the alternative, the Bohons challenge Commission actions that fall squarely within the Act's jurisdiction-removing purview. They "attack FERC's power to apply the Natural Gas Act and seek to 'set aside' existing pipeline certificates." *Bohon*, 37 F.4th at 666 (citing 15 U.S.C. § 717r(b)). "Those claims are very much anchored in pipeline proceedings. So they fall squarely within the Natural Gas Act's review scheme." *Id.* As a result, the Act precludes Article III courts' review of the Bohons' challenges to the Commission's authorizations for the Mountain Valley Pipeline Project. *See* Authorizing Order, 183 FERC ¶ 61,221 P 11 n.20 (explaining that the Act "provides that no court shall have jurisdiction to review any action taken by the Commission granting any approval necessary for the construction of the Mountain Valley Pipeline Project"), A-6-7; *see also Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001) ("[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted") (quoting *Plaut v. Spendthrift Farm, Inc.* 514 U.S. 211, 226 (1995)).

As this Court recognized, “[w]ithin constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider,” *Bohon*, 37 F.4th at 665 (quoting *Bowles v. Russell*, 551 U.S. 205, 212 (2007)), and this Court must respect its choice. As a result, the only function remaining for the Court is to again dismiss this appeal.

### CONCLUSION

For these reasons, this Court should find that its June 21, 2022 judgment, finding lack of jurisdiction, remains correct.

Respectfully submitted,

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August 7, 2023

## Certificate of Compliance

In accordance with Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), the Order of this Court, issued June 8, 2023, directing supplemental briefing, and the Order of this Court, issued July 7, 2023, extending the deadline for submission of supplemental briefs because it contains 4,222 words (not to exceed 5,000 words), excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Century Schoolbook 14-point font in Microsoft Word.

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August 7, 2023

# **ADDENDUM**

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## PUBLIC LAW 118–5—JUN. 3, 2023

137 STAT. 47

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

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

(b) **CONGRESSIONAL FINDINGS AND DECLARATION.**—The Congress hereby finds and declares that the timely completion of construction and operation of the Mountain Valley Pipeline is required in the national interest. The Mountain Valley Pipeline will serve demonstrated natural gas demand in the Northeast, Mid-Atlantic, and Southeast regions, will increase the reliability of natural gas supplies and the availability of natural gas at reasonable prices, will allow natural gas producers to access additional markets for their product, and will reduce carbon emissions and facilitate the energy transition.

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

(1) Congress hereby ratifies and approves all authorizations, permits, verifications, extensions, biological opinions, incidental take statements, and any other approvals or orders issued pursuant to Federal law necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline; and

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

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

Deadline.

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

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

(e) **JUDICIAL REVIEW.**—

(1) Notwithstanding any other provision of law, no court shall have jurisdiction to review any action taken by the Secretary of the Army, the Federal Energy Regulatory Commission, the Secretary of Agriculture, the Secretary of the Interior, or a State administrative agency acting pursuant to Federal law that grants an authorization, permit, verification, biological opinion, incidental take statement, or any other approval necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline, including the issuance of any authorization, permit, extension, verification, biological opinion, incidental take statement, or other approval described in subsection (c) or (d) of this section for the Mountain Valley Pipeline,

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whether issued prior to, on, or subsequent to the date of enactment of this section, and including any lawsuit pending in a court as of the date of enactment of this section.

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

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

## DIVISION D—INCREASE IN DEBT LIMIT

31 USC 3101  
note.  
Time period.

### SEC. 401. TEMPORARY EXTENSION OF PUBLIC DEBT LIMIT.

(a) IN GENERAL.—Section 3101(b) of title 31, United States Code, shall not apply for the period beginning on the date of the enactment of this Act and ending on January 1, 2025.

Effective date.

(b) SPECIAL RULE RELATING TO OBLIGATIONS ISSUED DURING EXTENSION PERIOD.—Effective on January 2, 2025, the limitation in effect under section 3101(b) of title 31, United States Code, shall be increased to the extent that—

(1) the face amount of obligations issued under chapter 31 of such title and the face amount of obligations whose principal and interest are guaranteed by the United States Government (except guaranteed obligations held by the Secretary of the Treasury) outstanding on January 2, 2025, exceeds

(2) the face amount of such obligations outstanding on the date of the enactment of this Act.

Deadline.

(c) RESTORING CONGRESSIONAL AUTHORITY OVER THE NATIONAL DEBT.—

(1) EXTENSION LIMITED TO NECESSARY OBLIGATIONS.—An obligation shall not be taken into account under subsection (b)(1) unless the issuance of such obligation was necessary to fund a commitment incurred pursuant to law by the Federal Government that required payment before January 2, 2025.

(2) PROHIBITION ON CREATION OF CASH RESERVE DURING EXTENSION PERIOD.—The Secretary of the Treasury shall not issue obligations during the period specified in subsection (a) for the purpose of increasing the cash balance above normal

183 FERC ¶ 61,221  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;  
James P. Danly, Allison Clements,  
and Mark C. Christie.

Mountain Valley Pipeline, LLC

Docket Nos. CP16-10-000  
CP21-57-000

ORDER AUTHORIZING ALL CONSTRUCTION ACTIVITIES

(Issued June 28, 2023)

1. On June 26, 2023, Mountain Valley Pipeline, LLC (Mountain Valley) requested Commission approval to move forward with all remaining construction associated with the Mountain Valley Pipeline Project.

**I. Background**

2. On October 13, 2017, the Commission issued Mountain Valley a certificate of public convenience and necessity authorizing the construction and operation of the Mountain Valley Pipeline Project, a new interstate pipeline system designed to provide up to 2,000,000 dekatherms per day of firm natural gas transportation service from Wetzel County, West Virginia, to Transcontinental Pipe Line Company, LLC's Compressor Station 165 in Pittsylvania County, Virginia.<sup>1</sup> Mountain Valley commenced construction of the project in February 2018.<sup>2</sup>

3. In July 2018, the U.S. Court of Appeals for the Fourth Circuit vacated the U.S. Forest Service's record of decision and the Bureau of Land Management's right-of-way grant that authorized the project to cross the Jefferson National Forest.<sup>3</sup> In response,

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<sup>1</sup> *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017), *order on reh'g*, 163 FERC ¶ 61,197 (2018), *aff'd sub. nom. Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (unpublished).

<sup>2</sup> *See* Mountain Valley's Weekly Status Report Nos. 14 and 15 (filed February 7 and 15, 2018, respectively) (construction did not commence until after February 2, 2018).

<sup>3</sup> *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018). Subsequently, in January 2022, the Fourth Circuit vacated the U.S. Forest Service's renewed record of decision and the Bureau of Land Management's renewed right-of-way grant. *Wild Va. v.*

Commission staff prohibited construction between mileposts 196.0 and 221.0, a 25-mile exclusion zone encompassing the two watersheds within which there is 3.5 miles of pipeline right-of-way that crosses the Jefferson National Forest.<sup>4</sup> Subsequently, in December 2020, the Commission reduced the exclusion zone and allowed construction to resume between mileposts 201.6 to 218.6, based on its finding that construction in that area would not contribute sediment to any portion of the Jefferson National Forest.<sup>5</sup>

4. In April 2022, the Commission issued an order amending Mountain Valley's certificate, approving, in part, a change in the crossing method for 183 waterbodies and wetlands from open-cut to trenchless.<sup>6</sup> In the order, the Commission explained that construction associated with the amendment could not proceed until: (1) Mountain Valley obtained authorization from the U.S. Army Corps of Engineers (Corps) to conduct the remaining open-cut crossings;<sup>7</sup> and (2) Endangered Species Act consultation for the amendment project was complete and the U.S. Fish and Wildlife Service (FWS) issued a new or revised Biological Opinion for the Mountain Valley Pipeline Project.<sup>8</sup> The order

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*U.S. Forest Serv.*, 24 F.4th 915 (4th Cir. 2022).

<sup>4</sup> *Mountain Valley Pipeline LLC*, Docket No. CP16-10-000 (August 29, 2018) (delegated order) (Director of OEP's August 29, 2018 Partial Authorization to Resume Construction Order).

<sup>5</sup> *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,252 (2020).

<sup>6</sup> *Mountain Valley Pipeline, LLC*, 179 FERC ¶ 61,013 (2022).

<sup>7</sup> In November 2020, the Fourth Circuit issued a stay of Mountain Valley's Nationwide Permit 12 verifications, issued by the Corps for the project. *Sierra Club v. U.S. Army Corps of Eng'rs*, Nos. 20-2039 and 20-2042 (4th Cir. Nov. 9, 2020) (order granting stay); *Sierra Club v. U.S. Army Corps of Eng'rs*, 981 F.3d 251 (Dec. 1, 2020) (accompanying opinion). The Corps' Nationwide Permit 12 verifications had authorized Mountain Valley, pursuant to section 404 of the Clean Water Act, to cross waters of the United States using an open-cut method, which was the crossing method approved in the Certificate Order. On March 4, 2021, Mountain Valley filed an individual permit application with the Corps for the remaining open-cut crossings.

<sup>8</sup> FWS issued a Biological Opinion for the Mountain Valley Pipeline Project in November 2017. The 2017 Biological Opinion was stayed by the Fourth Circuit in October 2019. *Wild Va., Inc. v. Dep't of the Interior*, No. 19-1866 (4th Cir. Oct. 11, 2019) (order granting stay and holding case in abeyance). Following reinitiated consultation, FWS issued a revised Biological Opinion for the project in September 2020. In February 2022, the Fourth Circuit vacated the 2020 Biological Opinion. *Appalachian Voices v. U.S. Dep't of the Interior*, 25 F.4th 259 (4th Cir. 2022).

further noted that before additional work could proceed in the Jefferson National Forest, the Commission must lift the existing exclusion zone.<sup>9</sup>

5. On February 28, 2023, FWS issued a new Biological Opinion and Incidental Take Statement for the Mountain Valley Pipeline, as amended, thus concluding ESA consultation.

6. On May 15, 2023, the U.S. Forest Service issued a record of decision and, on June 20, 2023, the Bureau of Land Management issued a right-of-way grant, authorizing the project to cross the Jefferson National Forest.

7. On June 3, 2023, President Biden signed into law the Fiscal Responsibility Act of 2023.<sup>10</sup> Section 324 of the Act, entitled “Expediting Completion of the Mountain Valley Pipeline,” ratifies and approves all authorizations issued pursuant to Federal law necessary for the construction and operation of the Mountain Valley Pipeline Project, and directs the relevant agencies to maintain those authorizations.<sup>11</sup> Section 324 further provides that it “supersedes any other provision of law (including any other section of th[e] Act or other statute, any regulation, any judicial decision, or any agency guidance) that is inconsistent with the issuance of any authorization, permit, verification, biological opinion, incidental take statement, or other approval for the Mountain Valley Pipeline.”<sup>12</sup>

8. On June 23, 2023, the Corps issued an individual permit for the Mountain Valley Pipeline, authorizing all remaining open-cut waterbody crossings.<sup>13</sup>

## **II. Discussion**

9. As noted, pursuant to section 324 of the Fiscal Responsibility Act of 2023, all issued Federal authorizations for the Mountain Valley Pipeline Project have been ratified by Congress. We find that includes the authorizations subject to the remand in the U.S. Court of Appeals for the District of Columbia Circuit’s May 26, 2023 decision in

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<sup>9</sup> *Mountain Valley Pipeline, LLC*, 179 FERC ¶ 61,013 at P 150, n.268.

<sup>10</sup> Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10 (2023).

<sup>11</sup> *Id.* § 324(c)(1)-(2), 137 Stat. at 47.

<sup>12</sup> *Id.* § 324(f), 137 Stat. at 48.

<sup>13</sup> The Corps’ permit also approves the trenchless crossing of five waterbodies that are subject to section 10 of the Rivers and Harbors Act.

*Sierra Club v. FERC*.<sup>14</sup> Accordingly, we find that no further action in response to the remand is necessary and none will be forthcoming.

10. Accordingly, Mountain Valley has all necessary authorizations for the Mountain Valley Pipeline Project. Mountain Valley is therefore authorized to proceed with all remaining construction associated with the project. Specifically, Mountain Valley is authorized to proceed with construction in the Jefferson National Forest,<sup>15</sup> and with all remaining waterbody crossings,<sup>16</sup> including waterbody crossings previously approved through the Commission staff variance process.<sup>17</sup>

11. We note that Order No. 871,<sup>18</sup> which precludes construction while the Commission considers certain requests for rehearing, is not implicated by this order, which implements the provisions of the Commission's initial certificate and amendment orders.<sup>19</sup> Thus, Mountain Valley is authorized by the Commission to proceed with all

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<sup>14</sup> 68 F.4th 630 (D.C. Cir. 2023).

<sup>15</sup> As Mountain Valley acknowledges in its June 26 request, it cannot commence work in the Jefferson National Forest until it receives a notice to proceed from the Bureau of Land Management.

<sup>16</sup> Our authorization here is issued in lieu of a notice to proceed with construction from the Director of the Office of Energy Projects (OEP). No further authorization from the Director of OEP is required before Mountain Valley can commence all outstanding construction on the project.

<sup>17</sup> See, e.g., Commission Staff's May 18, 2020 Partial Approval of Variance Requests No. D-35 and G-12 (approving change in waterbody crossing method but not authorizing construction).

<sup>18</sup> *Limiting Authorizations to Proceed with Constr. Activities Pending Rehearing*, Order No. 871, 171 FERC ¶ 61,201 (2020) (promulgating 18 C.F.R. § 157.23), *order on reh'g and clarification*, Order No. 871-A, 174 FERC ¶ 61,050, *order on reh'g and clarification*, Order No. 871-B, 175 FERC ¶ 61,098, *order on reh'g and clarification*, Order No. 871-C, 176 FERC ¶ 61,062 (2021).

<sup>19</sup> Order No. 871-B, 175 FERC ¶ 61,098 at P 17 (“To the extent that a non-initial order merely implements the terms, conditions, or other provisions of an initial authorizing order—such as a delegated order issuing a notice to proceed with construction, approving a variance request, or allowing the applicant to place the project, or a portion thereof, in service—a request for rehearing of that order would not implicate the initial authorizing order and so we agree that the rule would not apply.”).

construction activities at all locations in accordance with federal authorizations, notwithstanding any request for rehearing of this order.<sup>20</sup>

The Commission orders:

(A) The construction prohibitions from the Director of OEP's August 29, 2018 Partial Authorization to Resume Construction Order, as subsequently modified by the Commission's December 17, 2020 order, are lifted.

(B) Mountain Valley is authorized to proceed with all construction activities for the Mountain Valley Pipeline Project, including those approved in the Commission's April 8, 2022 amendment order, consistent with federal authorizations.

(C) The Director of OEP may authorize any subsequently filed variances that the Director finds to be needed to complete construction of the Mountain Valley Pipeline Project.

By the Commission.

( S E A L )

Debbie-Anne A. Reese,  
Deputy Secretary.

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<sup>20</sup> Section 324 of the Fiscal Responsibility Act of 2023 provides that no court shall have jurisdiction to review any action taken by the Commission granting any approval necessary for the construction of the Mountain Valley Pipeline Project. Fiscal Responsibility Act of 2023, § 324(e)(1), 137 Stat. at 47-48.

### Certificate of Service

I hereby certify that 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 on August 7, 2023. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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August 7, 2023