No. 23-1384

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPALACHIAN VOICES; WILD VIRGINIA; WEST VIRGINIA RIVERS COALITION; PRESERVE GILES COUNTY; PRESERVE BENT MOUNTAIN, a chapter of Blue Ridge Environmental Defense League; WEST VIRGINIA HIGHLANDS CONSERVANCY; INDIAN CREEK WATERSHED ASSOCIATION; SIERRA CLUB; CHESAPEAKE CLIMATE ACTION NETWORK; and CENTER FOR BIOLOGICAL DIVERSITY

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR;
DEB HAALAND, in her official capacity as Secretary of the U.S. Department of the Interior; UNITED STATES FISH AND WILDLIFE SERVICE, an agency of the U.S. Department of Interior; MARTHA WILLIAMS, in her official capacity as Director of the U.S. Fish and Wildlife Service; and CINDY SCHULZ, in her official capacity as Field Supervisor, Virginia Ecological Services, Responsible Official

Respondents,

and

MOUNTAIN VALLEY PIPELINE, LLC,

Intervenor.

PETITIONERS' OPPOSITION TO FEDERAL RESPONDENTS' MOTION TO DISMISS AND INTERVENOR'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY DENIAL

In 2014, Mountain Valley Pipeline, LLC ("MVP") unveiled its injudicious plan to raze a 304-mile-long path through Appalachia to build a 42-inch gas pipeline through steep, erodible, landslide-prone terrain and hundreds of sensitive

waterbodies. Communities in the pipeline's way have lawfully and tirelessly utilized administrative and judicial processes to protect their land and the Appalachian environment—including streams and rivers, the Jefferson National Forest, and endangered species on the brink of extinction.

The results of those efforts vindicated concerns the pipeline did not and could not comply with bedrock laws designed to protect communities and the environment. At least eight times, courts found that federal and state agencies failed to comply with the law in permitting the Mountain Valley Pipeline.[1] And in at least three of those cases, federal courts recognized that MVP's environmental compliance record called into question its promises that the project could be completed without harming streams in its path.[2]

But MVP bristled at being held accountable for the consequences of its poorly designed project, including "severe erosion and sedimentation along the pipeline's right-of-way." *FERC*, 68 F.4th at 636. Rather than grappling with the

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[1] *Sierra Club v. FERC*, 68 F.4th 630 (D.C. Cir. 2023); *Sierra Club v. W. Va. Dep't of Envtl. Prot.*, 64 F.4th 487 (4th Cir. 2023); *Appalachian Voices v. U.S. Dep't of Interior*, 25 F.4th 259 (4th Cir. 2022); *Wild Va. v. U.S. Forest Serv.*, 24 F.4th 915 (4th Cir. 2022); *Sierra Club v. U.S. Army Corps of Eng'rs*, 981 F.3d 251 (4th Cir. 2020); Order, *Wild Va. v. U.S. Dep't of Interior*, No. 19-1866 (4th Cir. Oct. 11, 2019), ECF No. 41; *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635 (4th Cir. 2018); *Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018).

[2] *FERC*, 68 F.4th at 651; *W. Va. Dep't of Envtl. Prot.*, 64 F.4th at 501-05; *U.S. Forest Serv.*, 24 F.4th at 927-28.

fact that the project was unable to comply with the law due to its location, design, and significant environmental effects, MVP instead directed its ire at the courts that repeatedly found the project failed to comply with this nation's longstanding environmental laws. Complaining that this Court had "taken actions that go beyond the mandate of the judiciary,"[3] the pipeline company turned to its powerful allies in Congress.

Those allies worked behind closed doors with oil and gas lobbyists[4] to attach a Mountain Valley Pipeline–specific provision to the entirely unrelated, must-pass debt-ceiling legislation (i.e., the Fiscal Responsibility Act ("FRA")). That provision purports to approve and ratify MVP's existing authorizations—including the Biological Opinion and Incidental Take Statement ("BiOp/ITS") that Petitioners challenge here—and to strip courts of jurisdiction over any challenges to those authorizations. FRA §§324(c), (e). In essence, the government passed a law attempting to ensure that, in this pending case of Petitioners versus the government, the government (and MVP) win.

As Senator Tim Kaine stated in response to the inclusion of the Mountain Valley Pipeline provision, "Congress putting its thumb on the scale so that one

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[3] Ex. A.

[4] Maxine Joselow, *How a fossil fuel pipeline helped grease the debt ceiling deal*, WASH. POST (May 31, 2023), https://wapo.st/3NiL8KU.

specific project doesn't have to comply with the same process as everyone else is the definition of unfair and opens the door to corruption."[5] It also violates Article III by invading the judicial power. As Alexander Hamilton warned, the judiciary must take "all possible care…to defend itself against [the] attacks" of the other branches. The Federalist No. 78, at 466 (Clinton Rossiter ed., 1961). This Court should reject Congress's attempt to interfere unconstitutionally with the judicial function and deny the pending motions to dismiss.

ARGUMENT

Respondents and MVP rely on FRA §324 to support their motions to dismiss, but the provisions of §324 on which they rely are unconstitutional exercises of judicial power by Congress as applied to this pending case. Accordingly, those provisions are ineffective and cannot bind this Court. *Marbury v. Madison*, 5 U.S. 137, 176-78 (1803).

As the Supreme Court has observed, "[t]he Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression." *Plaut v.*

[5] Press Release, Sen. Tim Kaine, *Kaine Introduces Amendment to Strip Mountain Valley Pipeline Provision from Debt Bill* (June 1, 2023), https://www.kaine.senate.gov/press-releases/kaine-introduces-amendment-to-strip-mountain-valley-pipeline-provision-from-debt-bill.

Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995). To cure the illness caused by legislative exercise of judicial power, "[t]he Convention made the critical decision to establish a judicial department independent of the Legislative Branch[.]" *Id.* at 221.

Courts must jealously guard the line between legislative and judicial power. To that end, courts have long recognized that, "once Congress has established lower federal courts and provided jurisdiction over a given case, Congress may not interfere with such courts by dictating the result in a particular case." *ACLU v. Holder*, 673 F.3d 245, 256 (4th Cir. 2011).

The provisions of FRA §324 violate that constitutional restriction on Congress's power. Simply put, §324 "prescribe[s] a rule of decision in a case pending before the courts, and [does] so in a manner that require[s] the courts to decide a controversy in the Government's favor." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980). This Court should not "allow[] one party to the controversy to decide it in its own favor[.]" *United States v. Klein*, 80 U.S. 128, 146 (1871).

I. The FRA's Jurisdiction-Stripping Provision Violates the Separation-of-Powers Doctrine.

A. This Court Has Jurisdiction to Resolve All Issues Presented by the Motions to Dismiss.

Respondents rely (at 4, 6) on FRA §324(e)(2) to argue that only the D.C. Circuit can consider the constitutionality of §324. Not so.

It is unassailable that federal courts have the power "to hear and determine…the question of [their] own jurisdiction, both as to parties and as to subject matter, and to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction." *Prack v. Weissinger*, 276 F.2d 446, 450 (4th Cir. 1960) (internal quotation marks omitted); *see also, e.g.*, *Jahed v. Acri*, 468 F.3d 230, 233 (4th Cir. 2006) (holding this Court retains jurisdiction to determine its own jurisdiction, even in the face of a statute stating that "no court shall have jurisdiction").

To avoid that fundamental principle, Respondents cite FRA §324(e)(2), which provides the D.C. Circuit "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." Properly understood, the most that §324(e)(2) does is place *original* jurisdiction in the D.C. Circuit over *new* litigation challenging §324 on its face or alleging that an action is beyond the scope of

authority conferred by §324. It has no effect on this Court's authority to determine the FRA's effect on this *pending* litigation.

This petition, brought under Natural Gas Act §717r(d)(1), seeks judicial review of the February 28, 2023 BiOp/ITS issued for the Mountain Valley Pipeline. ECF No. 3. It does not allege a claim that FRA §324 is invalid. Indeed, it is Respondents and MVP who put §324 at issue in this matter through their motions to dismiss. In opposing those motions, Petitioners raise the *argument* that §324 is unconstitutional because it violates separation-of-powers principles. This Court has jurisdiction both to entertain and resolve that argument, *Prack*, 276 F.2d at 450, notwithstanding §324(e)(2)'s assignment of original jurisdiction over certain *claims* to the D.C. Circuit.

That FRA §324(e)(2) addresses *new* litigation, not *pending* litigation, is clear from its use of the terms "claim" and "original…jurisdiction." Indeed, courts have long recognized the distinction between a *claim* and an *argument* or *issue*. *See Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (recognizing that *arguments* and *claims* are distinct); *In re Varat Enterprises, Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996) (recognizing distinctions between *claim* and *issue* preclusion). As it has elsewhere, Congress clearly used the term *claim* in FRA §324(e)(2) to refer to a new cause of action or lawsuit. *Cf. Sanders v. Allison Engine Co.*, 703 F.3d 930, 938-39 (6th Cir. 2012); *United States v. John C. Grimberg Co.*, 702 F.2d

1362,1367-68 (Fed. Cir. 1983); *see also Steiner v. 20th Century-Fox Film Corp.*, 232 F.2d 190, 193 n.3 (9th Cir. 1956) ("'[C]laim' means a cause of action."). That is underscored by Congress's assignment of "original…jurisdiction" to the D.C. Circuit. It is axiomatic that "original jurisdiction" refers to the "court of first instance" where a proceeding is initiated through a *claim*. *See United States v. El-Edwy*, 272 F.3d 149, 152 (2d Cir. 2001).

When Congress uses legal terms of art, it is presumed to use them consistently with their established usage. *Morissette v. United States*, 342 U.S. 246, 263 (1952). Congress's use of the terms "claim" and "original…jurisdiction" in FRA §324(e)(2) make clear that, at most, that section establishes the D.C. Circuit as the court of first instance for new litigation challenging §324's validity or alleging that an agency action is beyond its scope. The statute's language certainly does not indicate Congress intended to transfer venue of one issue of this proceeding to another federal circuit court. Indeed, that would be inconsistent with Congress's investiture of this Court with "original and exclusive" jurisdiction over petitions for review of permits related to natural gas facilities located within this circuit. 15 U.S.C. §717r(d)(1). The D.C. Circuit does not have jurisdiction to review the BiOp/ITS under either the Natural Gas Act or the FRA. Accordingly, Respondents' assertion (at 4, 6) that this Court is not competent to resolve the issues presented by the pending motions is contrary to both (1) the fundamental

principle that a federal court has the power to resolve all legal questions regarding its jurisdiction and (2) FRA §324(e)(2)'s express language.

B. The FRA's Jurisdiction-Stripping Provision Unconstitutionally Exercises the Judicial Power Because it Does Not Preserve an Adjudicative Role for the Court.

Congress may not direct courts in pending cases to reach a particular outcome based on existing law. *Bank Markazi v. Peterson*, 578 U.S. 212, 231 (2016); *Klein*, 80 U.S. at 146. Although Congress can amend statutes and make the changes applicable to pending cases, *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438 (1992), such amendments must not "usurp a court's power to interpret and apply the law to the circumstances before it[.]" *Bank Markazi*, 578 U.S. at 225 (cleaned up); *see also Patchak v. Zinke*, 138 S.Ct. 897, 920 (2018) (Roberts, C.J., dissenting) ("[T]he concept of 'changing the law' must imply some measure of generality or preservation of an adjudicative role for the courts."). Here, FRA §324(e)(1)'s jurisdiction-stripping provision is not a valid change in the law because it does not preserve any role for the courts.

Even assuming §§324(c) and (f) were changes to the substantive law in this case (they are not, *see* Section II, *infra*), for such changes to be constitutional, *courts* must retain the power to implement them. Sections 324(c) and (f) beg questions ordinarily decided by courts, including, *inter alia*, whether the FRA

impermissibly directs an outcome under existing law. However, §324(e)(1) purports to strip this Court of the power to address those questions.

Stated otherwise, if this Court were to accept that §324(e)(1) effectively strips its jurisdiction, then it would lack the power to address unresolved legal questions arising from §§324(c) or (f)—including the meaning and effect of those provisions—because Congress decided those issues on its own when it directed that "no court shall have jurisdiction to review" the BiOp/ITS.

The effect of Respondents' and MVP's arguments about §324(e)(1) is to compel a specific judicial result (dismissal) *without any opportunity* for legal or factual analysis of how any purportedly "new" law bears on the merits. FRA §324(e) would prevent this Court from asking the critical separation-of-powers question that *Klein* and its progeny require, i.e., whether §§324(c) and (f) actually change the substantive law. Such a result violates separation-of-powers principles and is unconstitutional under *Bank Markazi* and *Klein*.

C. The Supreme Court Plurality Opinion Cited by Respondents and MVP is Not Controlling.

Although Congress defines the jurisdiction of inferior federal courts, and may prospectively strip them of jurisdiction over classes of cases, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986), there are limits on that authority when it comes to *pending* cases. Attempts by Congress to target particular litigation and strip jurisdiction over pending cases violate the separation-

of-powers doctrine. In *Klein*, for instance, the Supreme Court held that Congress invaded the judicial power with a statute providing the Court "shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." 80 U.S. at 143. As *Klein* makes clear, an intrusion on the judicial power disguised as an exercise of authority over federal court jurisdiction constitutes a separation-of-powers violation.

To defend §324(e)(1)'s jurisdiction-stripping provision, Respondents (at 6) and MVP (at 3-4) cite a four-Justice plurality opinion in the Supreme Court's highly fractured decision in *Patchak v. Zinke*, 138 S.Ct. 897 (2018). However, *Patchak* was a 4-2-3 decision that, under this Court's application of *Marks v. United States*, 430 U.S. 188 (1977), does not offer a binding holding.

Although six Justices concurred in the *result* in *Patchak*, there was not a majority to uphold the Gun Lake Act's provisions stripping the courts of jurisdiction over a pending case as a valid exercise of the legislative power. Only four Justices agreed with that reasoning, while two more concurred in the result but only because, in their view, the statute reinstated sovereign immunity (which is not the case with the FRA).

Specifically, Justice Thomas (joined by Justices Breyer, Alito, and Kagan) reasoned that the Gun Lake Act, which stripped jurisdiction over cases related to a certain tract of land held in trust for a tribe, was constitutional because it did

"nothing more than strip jurisdiction over a particular class of cases[.]" *Patchak*, 138 S.Ct. at 909 (Thomas, J., plurality opinion; cleaned up).

Justices Ginsburg and Sotomayor concurred in the judgment, but did so on a different ground, reasoning that the language of the Gun Lake Act mirrored the language of the Administrative Procedure Act's ("APA") sovereign immunity waiver by using the phrase "shall be promptly dismissed," thereby displacing the APA's waiver of immunity.[6] *Id*. at 913 (Ginsburg, J., concurring). Justice Ginsburg reasoned that the Court need go no further than the sovereign immunity question to resolve the case. *Id.* at 912. Justice Sotomayor also wrote a separate concurrence, in which she stated an Act that strips courts of jurisdiction over a pending proceeding is not enough to be considered a change in the law; and that she joined the result *only* on sovereign immunity grounds. *Id*. at 913-14 (Sotomayor, J., concurring).

Chief Justice Roberts, joined by Justices Kennedy and Gorsuch, wrote a dissent explaining why the Gun Lake Act unconstitutionally violated separation-of-powers principles: "Congress cannot, under the guise of altering federal jurisdiction, dictate the result of a pending proceeding." *Id*. at 919 (Roberts, C.J.,

[6] FRA §324 is distinguishable from the Gun Lake Act because it does not include language that could be construed to reinstate the government's sovereign immunity for this case.

dissenting). "[T]he concept of 'changing the law' must imply some measure of generality or preservation of an adjudicative role for the courts. The weight of our jurisdiction stripping precedent bears this out.…The Court, to date, has never sustained a law that withdraws jurisdiction over a particular lawsuit." *Id*. at 920 (citations omitted).

When no five Justices agree on a single rationale, the holding of the Court may be viewed as the position taken by those Justices who concurred in the judgment on the narrowest grounds. *Marks*, 430 U.S. at 193-94. This Court has held that "[t]he *Marks* rule does not apply, however, unless 'the narrowest opinion represents a "common denominator of the Court's reasoning" and "embod[ies] a position implicitly approved by at least five Justices who support the judgment."'" *A.T. Massey Coal Co. v. Massanari,* 305 F.3d 226, 236 (4th Cir. 2002) (alteration original). Because Justices Ginsburg and Sotomayor did not implicitly or otherwise approve the reasoning of Justice Thomas's plurality cited by Respondents and MVP (Justice Ginsburg would not have reached the jurisdiction-stripping question, and Justice Sotomayor expressly joined the dissent's reasoning on that issue), there is no rationale common to five Justices and no holding to apply. Thus, *Patchak* does not control this case.

D. This Court Should Adopt Chief Justice Roberts's Reasoning From *Patchak*.

Petitioners have found no controlling Fourth Circuit case addressing whether Congress can strip a court's jurisdiction over a pending case under the circumstances present here.[7] And neither Respondents nor MVP has cited any such case. In the absence of a controlling holding from *Patchak*—beyond the narrow *result* applicable only to *the Gun Lake Act*—the Court should apply the reasoning from *Patchak* it finds most persuasive. *Cf. United States v. Davis*, 825 F.3d 1014, 1025-26 (9th Cir. 2016) (en banc). Petitioners submit that should be the position

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[7] In dicta in *United States v. Brainer*, 691 F.2d 691, 695 (4th Cir. 1982), this Court offered a "narrow" reading of *Klein* as "holding only that Congress violates the separation of powers when it presumes to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction)' and purports 'to bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.'" But because *Brainer* did not present the question whether Congress could constitutionally strip courts of jurisdiction over pending cases, its statements about the *Klein*'s limits are dicta. The same is true of the re-statement of *Brainer*'s narrow view of *Klein* in *Ameur v. Gates*, 759 F.3d 317, 327 (4th Cir. 2014)—the case was not pending when the statute was enacted, so the question of Congress's power to strip a court's jurisdiction over a pending case was not presented, rendering *Ameur*'s statements about *Klein* dicta.

Miranda v. Garland, 34 F.4th 338, 354 (4th Cir. 2022), which examined a statute that stripped jurisdiction to issue class-wide injunctive relief, is likewise inapposite because it did not present the question of Congress's power to strip jurisdiction in pending cases.

Finally, *Plyler v. Moore*, 100 F.3d 365, 372 (4th Cir. 1996), does not answer the question presented here because rather than stripping courts of jurisdiction in pending matters, as the FRA purports to do, the statute in that case restricted only the Court's equitable authority, leaving room for courts to apply a new standard.

presented by the four-judge plurality of Chief Justice Roberts, Justice Kennedy, Justice Gorsuch, and Justice Sotomayor (who agreed with the dissent with the lone exception of the sovereign immunity issue).[8] As Chief Justice Roberts persuasively reasoned:

> Congress exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending case. Because the Legislature has no authority to direct entry of judgment for a party, it cannot achieve the same result by stripping jurisdiction over a particular proceeding.…[T]here is [no] material difference between a law stating "The court lacks jurisdiction over Jones's pending suit against Smith" and one stating "In the case of *Smith v. Jones,* Smith wins"[.] In both instances, Congress has resolved the specific case in Smith's favor.

Patchak, 138 S.Ct. at 919-20 (Roberts, C.J., dissenting).

Chief Justice Roberts further explained why federal courts must guard against such congressional overreach, using reasoning equally applicable here:

> The Framers saw this case coming. They knew that if Congress exercised the judicial power, it would be impossible "to guard the Constitution and the rights of individuals from…serious oppressions." The Federalist No. 78, at 469 (A. Hamilton). Patchak thought his rights were violated, and went to court. He expected to have his case decided by judges whose independence from political pressure was ensured by the safeguards of Article III—life tenure and salary protection. It was instead decided by Congress, in favor of the litigant it preferred, under a law adopted just for the occasion. But it is our responsibility under the Constitution to decide cases and controversies according to law. It is our responsibility to, as the judicial oath provides, "administer justice without respect to persons." 28 U.S.C. § 453. And it is our responsibility to "firm[ly]" and "inflexibl[y]" resist any effort by the

[8] Petitioners are not asking the Court to find the *Patchak* dissent creates a rule or is precedent. Rather, the Court can look to Chief Justice Roberts' opinion to identify the most persuasive answer to the question presented by FRA §324(e)(1).

> Legislature to seize the judicial power for itself. The Federalist No. 78, at 470.

Id. at 922 (alteration original). Through the FRA, Congress attempts to "seize the judicial power for itself" in this case. *Id.* That effort "to manipulate[] jurisdictional rules" must fail. *Id*. at 919.

E. The FRA Targeted This Litigation and Lacks Sufficient Generality.

Unquestionably, the FRA targeted this litigation. Congress is presumed to be fully aware of this lawsuit and its preceding cases, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006), and thus knew that in 2019 this Court stayed MVP's first Biological Opinion, Order, *Wild Va.*, No. 19-1866, ECF No. 41, and that in 2022 this Court vacated the second, *Appalachian Voices*, 25 F.4th at 264.

In the 2022 case, this Court held that Respondents "failed to adequately evaluate the 'environmental baseline' and 'cumulative effects' for two listed species[,]" "neglected to fully consider the impacts of climate change[,]" and "failed to incorporate [their] environmental-baseline and cumulative-effects findings into [their] jeopardy determinations[.]" *Id.* at 271, 278. When Congress took up the FRA at the end of May 2023, it was against the backdrop of a ripe stay motion before this Court establishing Petitioners' likelihood of success on the merits in their challenge to Respondents' third effort—the BiOp/ITS—because

Respondents had repeated some of their prior legal errors (and committed some new ones). ECF No. 17-1 at 4-20.

In an effort to avoid losing yet another legal challenge to a deficient Biological Opinion, "Congress…attempt[ed] to decide the controversy at issue in the Government's own favor," *Sioux Nation*, 448 U.S. at 405—the type of effort held unconstitutional in *Klein*, 80 U.S. at 147. *See also Sioux Nation*, 448 U.S. at 404 (construing *Klein* to have held statute at issue unconstitutional because it prescribed a rule of decision in a pending case "that required the courts to decide a controversy in the Government's favor").

As this Court has observed, "once Congress has established lower federal courts and provided jurisdiction over a given case, Congress may not interfere with such courts by dictating the result in a particular case." *ACLU*, 673 F.3d at 256. At the time of the FRA's enactment, four pending cases sought judicial review of Mountain Valley Pipeline approvals: the instant case, two challenging authorizations for the Jefferson National Forest,[9] and one challenging a 2022 FERC order extending the expiration date of MVP's FERC Certificate.[10] FRA §324 is thus targeted at specific, pending litigation. It is not a law of general

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[9] *The Wilderness Society v. U.S. Forest Serv.*, No. 23-1592 (4th Cir.); *The Wilderness Society v. Bureau of Land Mgmt.*, No. 23-1594 (4th Cir.).

[10] *Appalachian Voices v. FERC*, No. 22-1330 (D.C. Cir.). The petitioners in that case are seeking voluntary dismissal.

application—it applies to a single project, impacting a known, small universe of litigants, including the government itself. By attempting to strip federal courts of jurisdiction in pending Mountain Valley Pipeline cases, Congress has attempted to direct the outcome in those cases and usurp judicial power. Without preserving an adjudicative role for the courts in these pending cases, Congress has pronounced the equivalent of "the government and MVP win." That is not a legitimate use of legislative power—rather, it is a blatantly unconstitutional effort by Congress to exercise judicial power. *Bank Markazi*, 578 U.S. at 231; *Sioux Nation*, 448 U.S. at 404; *Klein*, 80 U.S. at 146-47.

II. The FRA Does Not Moot This Petition.

Respondents (at 6-8) and MVP (at 5-6) argue this case is moot because FRA §324(c)(1) purports to "ratif[y] and approve[]" the BiOp/ITS, making it impossible (in their view) for the Court to grant Petitioners effective relief. That argument fails because §324(c) unconstitutionally compels a result in this pending action in violation of the separation-of-powers doctrine and is thus void.

Through §324(c), Congress did not prescribe amendments to the Endangered Species Act or APA. Indeed, Congress created no new substantive law for courts to apply. Rather it purported to "ratif[y] and approve[]" MVP's BiOp/ITS. But the question of whether to approve the BiOp/ITS is a judicial one, presented to this Court through the pending petition for review. By attempting to declare a victor

under old law, Congress impermissibly usurped the judicial power, effectively directing that, in this pending case, the government (and MVP) win. This improper exercise of judicial power is unconstitutional and cannot render this case moot. *Sioux Nation*, 448 U.S. at 404; *Klein*, 80 U.S. at 146-47.

Congress's attempt to direct a specific result in a pending case, without any room for judicial construction, is not a valid change in law for separation-of-powers purposes. *Cf. Bank Markazi*, 578 U.S. at 230 n.20, 231 (upholding provision that "changed the law by establishing new substantive standards" and left the court "plenty…to adjudicate"); *id*. at 231 (explaining that in *Robertson*, the Court "upheld the legislation because it left for judicial determination whether any particular actions violated the new prescription"); *Sioux Nation*, 448 U.S. at 406-07 (upholding amendment where "Congress in no way attempted to prescribe the outcome of the [court's] new review of the merits").

FRA §324(c)(1) provides no new substantive standards for courts to apply. Rather, it simply declares the BiOp/ITS "ratifi[ed] and approve[d]." In that way, the FRA is distinguishable from the statute at issue in *Robertson*, which provided alternative standards (i.e., new law) to govern national forest management in lieu of the statutes at issue in two specifically referenced pending cases. 503 U.S. at 437-38. In contrast, §324(c) provides nothing for the Court to apply. Rather, it

declares the BiOp to be lawfully issued, as if Congress were issuing a declaratory judgment in this case. That it cannot do.

FRA §324(c)(1)'s "ratification" language cannot save it. Although "Congress may, *by enactment not otherwise inappropriate*, ratify acts which it might have authorized," *Swayne & Hoyt v. United States*, 300 U.S. 297, 301-02 (1937) (emphasis added; cleaned up), that proposition does not authorize congressional attempts to invade the judicial function by dictating results in pending litigation. Cases holding that Congress may ratify acts which it may have authorized are not to the contrary. *See Swayne & Hoyt*, 300 U.S. at 301-02; *United States v. Heinszen & Co.*, 206 U.S. 370, 384 (1907); *United States v. W. Va. Power Co.*, 91 F.2d 611, 614 (4th Cir. 1937) (applying rule from *Swayne & Hoyt*). Such cases are distinguishable because *Klein*'s rule prohibiting Congress from exercising the judicial power in pending cases was not implicated.[11] Moreover, such cases recognize limits on Congress's ratification power—prohibiting ratifications "otherwise inappropriate" (*Swayne & Hoyt*, 300 U.S. at 301) or that "interfere with intervening rights" (*Heinszen & Co.*, 206 U.S. at 384)—that encompass a prohibition against ratification where it would unconstitutionally

[11] Although the statute at issue in *Patchak* purported to ratify the agency action at issue, the petitioner did not argue that the ratification was unconstitutional. 138 S.Ct. at 911 (Breyer, J., concurring).

exercise judicial power. Here, Petitioners gained an intervening right to review by an Article III court between the BiOp/ITS's February 2023 issuance and Congress's purported ratification. Congress declaring the BiOp/ITS to be "approve[d]" unconstitutionally interferes with that right and is thus "otherwise inappropriate." *Cf. Swayne & Hoyt*, 300 U.S. at 301.

FRA §324(c)(1)'s impermissible invasion of the judicial power cannot be made constitutional by Congress's prefatory phrase "[n]otwithstanding any other provision of law." Although such language may sometimes override conflicting provisions, *see, e.g.*, *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993); *In re FCX, Inc.*, 853 F.2d 1149, 1154 (4th Cir. 1988), it cannot transform an unconstitutional exercise of judicial power into a permissible one. In pending cases where Congress has not created new substantive legal standards for judicial application, Congress cannot simply add a magic phrase and thereby authorize itself to violate the separation-of-powers doctrine.[12] A provision stating "In the pending case of *Smith v. Jones*, Smith wins, notwithstanding any other provision of law" is still unconstitutional.

[12] The statute at issue in *Bank Markazi* included the phrase "notwithstanding any other provision of law," 578 U.S. at 218 n.4, but that phrase did not play a role in the Court's reasoning upholding the statute because the statute provided new substantive standards for judicial application, *id.* at 231.

Moreover, §324(f)'s effort to "supersede[]" "inconsistent" provisions of law likewise does not provide new law for the Court to apply, as required under *Bank Markazi*. 578 U.S. at 231. Although Congress "may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative," *id.* at 215, the amendment must "supply [a] new legal standard," *id.* at 231. It cannot "compel findings or results under old law." *Id.* at 228 (quoting *Robertson*, 503 U.S. at 438; cleaned up). Unlike the statutes at issue in *Bank Markazi* and *Robertson*, FRA §324(f) provides no replacement legal standards that could constitute new law for courts to apply. Indeed, it does not even identify the laws that it purports to supersede. Rather, §324(f) is just another impermissible direction by Congress that the government should prevail under old law.

Furthermore, §324(c)(2)'s direction to the Secretary of the Interior to "maintain" the BiOp/ITS does not render this case moot as MVP suggests (at 5). Properly understood, the most §324(c)(2) does is prohibit Respondents from unilaterally suspending or revoking the BiOp/ITS. It cannot be read to prohibit Respondents from following a judicial order vacating and/or remanding the BiOp/ITS. A direction from the legislative branch to the executive branch to give no effect to a lawful order from the judicial branch would certainly be unconstitutional.

Finally, Respondents' (at 8) and MVP's (at 5-6) reliance on the D.C. Circuit's unpublished decision in *Friends of the Earth v. Haaland*, No. 22-5036, 2023 WL 3144203 (D.C. Cir. Apr. 28, 2023), is misplaced. The statute at issue there mandated that the Secretary of the Interior issue certain offshore leases that had been vacated by a federal district court. *Id.* at *1. Accordingly, the Court held that an appeal of the district court order was moot. *Id.* Here, nothing in the FRA purports to compel Respondents to issue (or re-issue) the BiOp/ITS. Consequently, *Friends of the Earth* is inapposite.

III. Summary Denial is Not Warranted.

To support its request for summary denial, MVP simply repeats (at 7-8) its arguments in support of its mootness theory. Because the relevant provisions of §324 are unconstitutional exercises of the judicial power,[13] summary denial is not warranted.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court deny the motions to dismiss.

DATED: June 26, 2023

Respectfully submitted,

/s/ Elizabeth F. Benson
Elizabeth F. Benson
Sierra Club

[13] *See* Section II.

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CERTIFICATE OF COMPLIANCE

1. This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this response contains 5,193 words, excluding the parts of the response exempted by Fed. R. App. P. 27(d)(2) and Fed. R. App. P. 32(f).

2. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this response has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: June 26, 2023

/s/ Elizabeth F. Benson
Elizabeth F. Benson

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2023, I electronically filed the foregoing 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/ Elizabeth F. Benson
Elizabeth F. Benson

Exhibit A

From: Normane, Todd <TNormane@equitransmidstream.com>
Sent: Friday, March 11, 2022 4:52 PM
To: Bossie, Susan (Amanda) <Susan.Bossie@sol.doi.gov>; Parker Moore <PMoore@bdlaw.com>; Simon, Spencer <spencer_simon@fws.gov>
Cc: Normane, Todd <TNormane@equitransmidstream.com>
Subject: [EXTERNAL] MVP Petitions for Rehearing

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All,

I wanted to let you know that on Friday, March 11, 2022, Mountain Valley Pipeline, LLC (Mountain Valley) filed petitions with the U.S. Fourth Circuit Court of Appeals asking the full Court to reconsider the decisions issued in January and February 2022 by a panel of the Court vacating the Mountain Valley Pipeline (MVP) project's Biological Opinion and authorization to cross the Jefferson National Forest. Our counsel notified the Department of Justice regarding these filings and we expect those discussions about the judicial process for the *en banc* review to continue. I wanted to give you timely notice of the filings as well for your own consideration and discussions with your management. I have attached the petitions for your review.

As a matter of prime importance I want everyone at the federal agencies to understand that MVP's concerns are purely with the judicial process and not with the substantial work done by the federal government. The facts documented in the comprehensive administrative record demonstrates that everyone worked extremely hard over a long period of time to complete the permit process in a way that we believe exceeded all legal and regulatory requirements and achieved the highest standards of environmental protection. Everyone at the federal agencies worked diligently to ensure that they met or exceeded their respective mandates in the permitting processes. As you can see in the petitions, our arguments are solely with the judicial review process in the Fourth Circuit.

While we acknowledge the importance of judicial review as an integral element of the regulatory process, Mountain Valley firmly believes this panel of the Fourth Circuit has taken actions that go beyond the mandate of the judiciary. Congress never intended for Courts to replace the judgment and expertise of federal and state agencies. But in its most recent decisions the Fourth Circuit did just that, departing from its own well-settled rules governing review of agency actions under federal law. This approach has put Mountain Valley and the agencies in a seemingly endless loop that will delay MVP's completion and jeopardize the very same environmental resources that the panel and project opponents claim to be protecting.

While Mountain Valley is hopeful the Court will grant the petitions, there certainly are no guarantees. Mountain Valley therefore will continue collaborating with FWS to complete all work necessary for the Service to issue a comprehensive new BiOp/ITS as quickly as possible

Please let me know if you would like to schedule a call or meeting after you have had an opportunity to review the petitions.

Todd

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& Deputy General Counsel
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