No. 23A35

In the Supreme Court of the United States

MOUNTAIN VALLEY PIPELINE, LLC,
Applicant,

v.

THE WILDERNESS SOCIETY, ET AL.,
Respondents.

MOUNTAIN VALLEY PIPELINE, LLC,
Applicant,

v.

APPALACHIAN VOICES, ET AL.,
Respondents.

ON EMERGENCY APPLICATION TO VACATE THE STAYS OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT (NOS. 23-1592, 23-1594, & 23-1384)

BRIEF OF *AMICUS CURIAE* STATE OF WEST VIRGINIA IN SUPPORT OF EMERGENCY APPLICATION TO VACATE STAYS OF AGENCY AUTHORIZATIONS PENDING ADJUDICATION OF THE PETITIONS FOR REVIEW

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

The Fourth Circuit's stays did not issue in a vacuum. They came as an eleventh-hour foil to a natural gas pipeline project—already years delayed in litigation—that multiple federal and state agencies have repeatedly certified will benefit millions of consumers across multiple States, while protecting our natural resources along the way. They also came after Congress decided last month that business as usual was not working and added Section 324 to the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10, 37. Section 324 directed federal agencies to issue all remaining authorizations to get the Mountain Valley Pipeline finished and running, ratified those orders, and removed prior statutory causes of action to challenge them in federal court.

That should have been enough. But even though the federal agencies followed the law Congress enacted and the President signed, the Fourth Circuit stayed their authorizations without explanation. The result? Construction is once again at a standstill throughout the Pipeline's route across West Virginia and Virginia. And at this point even a short additional delay will likely thwart Congress's purpose that finishing the Pipeline fast "is required in the national interest." Act § 324(b).

West Virginia writes because the project starts and runs through much of our State before crossing into Virginia. So the stays directly affect our residents, our businesses, and our sovereign interests. We urge the Court to vacate them as soon as possible.

MVP and the Federal Respondents have an extremely high likelihood of success because the petitioners below cannot get past Section 324's express commands—and because Congress followed established law in making the choices it did. Leaving the stays

in place would also hurt the public interest generally, and West Virginians specifically. They threaten to erase our State's voice in the project as Section 324 stopped the litigation saga challenging our *own* regulatory decisions, not just those surrounding the federal agencies'. Keeping the project in suspended animation also risks environmental harm in the interim. Construction phases are meant to move quickly to minimize threats to affected lands and waters; even the best temporary control measures are not meant to hold through indefinite delays. Beyond that, the stays keep hostage a suite of benefits that Congress explicitly found to be in the national interest. They ought to flow to West Virginia, our region, and the country without more delay. The Court should act now.

SUMMARY OF ARGUMENT

I. The Fourth Circuit was wrong to stay the agencies' authorizations because the petitioners below could not show any likelihood of success on the merits of their claims. This Court should vacate the stays because MVP and the Federal Respondents will almost certainly prevail on *theirs*. Section 324 plainly leaves the Fourth Circuit without jurisdiction to hear the petitioners' claims, and Congress's choice to ratify authorizations and permits needed for the Pipeline are similarly clear—and legal. Section 324's embedded policy decisions are also not a matter for constitutional concern. Congress amends statutes all the time, including in response to judicial decisions interpreting their old versions. Vacating the Fourth Circuit's orders would respect "Congress'[s] superior institutional competence" to make the important judgment calls that surround the Pipeline. *Patsy* v. *Bd. of Regents of Fla.*, 457 U.S. 496, 513 (1982).

II. The court below also should not have entered the stays because the remaining factors support MVP and the Federal Respondents.

First, when Congress reset the statutory balance through Section 324, it also restored the affected States' ability to enforce decisions surrounding the Pipeline that are in their best interests and faithful to state law. This statutory choice honors the cooperative federalism framework Congress has consistently used to safeguard the States' role in matters that affect natural-resource management. But the same logic that seemingly animated the stays in these federal cases would let challengers once again delay state certification decisions, too.

Second, the stays increase the potential for environmental harm. Simply maintaining the status quo is not an option for a construction project on this scale. Putting construction on indefinite hold lengthens the time before miles of land along the Pipeline's route can be fully restored. All the while, the dangers from erosion and sedimentation runoff persist. In short, "almost finished" is not enough to avoid harm.

Third, Congress was right that the Pipeline's benefits make finishing it a national priority. West Virginian jobs and tax revenues are on the line. The Pipeline will also bring essential additional natural gas supply to help meet the region's growing needs at reasonable prices. And it will help insulate our energy sector as a whole from foreign supply challenges and domestic cyberattacks. Especially with no plausible legal justification to withhold these gains, the Court should vacate the stays.

ARGUMENT

I. No Plausible Grounds Support The Fourth Circuits' Orders.

The petitioners below have an almost impossible task ahead. To prevail, they would have to explain how the Fourth Circuit can consider Section 324's validity despite Congress's choice to vest exclusive jurisdiction over challenges like theirs in a different federal court. Act § 324(e)(2). Then they would have to show that the provisions limiting review of certain agency actions falter on constitutional or other grounds. *Id.* § 324(e)(1). And then they would still have to win on the merits—that despite express congressional ratification "[n]otwithstanding any other provision of law," *id.* § 324(c)(1), the agency decisions they challenge are somehow illegal. MVP and the Federal Respondents ably explain why none of that is going to happen: Section 324's text and this Court's precedents make clear that the petitioners had no business challenging the Act in the Fourth Circuit, and the Fourth Circuit had no business blocking the Pipeline's construction *yet again* by apparently finding merit in their losing claims. Because MVP is exceedingly likely to prevail, the Court should vacate the Fourth Circuit's unexplained stays to the contrary.

For one thing, the Fourth Circuit panel cannot properly enter *any* order in these cases. It would be hard for Congress to be more straightforward than to say that the D.C. Circuit "shall have original and exclusive jurisdiction over any claim alleging the invalidity of this section or that an action is beyond the scope of authority conferred by this section." Act § 324(e)(2). "Exclusive" means just that. See, *e.g.*, *Woods* v. *Hills*, 334 U.S. 210, 213-14 (1948) (statute granting "exclusive jurisdiction" to one court "precluded" another court from ruling on the issue). And "any" claim sweeps broad. Cf. *K Mart Corp.* v. *Cartier, Inc.*,

485 U.S. 176, 188 (1988) (distinguishing "categorical" exclusive-jurisdiction grants that use language like "all" from more targeted jurisdictional tweaks). With "limited exceptions" that apply "exclusively to this Court"—not the federal courts of appeals—"a congressional grant of jurisdiction is a *prerequisite* to the exercise of judicial power." *Patchak* v. *Zinke*, 138 S. Ct. 897, 907 (plurality op.) (2018) (emphasis in original) (cleaned up). The Fourth Circuit doesn't have one.

Nothing is suspect about Congress's choice. The parties all agree that Congress can direct particular cases to particular courts; con law child's play. Congress chose a court with authority, capacity, and capability to decide claims like petitioners'. *E.g.*, John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 554 (2010) (describing the D.C. Circuit as the "de facto, quasi-specialized administrative law court) (cleaned up). It did not, for instance, "confer the Government's 'judicial Power' on entities outside Article III." *Stern* v. *Marshall*, 564 U.S. 462, 484 (2011). And implicit in granting jurisdiction to the D.C. Circuit is the idea that people can, in fact, challenge Section 324. So this isn't a situation where Congress has "take[n] away the whole appellate power" to assess a law's validity. *Ex parte McCardle*, 74 U.S. 506, 509 (1868); see also Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 712 (1997) ("Article III, Section 2" requires only the existence of jurisdiction, not that such "jurisdiction … be extended to the full limits of the judicial power.").

Moving past whether the Fourth Circuit can weigh in at all (as the panel seems to have done), petitioners' other hurdles are equally high. Section 324 is a statutory

amendment, and Congress enacts those all the time. There used to be federal-law causes of action for petitioners' various challenges over the past several years. Now there are not. Congress expressly modified prior law by making Section 324 "supersede[] any other provision of law" inconsistent with its directive to issue project permits and authorizations, Act § 324(f), and by providing that "no court shall have jurisdiction to review" the agencies' actions "[n]otwithstanding any other provision of law," *id.* § 324(e)(1).

Petitioners' argument below to the contrary elevates the century-and-a-half-old decision in *United States* v. *Klein*, 80 U.S. 128 (1871), above what the Court has said since when addressing questions like these. *E.g.*, Fed.Resps.Br.22-25. And it reads *Klein* for too much. There, the Court "made no effort to limit Congress's authority to assign and withdraw jurisdiction from Article III courts." Andrea Olson, *Defining the Article III Judicial Power: Comparing Congressional Power to Strip Jurisdiction with Congressional Power to Reassign Adjudications*, 53 CREIGHTON L. REV. 111, 125 (2019). It was also not about whether Congress "left too little for courts to do." *Bank Markazi* v. *Peterson*, 578 U.S. 212, 228 (2016). Congress had tried to dictate specific rules of decision without "altering the legal standards governing" the relevant question because (since pardon power belongs to the President) it was tinkering with legal standards "Congress was powerless to prescribe." *Id.* Neither concern extends here. Congress altered substantive legal standards that existed because Congress enacted them in the first place. So the Act is squarely within the Legislature's ambit. Judicial "independence does not mean total insulation of the judicial branch any more than it does for the other branches." Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An*

Opinionated Guide to the Ongoing Debate, 36 STAN. L. REV. 895, 907 (1984). Here, Congress had a constitutionally given say, and it spoke through Section 324.

And—stepping back from the fervor over this particular pipeline project and Congress's targeted statutory fix—resetting a statutory balance is not unusual. Congress did what the Framers and the people they represent would expect it to do whenever a law is due for an update. It can and does consider amendments if the priorities Congress wants to advance get out of whack, for any number of reasons. New economic factors like "changing business practices and increased competition" is one. Shannon Moyer, *Frustrating the Internet Consumer and the Purposes Behind Trademark Law: The Unauthorized Use of Trademarks As Metatags*, 27 AIPLA Q.J. 335, 347 (1999). The value of having "[a]mbition … counteract ambition," THE FEDERALIST NO. 51 (James Madison), is another, like when an Executive-directed agency regulates beyond the expected scope of its authorizing statute.

Surprising judicial applications (or just ones Congress dislikes) are in the same camp. Though Congress must of course follow proper legislative processes, nothing is "jurisprudentially unique about the situation where Congress amends a statute in response to [this Court's] interpretation." *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1388 (10th Cir. 1990). In fact, courts assume that Congress is "aware of" judicial interpretations to the extent that they "presume" Congress means to adopt this Court's longstanding "interpretation of a statute … when it re-enacts the statute without explicit change." *Commissioner* v. *Engle,* 464 U.S. 206, 225 (1984) (cleaned up). Inherent to that

presumption is the idea that Congress could make a change if it wanted to. In responding to a lower federal court's decisions instead of this Court's, that's all Congress did here.

And Congress is the branch best situated to make judgment calls like that. It has the representational heft and institutional accountability to reflect the "will of the people." *United States* v. *Lee Yen Tai,* 185 U.S. 213, 222 (1902). Whatever someone thinks of Section 324 as a policy matter, it went through ordinary lawmaking hoops that build in deliberation, compromise, and input from representatives across all regions of the country. That's largely why—with full appreciation and respect for the important work of the courts and the Fourth Circuit specifically—it took nothing from the judicial power when Congress enacted a law with the effect of removing the years-old roadblock that a single, three-judge panel had become. Congress is "far better situated than … [c]ourt[s] to assess the empirical data, and to balance competing policy interests" like those at stake in the pipeline project. *Exxon Shipping Co.* v. *Baker,* 554 U.S. 471, 520 (2008). Especially in an area like this with "vehement disagreement over the validity of the assumptions underlying" the varying "policy considerations," legislative "solutions are preferable." *Patsy*, 457 U.S. at 513. In staying the agency authorizations, the panel below appears to have forgotten that courts should respect not only "the ultimate purposes Congress has selected," but also "the means it has deemed appropriate" to get there. *MCI Telecomms. Corp.* v. *Am. Tel. & Tel. Co.,* 512 U.S. 218, 231 n.4 (1994).

So Section 324 is no beta test of constitutional creativity. Congress did what it often does: stepped in to fix what it perceived as a recurring problem with how other statutes it wrote were being applied. It plainly removed the Fourth Circuit from reviewing any aspect

of that decision. And it had full constitutional authority to do so. The Court should vacate the stays because MVP and the Federal Respondents are exceedingly likely to prove just that.

II. Removing The Lower Court's Section 324 Block Would Advance The Public Interest And Avoid Serious Harms.

The Fourth Circuit's orders are not just *ultra vires*—they also all-but guarantee short- and long-term damage. So the remaining factors also strongly support vacating the stays. Section 324 is squarely in the public interest, and stopping the lower court from ignoring its commands will advance the important goals Congress wrote into it while also avoiding irreparable harm.

A. The Act Restores Cooperative Federalism and Respects the States' Say in the Pipeline.

Over the better part of the last decade, the petitioners below and others have asked the federal courts to halt practically every aspect of every step when it comes to building the Pipeline. The challenges at issue now are the latest in this litigation string. Yet although they involve federal agencies issuing federal authorizations, a history of challenges to *state* agency decisions is bound up here, too. The same three-judge panel below hasn't looked on the pipeline project any kinder in those cases. But the Act resets the state-federal balance in this important context, restoring the affected States' voice in a matter that directly touches their residents, economies, and sovereign interests.

West Virginia (and Virginia and North Carolina) got tied up in this litigation cycle because the Pipeline implicates Sections 401 and 404 of the Clean Water Act. Pipeline construction discharges dredged or fill material into the waters of the United States, so MVP had to request a Section 401 "certification" "that any such discharge will comply" with

the relevant State's water-quality standards. 33 U.S.C. § 1341(a)(1). These Section 401 certifications "are essential in the scheme to preserve state authority to address the broad range of pollution," *S.D. Warren Co.* v. *Me. Bd. of Env't. Prot.*, 547 U.S. 370, 386 (2006), and States can include "any limitations necessary to ensure compliance with state water quality standards," *PUD No. 1 of Jefferson Cnty.* v. *Wash. Dep't of Ecology*, 511 U.S. 700, 713-14 (1994) (cleaned up). Clearing Section 401 is a prerequisite to getting a Section 404 permit from the U.S. Army Corps of Engineers. See 33 U.S.C. § 1344(a).

It matters that Section 401 is in the CWA. "Authority over water is a core attribute of state sovereignty." *Kansas* v. *Nebraska*, 574 U.S. 445, 480 (2015). It's part of the States' longstanding responsibility for "the conservation of natural resources" within their borders. *Nw. Cent. Pipeline Corp.* v. *State Corp. Comm'n of Kan.,* 489 U.S. 493, 512 (1989); see also, *e.g.*, *Atl. Richfield Co.* v. *Christian,* 140 S. Ct. 1335, 1362 (2020) (Gorsuch, J., concurring in part and dissenting in part) (noting that "the protection of natural resources is a traditional and central responsibility of state governments"). So Congress has consistently honored this sovereign prerogative with "purposeful and continued deference to state water law." *California* v. *United States*, 438 U.S. 645, 653 (1978). Indeed, the CWA was one of the first times Congress stepped into the "water quality" space—and there only reluctantly. Robin Kundis Craig, *Adapting Water Federalism to Climate Change Impacts: Energy Policy, Food Security, and the Allocation of Water Resources,* 5 ENV'T. & ENERGY L. & POL'Y J. 183, 206 (2010). Congress moved with respect, placing state-authority considerations at the heart of the CWA's "cooperative federalism." *New York* v. *United States*, 505 U.S. 144, 167 (1992) (cleaned up). And it left no doubt of its intent to "recognize, preserve, and protect

the *primary* responsibilities and rights of States" when it comes to local pollution control and "the development and use … of land and water resources." 33 U.S.C. § 1251(b) (emphasis added).

This is the backdrop against which the Section 401 certification process should play out. But the problems on the federal permitting side that motivated Congress to put Section 324 into law bled into this state-focused aspect of the Pipeline's approval saga, too. Put aside for a moment whether federal courts properly exercise jurisdiction at all in reviewing orders that state agencies issue under state-law standards. See *Shrimpers & Fishermen of RGV* v. *Tex. Comm'n on Env't. Quality*, 968 F.3d 419, 428 (5th Cir. 2020) (Oldham, J., concurring) (questioning whether 15 U.S.C. § 717r(d)(1) creates federal jurisdiction over "purely state-law dispute[s]" and whether it would be constitutional if it did). At a minimum, determining whether a state agency followed state law requires a light touch. See, *e.g.*, *Nat'l Audubon Soc'y* v. *U.S. Army Corp. of Eng'rs*, 991 F.3d 577, 583 (4th Cir. 2021) (explaining "highly deferential" arbitrary and capriciousness standard in this context). All the more when the CWA's cooperative federalism precepts are added in. But over the past several years the Fourth Circuit has arguably left its deferential role and repeatedly struck down state decisions surrounding the Pipeline.

West Virginia's Department of Environmental Protection, for instance, has been on the losing end of federal-court challenges to its Section 401 certification decisions since 2017. Then, the Department agreed to a remand to look again at certain state-law issues. See Order, *Sierra Club* v. *W. Va. Dep't of Env't. Prot.,* No. 17-1714 (4th Cir. Oct. 17, 2017) (remanding case). A year later, the panel below held (among other issues involving the

Corps) that the Department could not waive individual project certification without notice-and-comment rulemaking. *Sierra Club* v. *U.S. Army Corps of Eng'rs*, 909 F.3d 635, 640, 641-54 (4th Cir. 2018). And most recently, the panel rejected the State's decision to certify the project again: With a cursory acknowledgment of the States' "essential role in protecting their own waters," it deemed the Department's justifications "deficient" under West Virginia law. *Sierra Club* v. *W. Va. Dep't of Env't. Prot.*, 64 F.4th 487, 494, 507 (4th Cir. 2023) (cleaned up).

So Section 324 is important to West Virginia's and other States' sovereign interests. Congress enacted it exactly two months after the Fourth Circuit vacated West Virginia's second Section 401 certification. The Act's direction that federal agencies must issue needed authorizations and Congress's decision to ratify those orders rightly get top billing here since these cases challenge federal agency actions. But Section 324 *also* provides that "no court shall have jurisdiction to review any action taken by … a State administrative agency acting pursuant to Federal law" in the same category of Pipeline-related actions that applies on the federal side. Act § 324(e). That language leaves no question about Congress's intent to keep federal courts from reviewing challenges like those to West Virginia's Section 401 certifications: It tracks the portion of the statute cited to get these state-law-based challenges into federal court in the first place. See 15 U.S.C. § 717r(d)(1) (granting federal-court jurisdiction over certain civil actions to review decisions of a "State administrative agency acting pursuant to Federal law").

So Section 324 directly resets the CWA's cooperative federalism balance in an area where it had become especially weighed down. It recognizes the importance of States'

statutory—and inherent—authority over local water management. It reasserts the "[d]ue regard for the rightful independence of state governments, which … requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934). And it respects state judgments about how best to protect water quality in their borders. Case in point: West Virginia issued a third certification shortly after the Act became law that approved the Project's water crossings, but with numerous conditions MVP must follow to ensure that it stays on the legal side of West Virginia's water-quality criteria and anti-degradation laws. See W. VA. DEP'T OF ENV'T. PROT., STATE §401 WATER QUALITY CERTIFICATION (June 8, 2023), https://tinyurl.com/27zsaaep. Yet if the Court allows these stays to stand, it is hard to see what would keep the Fourth Circuit from taking the same approach it did here in response to any challenge to this latest order. Vacating the stays would insulate against challenges to state-agency decisions like these—and the additional delay that litigation would mean for the Pipeline.

B. The Act Avoids Irreparable Harm From Leaving Construction Sites in Indefinite Limbo.

The equitable factors also support lifting the stays because leaving the Pipeline nearly done—but not—does real harm. In reality, the Fourth Circuit's decisions to stay construction while challenges based on environmental concerns play out are backfiring. Letting the Act operate as Congress intended would mean getting land from construction sites to final restoration, which would remove the high risk of damage to our lands and waters from an indefinite stasis. The Court should act for this reason, too.

The Pipeline is "already mostly finished." *Appalachian Voices* v. *U.S. Dep't of the Interior*, 25 F.4th 259, 282 (4th Cir. 2022). But not quite. Still to go is a short stretch through Jefferson National Forest, remaining stream crossings across West Virginia and Virginia, and "final restoration of the construction environment." Appl.2. The Act was supposed to get us from this nearly finished state to an operational one. But the stays have put everything on pause—again. The Fourth Circuit's halt-orders came as part of the third set of challenges to the U.S. Fish and Wildlife Service's Biological Opinion and Incidental Take Statement. See Appl.4; Fed.Resps.Br.3-4. That means the stays stop construction not only in the Jefferson National Forest; the Biological Opinion covers the whole thing. See U.S. FISH AND WILDLIFE SERV., BIOLOGICAL OPINION FOR THE MOUNTAIN VALLEY PIPELINE PROJECT 8 (Feb. 28, 2023), https://tinyurl.com/2su8asns. So the 45 miles of pipeline rights-of-way that have yet to be finally restored in West Virginia, see Appl.App'x.10-11, are caught up, too. And a good portion of the crossings over the "637 waterbodies and 330 wetlands" on the Pipeline's route that remain undone, BIOLOGICAL OPINION, *supra*, at 31, are also within West Virginia's borders. Appl.App'x.10-11; see generally 401 CERTIFICATION, *supra*, Att. B, App'x F, Ex. B (proposed temporal mitigation requirements for streams and wetlands).

West Virginia will thus bear a significant portion of any harms associated with construction delays. And though the State is working with MVP to mitigate damage and protect West Virginia's natural resources in the meantime, even the best preventative measures are no failsafe. The problem is that the lower court's stays do not simply preserve the status quo. They stop construction *progress*, but that only prolongs the time work areas

remain disturbed. And the longer that state lasts, the greater the potential for environmental damage.

Sediment deposits and runoff can be serious issues during pipeline construction—sediments can be particularly damaging to "the physical, chemical and biological integrity of aquatic ecosystems," *Sediments*, EPA, https://tinyurl.com/2hwvjtwa (last visited July 23, 2023), by reducing the sunlight and visibility available to aquatic life. The "accelerated erosion" that often comes with earthmoving activities can also combine with "lack of vegetation, steepening of slopes, [and] increased runoff" to compound the problem by raising the "rate of erosion" even more. *Fact Sheet: General Water Pollution Control Permit Stormwater Associated with Oil and Gas Related Construction Activities*, W. VA. DEP'T OF ENV'T. PROT. 2 https://tinyurl.com/35rhj22h (last visited July 23, 2023). Indeed, "[b]y volume," sediment "degrades more miles of stream tha[n] any other pollutant." *Id.*

So the risks of sedimentation buildup are (unsurprisingly) especially acute near water, which makes it important that water crossings comprise much of the work that remains undone in West Virginia. Many of the unfinished portions of the Pipeline also traverse mountainous terrain, see *Plan of Development, App'x A-3: Topographic Maps*, MOUNTAIN VALLEY PIPELINE (last visited July 23, 2023), https://tinyurl.com/j98btd3r, where steep slopes pose additional problems through potentially increased runoff into area streams. See *Oil and Gas Fact Sheet*, *supra*, at 8 (construction plans must "address the steepness of cut-and-fill slopes and how the slopes will be protected from runoff, stabilized and maintained"); *Plan of Development, App'x C-1: West Virginia Erosion and Sediment Control Plan*, MOUNTAIN VALLEY PIPELINE 9 (last visited July 23, 2023),

https://tinyurl.com/c8c398y2 (describing "special construction techniques" for steep slopes, including "temporary sediment barriers" and "temporary slope breakers" to "reduce water runoff or divert water areas away from the disturbed areas").

Temporary control measures—silt fences, water bars, and other technologies and best practices—are highly effective in reducing these concerns. See *West Virginia Erosion and Sediment Control Plan*, *supra*, at 9. Hydraulic controls like sediment basins and traps, for instance, contain and "slow[] water velocities" to "allow[] for the settling and deposition of suspended particles by gravity." *Fact Sheet*, *supra*, at 8; see also, *e.g.*, BIOLOGICAL OPINION, *supra*, at 43, 45 (noting MVP's installation of "temporary equipment bridges … to reduce suspended sediment and sedimentation caused by construction and vehicular traffic"). But these temporary controls are just that—temporary. They require maintenance, and many are physical structures, like earthen berms, that are themselves subject to erosion. See Appl.App'x.15, ¶¶ 13-14 (explaining that "most [erosion control devices] are designed to perform optimally over a limited period of time, so the longer the construction site remains disturbed, the more frequently [they] will need to be replaced, and the greater the risk to rivers and streams"); *West Virginia Erosion and Sediment Control Plan*, *supra*, at 10 (discussing the need to monitor "sediment control fencing, temporary detention basins, [and] diversion berms" "periodically during construction, and particularly after precipitation events"). And by their nature, these controls are less resilient than the permanent solutions after construction areas are restored and the equipment and work crews leave.

All of this is why it's best practice to move through active construction phases fast. Specific conditions in West Virginia's Section 401 certification deal with what MVP is required to do *after* construction, with the assumption that the time from site preparation to final restoration will be relatively short. MVP must, for example, stabilize "all disturbances below the ordinary high-water mark" "as soon as practicable following *completion of the crossing* to prevent soil erosion." 401 CERTIFICATION, *supra*, Att. A, at 1 (condition 4) (emphasis added); see also *id.* Att. A., at 4 (condition 22; after crossings, MVP must return "all waterbody banks … as close as practicable to preconstruction contours" to prevent future "erosion of stream banks"). Permanent controls like sodding and reseeding—which follow the "fundamental principle that vegetation is the most effective form of erosion control," *Fact Sheet*, *supra*, at 7—are not feasible while the land in question remains a work zone, either. And even those methods take time to reach full effectiveness: anchoring mulching in place, for instance, is another interim step before "vegetation is well established." *Id.* So delaying the construction phases before any of this can begin prolongs the period of greatest potential environmental risk.

That expanded delay period is part of what makes the stays so concerning. Just as construction had started up again, the Fourth Circuit's orders brought it to another stop. Appl.4. The work stoppage includes the 45 miles in West Virginia that have not yet been restored, as well as the many water crossing sites still to be completed across West Virginia. (The same, of course, is true for corresponding areas in Virginia.) West Virginia was already worried about the potential harms from continued delay when it issued its third Section 401 certification in June: At over six years into the State's regulatory review,

drawing out the approval process longer "would only serve to delay completion of the project and final restoration of areas disturbed during construction"—which, in turn, would "increase the risk to the environmental resources we are charged with protecting." 401 CERTIFICATION, *supra*, at 4. But the lower court's orders brought the risk of irreparable harm home anyway.

Worse, the stays came down at a time of year when summer storms make the risks of sedimentation pollution especially high, even with industry best practices in place. Most erosion- and sediment-control measures aim to reduce exposing "disturbed areas to significant water flow," including "precipitation" in upland areas that carries soil into streams and other waters as it runs downhill. 401 CERTIFICATION, *supra*, at 11. So heavy rains often tax silt fencing and other obstruction-based controls, sometimes to the point of failure. Last summer, parts of West Virginia saw record-breaking rains. *E.g.*, Jake Flatley, *National Weather Service: Charleston area breaks all-time record for rainfall in a summer*, METRONEWS (Aug. 23, 2022), https://tinyurl.com/bddk3yx9. This summer's totals are projected to be above average again. Matthew Cappucci, *Here's what experts are predicting for this summer's U.S. weather*, WASH. POST (May 19, 2023), https://tinyurl.com/bdhrtjsk. And with parts of Southern West Virginia near the Pipeline's route already seeing record-breaking rain so heavy that it triggered "historical flooding," Chad Merrill, *Historical Flooding Slams Far Southern West Virginia/Southwest Virginia*, WOAY (May 29, 2023), https://bit.ly/3Kbr0JL, it seems the danger is here.

Congress knew that "*timely* completion of construction" "is required in the national interest." Act § 324(b) (emphasis added). Congress mostly meant for that speed to realize

the Pipeline's many benefits, discussed more next. *Id.* But speed is also important to avoid damage building up while the Fourth Circuit is content to wait. Temporary control measures can be highly effective during pipeline construction, but even with the best maintenance and attention, they are bound to come up short if forced to carry the load much longer than planned. With this new litigation delay—and so soon after construction had picked up again—we risk serious harm to our natural resources while the last stages of the project remain on pause. West Virginia has done what we can to limit more time in stasis. We need the Court's help for the rest.

C. The Act Frees the Pipeline to Provide Important Benefits to Mid-Atlantic and Southeastern America, and to the Country as a Whole.

Finishing the Pipeline also promises too many needed gains to let the lower court hold it up longer in unexplained limbo. Even before Congress stepped in to reset the statutory balance, for instance, six federal agencies had already blessed this project—and all more than once. CONG. RSCH. SERV., MOUNTAIN VALLEY PIPELINE: CONGRESSIONAL AUTHORIZATION (July 12, 2023), https://tinyurl.com/84nn4s52 (describing FERC, National Park Service, U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, U.S. Forest Service, and Bureau of Land Management permitting history). For good reason. The Pipeline is good for the States it runs through in the form of jobs and added local revenues. It's good for neighboring States as it ensures reliable, affordable energy. And it's good for the rest of the country as it brings critical infrastructure and enhanced energy security.

First, the project brings significant economic benefits to the States on its route. Building the last stretch and restoring work sites creates jobs—up to 4,000 West Virginia construction jobs are at stake. Steven Allen Adams, *Capito: Congress 'Loud and Clear' on*

Mountain Valley Pipeline, PARKERSBURG NEWS & SENTINEL (July 14, 2023), https://tinyurl.com/yhubh3f2. The Pipeline's ongoing operation will provide a modest number of jobs, too. See *Braxton County*, MOUNTAIN VALLEY PIPELINE, https://tinyurl.com/4st2pk3m (last visited July 23, 2023); *Craig County*, MOUNTAIN VALLEY PIPELINE, https://tinyurl.com/2z4nc4v5 (last visited July 23, 2023). And these jobs provide for families across West Virginia (and Virginia) with average salaries of around $60,000. See *Economic Benefits*, MOUNTAIN VALLEY PIPELINE, https://tinyurl.com/ye29tvmd (last visited July 17, 2023).

The Pipeline's benefits to local communities will also keep flowing once it is finished. Beyond the roughly $82 million in additional state and local tax revenue for West Virginia throughout construction, West Virginia counties expect to receive $35 million annually in ad valorem taxes. *Economic Benefits*, *supra* (also $49 million and $10 million for Virginia, respectively). Landowners will earn millions in annual royalties. Eric Douglas, *Mountain Valley Pipeline Gets Big Push in Debt Ceiling Bill*, WV PUB. BROAD. (May 30, 2023), https://tinyurl.com/t695czyx (Senator Manchin estimating "about $300 million a year in revenue to the royalty owners"). North of the Pipeline where it connects to the Equitrans transmission system, Pennsylvania stands to gain, too: $2 billion a year in gas sales, and royalty payments estimated at $150 million a year. Benjamin Kail, *The Debt Limit Deal Fast-Tracked Mountain Valley Pipeline. Opponents Fear It Could 'Open the Floodgates,'* PITTSBURGH POST-GAZETTE (June 22, 2023), https://tinyurl.com/2p87br9a.

All that is even before getting to the direct benefits from more accessible, affordable natural gas—as other *amici* have well detailed. *E.g.*, Duke.Energy.Carolinas.Br.5-8;

Roanoke.Gas.Co.Br.2-3. Congress emphasized that the Pipeline "will serve demonstrated natural gas demand" by "increas[ing] the reliability of natural gas supplies and the availability of natural gas at reasonable prices" and "allow[ing] natural gas producers to access additional markets for their product." Act § 324(b). After all, up to 2 billion cubic feet of natural gas per day, FERC, MOUNTAIN VALLEY PROJECT AND EQUITRANS EXPANSION PROJECT: FINAL ENVIRONMENTAL IMPACT STATEMENT 1 (June 2017), https://tinyurl.com/vw622p2f, is quite the boon for consumers across the Southeast.

And before the Fourth Circuit's stays, it was on track to arrive at an important time. Americans' energy demands are going up. See *U.S. Energy Consumption Increases Between 0% and 15% by 2050*, EIA (Apr. 3, 2023), https://tinyurl.com/4jsv7b38 (estimating up to 15% increase in U.S. energy consumption by 2050). Severe weather events are putting more strain on the nation's power grids even at current demand levels. Right now in Summer 2023, for instance, two-thirds of North America is at risk of energy shortfalls during extreme demand periods. See *2023 Summer Reliability Assessment*, NERC, https://tinyurl.com/7wpu7kpx (last visited July 23, 2023). And alternate forms of energy are not a feasible solution (if they ever will be). No large-scale, cost-effective way to store renewable energy exists, David Schmitt & Glenn Sanford, *Energy Storage: Can We Get It Right?*, 39 ENERGY L.J. 447, 448 (2018), and it could be decades before it does, *New Nature Conservancy Study Says America Can Go Carbon-Free by 2050 While Benefiting Conservation and Communities*, NATURE (May 9, 2023), https://tinyurl.com/aw6928p5.

The Pipeline is also a key piece in our infrastructure network to help the country move toward energy independence. This goal is especially important "[a]mid strife between

global political leaders" and wars in energy markets. Karen Alday, Givens *v.* Mountain Valley Pipeline, LLC *and the Unresolved Circuit Split*, 7 TEX. A&M J. PROP. L. 137, 139 (2021); see also *Remarks by President Biden on Actions to Strengthen Energy Security and Lower Costs*, THE WHITE HOUSE (Oct. 19, 2022), https://tinyurl.com/pmyz6duj (President Biden, noting oil and gas price increases after Russia invaded Ukraine).

More pipelines also give more buffers against attacks on the electrical grids. Cyberattacks are on the rise. See Jacob Knutson, *Attacks on Power Grids Raise Alarm Among Top Officials*, AXIOS (Mar. 8, 2023), https://tinyurl.com/4xm5jumc. Memorably, for several days in May 2021, a ransomware cyberattack shut down the Colonial Pipeline—the largest pipeline in the United States, which carries gasoline and other liquid fuels across the Southeast. Rebecca Falconer, *Emergency Declaration Issued in 17 States and D.C. Over Fuel Pipeline Cyberattack*, AXIOS (May 10, 2021), https://tinyurl.com/5eryhdna. The attack led to jet fuel shortages for airlines and gas shortages and states of emergency in 17 States and the District. *Id.*; see also Catherine Thorbecke, *Gas Hits Highest Price in 6 Years, Fuel Outages Persist Despite Colonial Pipeline Restart*, ABC NEWS (May 17, 2021), https://tinyurl.com/mrtp6t3h. Many members of North Carolina's General Assembly recently cited it as a reason that the State would be more secure with the "additional source of natural gas supply" that the proposed MVP Southgate expansion would allow—but of course, expansion is possible only if the Pipeline's main project makes it to the finish line. See Letter from N.C. Gen. Assembly Senate Chamber to Kimberly D. Bose, Sec'y, FERC, (June 30, 2023), https://tinyurl.com/3ywf8w4s (supporting extension to complete MVP Southgate project).

Congress was not alone in seeing that, through all this, the Pipeline is critical to help "ensure the reliable delivery of energy that heats homes and businesses, and powers electric generators that support the reliability of the electric system." Letter from Jennifer M. Granholm, Sec'y, DOE, to FERC (April 21, 2023), https://tinyurl.com/38eadecp. Regions of the country "with highly interconnected pipeline systems are less vulnerable to supply disruptions … and power outages." Sam Kalen, *A Bridge to Nowhere? Our Energy Transition and the Natural Gas Pipeline Wars*, 9 MICH. J. ENV'T. & ADMIN. L. 319, 320-21 (2020). Pipelines, in short, are "one of America's greatest strategic assets," critical to American energy independence and the reliability and cost-savings it can bring. *Energy Security is National Security*, HOUSE FOREIGN AFFS. COMM. GOP, https://tinyurl.com/mtr8vfhx (last visited July 23, 2023). No wonder Congress recognized that finishing *this* one quickly is a "national priority," Act § 324(b): millions of Americans are relying on it to provide consistent, cost-effective energy at a time we need it most. Keeping the stays in place unjustifiably delays all of that.

CONCLUSION

This Court should grant the application and vacate the Fourth Circuit's stays. It should also treat the application as a petition for writ of mandamus and direct the Fourth Circuit to dismiss the petitions for review.

Respectfully submitted.

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