No. _____

In the Supreme Court of the United States

ORUS ASHBY BERKLEY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is a delegation of Congressional power an "agency order" or "agency action" such that a party wishing to challenge that delegation must file that challenge with the agency under the administrative review scheme of 15 U.S.C. § 717r, or is the proper forum for constitutional challenges the district court?

II. Is an administrative agency's test for determining "public use" for purposes of eminent domain an "agency order" such that a party wishing to challenge that test as unconstitutional must file that challenge with the agency and adhere to its administrative review scheme, or is the proper forum for constitutional challenges the district court?

LIST OF PARTIES

Petitioners are landowners, Orus Ashby Berkley, James T. Chandler, Kathy E. Chandler, Constantine Theodore Chlepas, Patti Lee Chlepas, Roger D. Crabtree, Rebecca H. Crabtree, George Lee Jones, Margaret McGraw Slayton Living Trust, and Thomas Triplett, Bonnie B. Triplett, and were the appellants in the court below. The Federal Energy Regulatory Commission ("FERC"), Neil Chatterjee, in his official capacity as Acting Chairman of FERC, and Mountain Valley Pipeline, LLC ("MVP") are respondents and were the appellees. Dawn Cisek, Martin Cisek, Edith Echols, and Estial Echols were plaintiffs at the District Court and withdrew their appeals at the Fourth Circuit.

CORPORATE DISCLOSURE

This Petition is not filed on behalf of a corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Orus Ashby Berkley, James T. Chandler, Kathy E. Chandler, Constantine Theodore Chlepas, Patti Lee Chlepas, Roger D. Crabtree, Rebecca H. Crabtree, George Lee Jones, Margaret McGraw Slayton Living Trust, and Thomas Triplett, Bonnie B. Triplett (hereinafter "Petitioners" or "Landowners") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 896 F.3d 624, and reproduced in the appendix hereto ("App.") at 1. The opinion of the District Court for the Western District of Virginia, Roanoke Division, is reported at 2017 U.S. Dist. LEXIS 202907, and reproduced in the appendix at 23.

JURISDICTION

The judgment of the Fourth Circuit was entered on July 25, 2018. App. 1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Vesting Clauses:

> Article I, Section 1 of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."

> Article II, Section I, Clause 1 provides that "[t]he executive Power shall be vested in a President of the United States of America."
>
> Article III, Section I provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The Takings Clause of the Fifth Amendment to the Constitution provides that no private property shall "be taken for public use, without just compensation."

Pertinent provisions of the Natural Gas Act ("NGA"), 15 U.S.C. § 717 *et. seq*. are reproduced in the appendix and cited below.

INTRODUCTION

This case is ***not*** about the wisdom of building a pipeline. It is about individual liberty, the separation of powers doctrine that secures that liberty, and the Constitution that dictates that separation. It is not an "anti-pipeline" action. Nor is it a "pro-pipeline" action. The issue here is neither a "left" issue nor a "right" issue. It is, rather, a constitutional issue affecting the private property rights of ***all*** Americans (and even non-citizens) who either own property or wish to own property.

The underlying action addresses several key constitutional issues:

1. The federal non-delegation doctrine, prohibiting Congress from delegating away its legislative

power, particularly to a private entity[1] such as MVP.

2. The separation of powers doctrine, prohibiting Congress from both legislating away its own power and simultaneously attempting to vest judicial review power in an administrative regulatory agency.

3. The "public use" standard as defined in *Kelo v. City of New London*, 545 U.S. 469 (2005), for the taking of *private* property for another *private* use.

The Fourth Circuit has held that a Landowner alleging that Congress violated the Constitution cannot file his action in the District Court. Instead, he must *first* go and ask the federal regulatory agency—the very same agency created by Congress via the very same action challenged by Landowners—what it [the agency] thinks about the constitutionality of a Congressional Act. And not just any Act of Congress but precisely that Act which delegated to it [the agency] the power it now exercises. The result? An administrative agency (i.e.,

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[1] *See Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225, 1237 (2015)(Alito, J., concurring)("***When it comes to private entities, however, there is not even a fig leaf of constitutional justification***. Private entities are not vested with "legislative Powers." Art. I, §1. Nor are they vested with the "executive Power," Art. II, §1, cl. 1, which belongs to the President.")(emphasis added). *Cf.* Appendix (hereinafter "App.") at 216. (Defendant MVP stating in its Memorandum of Law in support of its Motion To Dismiss: "Congress has not delegated the power of eminent domain to FERC. Rather, ***the NGA delegated the power of eminent domain to natural gas companies.***")(emphasis added).

FERC) sitting in judgment over the constitutionality of Congressional action. Why? Because Congress said so. This, in fact, is the precise definition of legislative supremacy[2] at its best, tyranny at its worst. If tyranny is the concentration of power into the hands of a singular branch—or, in this case, an agency—then legislative supremacy is the road that gets us there. A far cry from the constitutional supremacy the Founders so carefully designed.

Petitioners hereby petition the United States Supreme Court for reversal of the Fourth Circuit's decision on the issue of subject matter jurisdiction to hear Petitioners' constitutional challenges raised in Counts One, Two, and Three.[3]

STATEMENT OF THE CASE

Petitioners[4] are landowners along the path of a proposed natural gas pipeline. They brought this action

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[2] *See Dep't of Transp.*, 135 S.Ct. at 1245 (Thomas, J., concurring)("And experiments in legislative supremacy in the States had confirmed the idea that even the legislature must be made subject to the law.").

[3] *See* App. 86 (Count One), App. 87 (Count Two), and App. 88 (Count Three).

[4] Petitioners are Orus Ashby Berkley, James T. Chandler, Kathy E. Chandler, Constantine Theodore Chlepas, Patti Lee Chlepas, Roger D. Crabtree, Rebecca H. Crabtree, George Lee Jones, Margaret McGraw Slayton Living Trust, and Thomas Triplett, Bonnie B. Triplett. After the Fourth Circuit appeal was filed, Dawn Cisek, Martin Cisek, Edith Echols, and Estial Echols, who were also plaintiffs at the District Court, withdrew their discrete appeals.

against the Federal Energy Regulatory Commission ("FERC"), Neil Chatterjee, in his official capacity as Acting Chairman of FERC, and against Mountain Valley Pipeline, LLC ("MVP"), the private natural gas company invoking eminent domain to "take" Petitioners' land and convert it to another private use, i.e., building a private pipeline across Petitioners' land.

Petitioners invoked 28 U.S.C. § 1331 and presented three[5] constitutional issues to the District Court for the Western District of Virginia:

1. Congress's delegation to FERC of the power of eminent domain under 15 U.S.C. § 717f(h) is overly broad and unconstitutional under the "intelligible principle" test.[6] *See* App. 87 (Count Two).

2. FERC's sub-delegation of the power of eminent domain to MVP, a ***private entity***, under 15

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[5] Petitioners initially presented four counts (Counts One, Two, Three, and Four) in their Complaint but later dismissed Count Four of the Complaint prior to filing an appeal with the Fourth Circuit. As such, only jurisdiction over Counts One, Two, and Three is before this Court.

[6] *See* App. 87 (Count Two); *see also* App. 165-172, 175-190 (Plaintiffs' Memorandum of Law); *see also Dep't of Transp.*, 135 S.Ct. at 1246 (2015)(Thomas, J., concurring)(noting that although the "intelligible principle" test is widely used and followed by this Court in delegation challenges, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) could instead be read to adhere to the "factual determination" rationale from *Marshall Field & Co. v. Clark,* 143 U.S. 649 (1892), which is a stricter standard on federal delegation than the one imposed by the "intelligible principle" standard).

U.S.C. § 717f(h) is an unconstitutional delegation in violation of the well-established federal private non-delegation doctrine.[7] *See* App. 88 (Count Three).

3. Because the initial delegation of power was overly broad, FERC has been allowed to create a self-imposed, shifting-scale balancing test for determining when to grant a private entity the power of eminent domain to take private land. However, because no standards were set by Congress at the time of the initial delegation of power on what constitutes "public use," and no checks are in place to enforce Constitutional standards, FERC has consequently created its own balancing test that measures "public use" using a self-imposed administrative standard that violates the Fifth Amendment Takings Clause.[8] *See* App. 86 (Count One).

Petitioners thus argued that the agency's administrative standard for "public use" violates even the lax standards previously outlined by this Court for the taking of private property in *Kelo v. City of New London*, 545 U.S. 469 (2005), *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Berman v. Parker*, 348 U.S. 26 (1954). Petitioners reasoned as follows:

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[7] *See* App. 88 (Count Three); *see also* App. 172-190 (Plaintiff's' Memorandum of Law).

[8] *See* App. 86 (Count One); *see also* App. 147-165 (Plaintiffs' Memorandum of Law).

First, even under the standard set in *Kelo*, "public use" had to be limited to a local/regional use, meaning *that* particular region where the land was being taken had to benefit in some manner from the taking. The taking, in other words, has to serve a purpose for the public in *that particular region* where eminent domain is invoked. *Kelo* broadened the kind of use that can justify eminent domain within the same region. It did not broaden the region itself, nor extinguish the directness or scope of public use; it merely reinterpreted "use" as "purpose," as opposed to the historical interpretation requiring "access," but that purpose must still be for *that* community (i.e., limited by scope). An illusory benefit to the Landowners whose land is taken for another private use will not suffice, either under the original meaning of the Constitution or even under the *Kelo* standard.[9]

Second, FERC's takings standard is unconstitutional under the *Kelo, Midkiff, Berman* trio of cases because it does not account for the social harm element required under those cases. The Court's decision in *Kelo* was shaped by two central elements: (1) social harm, and (2) the revitalization of a specific geographic area. The social harm being eliminated in *Kelo* was a state of impoverishment. In *Midkiff*, it was

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[9] *See* App. 156 ("A trickle-down benefit does not suffice, nor does the potential of some future public use suffice. *See Mt. Valley Pipeline, LLC v. McCurdy*, 793 S.E.2d 850, 861-62 (W.Va. 2016). While *Kelo* permits eminent domain to be invoked for economic development, it does not allow just any economic development. Rather, it permits eminent domain only if there is an economic development for that particular community. The facts of *Kelo* and related case law plainly demonstrate this scope.").

the concentration of land ownership in that area, i.e., extreme wealth. In *Berman*, it was a blighted area of D.C., i.e., extreme poverty.

Thus, Petitioners argued that the Constitutional standard under the Takings Clause, even as defined in the *Kelo* trio of cases, limits takings not only to the geographic scope where eminent domain is invoked but also to regions where there is a demonstrable social harm, such as extreme wealth or extreme poverty. This standard, however, was not enforced by Congress when it delegated the power of eminent domain via the NGA.

Petitioners presented their action both as a facial and an as-applied challenge. Petitioners alleged the FERC standard is both facially unconstitutional (i.e., in *all* cases no matter the facts) and also unconstitutional as-applied in this particular case.

The District Court dismissed the action. On the Defendants' Motion to Dismiss, the Court held that it did not have subject matter jurisdiction over any of the constitutional questions, even the facial challenge. The Court reasoned that the NGA's administrative review scheme required Petitioners to first present their constitutional questions to the agency. Instead of filing in the District Court, Petitioners must first ask the agency whether it [the agency] thinks that Congress violated the Constitution. This is so, the Court reasoned, because Congress said so (i.e. Congress's "intent"[10] was to send these types of constitutional

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[10] App. 38; *see also* App. 7 (Fourth Circuit Opinion)("Ultimately, we agree with the district court that Congress . . . ***intended*** for such claims to come to federal court through the ***administrative review scheme*** established by the Natural Gas Act.")(emphasis added).

questions challenging its own actions to the agency for review and then ultimately a Court of Appeals). Thus the Court concluded that "meaningful review" was available to Petitioners because they could present their constitutional challenge to an Act of Congress to the very agency whose legitimacy is being questioned by the Petitioners' action.

The District Court further reasoned that Petitioners' constitutional questions—including their facial challenge—were not "wholly collateral" to the statute's administrative review scheme because they were the "vehicle by which [plaintiffs] seek to reverse agency action."[11] Petitioners, however, argued they do not seek to reverse "*agency* action" but, rather, to reverse *Congressional* action. The Court reasoned that there actually was no facial challenge over which it could exercise subject matter jurisdiction because it concluded that if Petitioners won their facial attack on the statute and proved that Congress violated the Constitution, then FERC's Order would effectively be invalidated as well, which would help the Petitioners' own situation (i.e., by preventing a taking of their land). Put another way: the District Court reasoned that because Petitioners asserted injuries-in-fact to their own land, they did not assert a facial challenge to the statute.

Petitioners appealed to the Fourth Circuit, arguing that this conclusion flips constitutional law upside down. Petitioners noted the exact opposite is true: Plaintiffs are ***required*** to assert an injury-in-fact to their own properties in order to have standing to assert

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[11] App. 40.

a constitutional challenge.[12] Had they not asserted concrete and particularized injuries-in-fact (which can be either actual or imminent harm) to their own land, they would not have standing to bring a facial constitutional challenge in the first place.

On appeal, the Fourth Circuit affirmed the dismissal and similarly held that the District Court did not have subject matter jurisdiction under 28 U.S.C. § 1331 over any of the constitutional questions presented by Petitioners, including the facial challenge. Instead, the Fourth Circuit reasoned that Petitioners must go through the "administrative review scheme" created by Congress and submit those constitutional questions to the agency.

Petitioners respectfully request that this Court reverse the judgment of the Fourth Circuit on the issue of the District Court's subject matter jurisdiction under 28 U.S.C. § 1331 to hear the constitutional challenges raised in Counts One, Two, and Three.

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[12] Petitioners explained this requirement—that is, that one *must* have an "injury-in-fact" in order to have standing to bring a constitutional challenge—at length in their Reply Brief to the Fourth Circuit included here in the Appendix. *See* App. 313-317.

REASONS FOR ALLOWANCE OF THE WRIT

I. REVIEW IS WARRANTED UNDER SUPREME COURT RULE 10(c) BECAUSE THE FOURTH CIRCUIT DECISION IS IN CONFLICT WITH RELEVANT SUPREME COURT PRECEDENT HISTORICALLY UPHOLDING DISTRICT COURT JURISDICTION OVER THE CONSTITUTIONALITY OF CONGRESSIONAL ACTS AS A SAFEGUARD OF THE SEPARATION OF POWERS DOCTRINE AND INDIVIDUAL LIBERTY.

A. Defendant FERC—A Regulatory Agency—Has Twice Conceded It Is *Not* A "Check and Balance" On Congress And The "Administrative Review Scheme" Advanced By The Fourth Circuit Is Therefore *Not* The Proper Forum For Petitioners' Constitutional Challenge Of A Congressional Act.

Congress cannot write a law exempting itself from judicial review.[13] Nor can it vest a federal regulatory agency with the power to determine whether an Act of Congress (i.e. the initial delegation of power from the delegator, Congress, to the delegatee, FERC/MVP) violates the Constitution. On this point, Defendant FERC has at least twice conceded, noting that

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[13] Congress could, of course, in theory attempt to do so but such a law would be "checked" [i.e. reviewed] by the Judiciary and rendered unconstitutional.

constitutional challenges are outside its regulatory jurisdiction:

> We do agree with plaintiffs in one respect. My agency, while it's a federal agency, it's obviously not an Article III court. ***Obviously, we don't sit in judgment on the constitutionality of any federal statute that we administer***.[14]

FERC again conceded this distinction between regulatory jurisdiction (i.e. its ability to review the agency's ***regulatory acts*** such as whether the issuance of Orders comports with the existing regulatory scheme) and judicial review power (i.e. the ability to review ***Congressional acts,*** *for which it concedes it has no jurisdiction)* in its actual Certificate*:*

> [S]uch a question is ***beyond our jurisdiction:*** only the Courts can determine whether Congress' action in passing section 7(h) of the NGA conflicts with the Constitution.[15]

But Petitioners here have done precisely that: challenged Congress's action in passing section 7(h) of the NGA as: (1) an overly broad, unconstitutional delegation of power, and (2) an impermissible sub-delegation to an ineligible, *private entity*. Petitioners' argument is not that the federal agency violated the regulatory scheme but, rather, that Congress violated

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[14] App. 257 (emphasis added) (Transcript of Oral Argument reporting admission by FERC Solicitor General, Robert H. Solomon, that FERC cannot sit in judgment on the constitutionality of any federal statute.).

[15] App. 252 (emphasis added).

the Constitution when it delegated legislative power to that agency in the first place. Regardless of the ultimate merits of Petitioners' challenge, the constitutional question posed by Petitioners is and continues to be—per FERC's own admission—beyond the agency's jurisdiction.

It is, therefore, undisputed that an administrative agency such as FERC cannot assess constitutional challenges to Congressional acts. (The question of *which* court has jurisdiction—whether it is the District Court or the Court of Appeals—is separately addressed in Part III below.) Whether through an administrative "rehearing" process or any type of administrative review, a federal agency cannot—and should not—determine the constitutionality of a Congressional Act that delegated it [FERC] power in the first place. FERC, in other words, cannot sit in judgment on the constitutionality of itself or its own power. Nor can Congress. The separation of powers doctrine forbids it.

B. The Judiciary *Is* The "Check and Balance" On Congressional Acts And *Is* Therefore The Only Entity Vested With Power To Determine Whether A Congressional Delegation Of Power Is Constitutional.

i. The Framers, By "Careful Design,"[16] Crafted The Separation Of Powers To Preserve Individual Liberty.

To exempt Congress from judicial review would be an egregious violation of the separation of powers doctrine, which is—and continues to be—instrumental in preserving individual liberty. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225, 1246 (2015)(Thomas, J., concurring)("At the center of the Framers' dedication to the separation of powers was individual liberty." The Federalist No. 47, at 302 (J. Madison)(quoting Baron de Montesquieu for the proposition that "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates"); *see id.* at 1237 (Alito, J., concurring)("The principle that Congress cannot delegate away its vested power exists to protect liberty"); *see also United States v. Nichols,* 784 F.3d 666, 670 (10th Cir. 2015)(Gorsuch, J., dissenting) ("There's ample evidence, too, that the framers of the

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[16] *See, e.g., Dep't of Transp*., 135 S.Ct. at 1237 (Alito, J., concurring)("Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints.").

Constitution thought the compartmentalization of legislative power not just a tool of good government or necessary to protect the authority of Congress from encroachment by the Executive but essential to the preservation of the people's liberty.").

It is, rather, the role of the judiciary to act as a "check and balance" on Congress. To divest the Court of judicial review over a Congressional act is to undermine the very foundation upon which this nation was built: constitutional supremacy,[17] i.e., as contrasted with legislative or parliamentary supremacy articulated by William Blackstone and prevalent in Britain. As Justice Thomas noted in *Dep't of Transp. v. Ass'n of Am. Railroad:*

> The "check" the judiciary provides to maintain our separation of powers is enforcement of the

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[17] *Carter v. Carter Coal Co*., 298 U.S. 238 (1936)(holding that the Bituminous Coal Conservation Act was an overly broad delegation of power to a private entity, and explaining that constitutional supremacy requires the Judiciary to invalidate conflicting Congressional acts:

> The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior statute whenever the two conflict.

Id. at 296-97.).

> rule of law through judicial review. We may not—without imperiling the delicate balance of our constitutional system—forgo our judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law.

Dep't of Transp. v. Ass'n of Am. Railroads, 135 S.Ct. 1225, 1246 (2015)(quoting *Perez v. Mortg. Bankers Ass'n,* 135 S.Ct 1199 (2015))(Thomas, J. concurring)(internal citations omitted). By contrast, in Defendant MVP's Motion to Dismiss—the Motion that was ultimately granted by the District Court and then affirmed by the Fourth Circuit—MVP emphatically argued that the Court has no business "second-guessing" the "wisdom" of Congress:

> [T]he Constitution vests Congress with the power of eminent domain, and Congress has seen fit to delegate that power ***to private entities*** so that those entities can provide natural gas to the public. **It is not the Court's place to second-guess the wisdom of Congress *in providing private entities*** with that power.[18]

Aside from the overt admission that Congress has indeed—as Petitioners' underlying Complaint alleged—improperly delegated legislative power ***to a private entity***[19]—a delegation long deemed

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[18] App. 218 (emphasis added)(internal quotations and citations omitted).

[19] *See* App. 87-88 (Counts Two and Three); *see also* App. 165-190 (Plaintiffs' Memorandum of Law).

impermissible and unconstitutional[20] under this Court's private non-delegation doctrine—MVP's notion of judicial review has entirely swept away the separation of powers doctrine that prevents the concentration of power within any one branch or, worse yet, any one agency, as is the case here.

ii. Without Judicial Review By This Court, The So-Called "Wisdom" Of Congress In Creating Agencies Like FERC Will Inevitably Descend Into What Blackstone And Madison Described As "The Very Definition of Tyranny."

What MVP calls the "wisdom" of Congress, our Founders called the "tyranny" of government, achieved through either (1) an initial allocation of power or (2) the gradual concentration thereof, i.e., through the unchecked rise of the administrative state. *See, e.g., Dep't. of Transp. v. Ass'n of Am. Railroads,* 135 S.Ct. 1225, 1244 (2015) defining a "tyrannical government," per William Blackstone's definition, as one in which "the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men" (quoting 1 Commentaries 129, 142); *see also* James Madison, The Federalist No. 47, p. 301: "The accumulation of all powers, legislative, executive,

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[20] *See Dep't of Transp*., 135 S.Ct. at 1237 (Alito, J., concurring)("When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with "legislative Powers." Art. I, §1. Nor are they vested with the "executive Power," Art. II, §1, cl. 1, which belongs to the President.").

and judiciary, in the same hands, may justly be pronounced the very definition of tyranny." To thus assert, as Defendants here have successfully done, that the judiciary has no business "second-guessing" the "wisdom" of Congress—in this case, its wisdom in passing the NGA, delegating its legislative power to a federal agency, concentrating it into the hands of a private entity, and then shielding itself from judicial review—is to strip the judiciary of its primary function as a "check and balance" on the other two branches of government.

C. This Court Has Consistently Recognized District Court *Jurisdiction* Over Challenges Brought Under The Non-Delegation Doctrine—Even When The Delegations, *On Their Merits*, Were Ultimately Deemed Constitutional—And The Fourth Circuit Has Therefore Erred In Affirming Dismissal.

i. The History And Context Of Relevant Supreme Court Decisions Demonstrates That The District Court Can—And *Should*—Hear This Constitutional Challenge.

The Supreme Court has consistently recognized the District Court's jurisdiction to hear claims brought under the federal non-delegation doctrine, even when the challenged delegations, *on their merits*, were ultimately deemed constitutional. Recall that the only question for this Court, at this time, is whether the lower court had *jurisdiction* to hear the Petitioners' claims, not whether the Petitioners' are ultimately right about the delegation being unconstitutional. The

underlying merit of the Petitioners' constitutional challenge, in other words, is not the subject of this Petition; it is only the question of subject matter jurisdiction that comes before this Court.

Throughout history, however, this Court (and many others throughout the nation) has not only acknowledged jurisdiction but also heard numerous delegation challenges, *on the merits*, many of which originated in the District Courts. This is true not only of the pre-New Deal era case law, but also of recent cases filed in the 21st century (which, regardless of the ultimate decision on the merits, all recognized District Court jurisdiction to hear the challenge). The following is a non-exhaustive list of cases throughout history that similarly challenged Acts of Congress under the same federal non-delegation doctrine invoked here *and* that *originated in the District Courts*, thus demonstrating that the Petitioners also properly filed their constitutional challenge *in the District Court for the Western District of Virginia* and should not have been dismissed: *Ass'n of Am. R.R. v. Dep't. of Transp.*, 865 F. Supp. 2d 22 (D.C. Dist. 2012)(similarly presenting two constitutional challenges, both filed in the D.C. District Court, to § 207 of the Passenger Railroad Investment and Improvement Act of 2008 ("PRIIA"): the first challenge contending that § 207 "violates the nondelegation doctrine and the separation of powers principle" by delegating legislative power to Amtrak, a private entity, and the second challenge arguing that § 207 violates the Due Process Clause of the Fifth Amendment). Both constitutional challenges were originally heard, *on the merits*, in the D.C. District Court, then reversed, on the merits, by the Court of Appeals, and ultimately remanded, again on the

merits, by the Supreme Court after it found Amtrak was not a private entity; *Synar v. United States*, 626 F. Supp. 1374 (D.C. Dist. 1986)(originating in the District Court, which discussed the merits of plaintiffs' delegation challenge under the "intelligible principle" standard, and acknowledged that judicial review of a delegation challenge must proceed "on the assumption that the delegation doctrine remains valid law" and is generally analyzed, on the merits, by a District Court using a "factual comparison" of delegations previously adjudicated by the Supreme Court. *Id*. at 1384-85.); *Skinner v. Mid-America Pipeline Co*., 490 U.S. 212 (1989)(originating in the District Court for the Northern District of Oklahoma, which adopted the Magistrate's recommendations and found that Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985 was an invalid delegation to the Secretary of Congress' taxing power under the Federal Constitution, a judgment later reversed, again *on the merits*, by the Supreme Court but nonetheless demonstrating that District Courts such as the one in which Petitioners filed do indeed have subject matter jurisdiction over the very same type of constitutional challenges brought by Petitioners in the Western District of Virginia).[21]

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[21] *See also Carter v. Carter Coal,* 298 U.S. 238 (1936)(holding that the Bituminous Coal Conservation Act of 1935 was an unconstitutional delegation of legislative power to a private entity)(originating in and reversing the District Court in *R. C. Tway Coal Co. v. Glenn*, 12 F. Supp. 570 (W.D. Ky 1935)); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)(originating from an appeal of the judgment in the District Court of the United States for the Eastern District of New York where appellants were convicted of illegal trade practices in the

II. REVIEW IS WARRANTED UNDER RULE 10(a) BECAUSE THE FOURTH CIRCUIT COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS BY OTHER CIRCUITS RECOGNIZING DISTRICT COURT JURISDICTION OVER DELEGATION CHALLENGES AND THE SUPREME COURT SHOULD THEREFORE GRANT CERTIORARI TO RESOLVE THE CIRCUIT SPLIT.

A. The Fourth Circuit's Blanket Deference To "Administrative Review Schemes" Passed By Congress And Regulatory Agencies Is A Modern Day Manifestation of "Legislative Supremacy" At Its Best, Tyranny At Its Worst.

The Fourth Circuit held that "the district court correctly determined that it did not have jurisdiction to review the matter."[22] Instead, the Fourth Circuit affirmed the District Court in finding that the Petitioners' constitutional challenge to a Congressional Act must "come to federal court through the administrative review scheme" established by the

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sale of poultry in violation of the National Industrial Recovery Act and the Code of Fair Competition); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)(originating as an appeal from the District Court of the United States for the Eastern District of Texas, as *Amazon Petroleum Corp. v. Railroad Com. of Texas*, 5 F. Supp. 639 (E.D. Tex 1934)).

[22] App. 7.

NGA.[23] Even before getting to the court of appeals, the Fourth Circuit reasoned that constitutional challenges must first be presented to the agency itself. App. at 9 (stating that Congress requires Petitioners to go "through the review process with FERC" even for challenges alleging that Congress violated the Constitution).

In plain English: the Fourth Circuit believes that any Landowner alleging that *Congress* violated the Constitution cannot file his action in the District Court, or in any court for that matter.[24] Instead, he must *first* go and ask the federal regulatory agency—ironically the very same agency created by Congress via the very same action challenged by Landowners—what it [the agency] thinks about the constitutionality of a Congressional Act. And not just *any* Act of Congress but precisely *that* Act which delegated to it [the agency] the power it now exercises. The result? An *administrative agency* (i.e., FERC) sitting in judgment over the constitutionality of Congressional actions.[25]

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[23] App. 7.

[24] The question of which court has jurisdiction-whether it be the District Court or the Court of Appeals—is addressed separately below in PART III. The present section addresses only the Circuit Split between the Fourth Circuit's [misplaced] belief that the District Court does not have jurisdiction over delegation challenges and the other Circuits' belief that it does have jurisdiction over such federal questions.

[25] Recall that even FERC—the agency in question—*twice* already conceded this point, admitting (as cited in Part I above) that it does not have jurisdiction to sit in judgment over constitutional challenges. App. 257 and 252.

Why? Because Congress said so.[26] This, in fact, is the precise definition of *legislative* supremacy at its best, tyranny at its worst. If tyranny is the concentration of power into the hands of a singular branch—or, in this case, an agency—then legislative supremacy is the road that gets us there. A far cry from the ***constitutional*** supremacy the Founders so carefully designed.

The distinction between legislative supremacy and constitutional supremacy is this: "Legislative Supremacy" means the Legislature (i.e., Congress) is the supreme law of the land. So, under legislative supremacy, whatever the legislature says, goes. "Constitutional Supremacy"—the system designed by the Framers—means the Constitution is the supreme law of the land. So, under constitutional supremacy, whatever the legislature (in this case, Congress) says, does <u>*not*</u> go, unless it comports with the Constitution. And how do we make sure the legislature's actions are constitutional? Assuming, for example, the legislature (i.e., Congress) does something unconstitutional, who has the power to "un-do" their action and enforce the Constitution? The Judiciary. This, at least, is the original meaning of the Constitution and its separation of powers doctrine. It is not, however, the proposition advanced by the Fourth Circuit, which defers to what

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[26] App. 8-9 ("Thus, the statute indicated that Congress ***did not want*** cases brought by private parties, like the plaintiff in *Bennett*, to be heard by district courts. These considerations lead to the same conclusion in this case.")(emphasis added). ("[T]he Natural Gas Act establishes an extensive review framework, including review before FERC and eventually by a court of appeals." App. 9.) Recall, again, that FERC twice conceded it had no such review power.

"Congress wants" or "what Congress does not want"[27] even if "what Congress wants" is to strip the judiciary of its review power and instead send constitutional questions to an administrative regulatory agency (which, again, is the very same agency that was empowered via the Congressional act now being challenged by Landowners as unconstitutional).

The agency, therefore, along with its entire administrative review scheme should be disqualified from adjudicating the constitutional questions raised by Petitioners for several reasons: ***First***, the agency directly benefitted from the Congressional action being challenged, i.e., the statutory enactment (the NGA) that delegated its powers in the first place. The agency, in other words, is an "interested party." It is biased. It will rule in favor of preserving its own power. ***Second***, even if it weren't biased (which it is), the agency is not qualified to determine the constitutionality of anything, let alone its own existence. ***Third***, even if it could determine the constitutionality of its own existence (which it cannot), it most certainly cannot judge the constitutionality of Congress's actions, let alone an action that allotted the agency—and the subsequent *private* entities—the power of eminent domain in the first place. ***Fourth***, even if the agency [FERC] somehow did acquire the "expertise" to adjudicate constitutional questions—for example, if FERC set out and hired an army of constitutional law professors—it *still* could not adjudicate Petitioners' challenges

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[27] App. 8-9 (Fourth Circuit Opinion discussing Congress's "intent" and analogizing it to the decision in *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016) where Congress also "did not want" cases brought by private parties "to be heard by district courts.").

because it has no authority to do so under the Constitution. The supreme law of the land vests the power of judicial review in the judicial branch, not in administrative agencies created by the executive and improperly empowered by the legislature.

Despite the agency's lack of expertise on both questions of constitutionality and jurisprudence, the Fourth Circuit held that Petitioners should have gone through the "administrative review scheme" with FERC instead of filing in the District Court.

B. Other Courts Of Appeals Across The Country Have Recognized District Court Jurisdiction To Sit In Judgment Over Constitutional Challenges, Particularly Those Brought Under The Federal Non-Delegation Doctrine.

A Circuit split lingers here. Unlike the Fourth Circuit, which found that the District Court lacked subject matter jurisdiction to hear Petitioners' constitutional federal questions, other Circuit Courts have not only acknowledged District Court jurisdiction for delegation challenges but also acknowledged the continued existence and validity of the federal non-delegation doctrine (despite the ultimate disposition of those challenges on their merits). The following is a non-exhaustive list of other Circuit Courts that have recently recognized District Court jurisdiction to adjudicate similar challenges also brought under the federal non-delegation doctrine (remember the only issue before this Court is jurisdiction, not the ultimate disposition on the merits of the delegation challenge itself): *Ass'n of Am. R.R. v. United States DOT*, 721 F.3d 666 (D.C. Cir. 2013)(holding that Amtrak was a "private corporation"

which could not constitutionally be granted regulatory power under the non-delegation doctrine, but later remanded by *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225 (2015) on the issue of how the lower court *classified* Amtrak as a "private entity," not on the issue of whether the District Court had jurisdiction to answer the question in the first place); *Boerschig v. Trans-Pecos Pipeline*, LLC, 872 F.3d 701 (5th Cir. 2017)(primarily addressing a *state* non-delegation doctrine but nonetheless comparing Texas's *state* non-delegation doctrine to the *federal* non-delegation doctrine:

> Like the doctrine that prevents Congress from delegating too much power to agencies, this doctrine preventing governments from delegating too much power to private persons and entities is of old vintage, not having been used by the Supreme Court to strike down a statute since the early decades of the last century. Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 941-43 (2014). Although this so-called "private nondelegation" doctrine has been largely dormant in the years since, its continuing force is generally accepted.

Id. at 707)(collecting also, for purposes of the *state* non-delegation doctrine issue, a list of three Supreme Court cases that held statutes unconstitutional for delegating power to private parties);[28] *United States v. Martinez*

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[28] *See also General Elec. Co. v. New York State Dept. of Labor*, 936 F.2d 1448 (2d Cir. 1991) (noting that the private non-delegation doctrine remains good law).

*Flore*s, 428 F.3d 22 (1st Cir. 2005)(addressing, on an appeal from the District Court of New Hampshire, whether Congress's endorsement of "fast-track" case processing and downward sentencing violated the non-delegation doctrine and explaining that the focus of the inquiry in a federal non-delegation challenge is on Congress, not on the agency: "[T]he proper focus of nondelegation analysis is on the terms of Congress' delegation to the agency or other governmental body, not on the terms of the agency's subsequent exercise of the delegated authority." *Id*. at 27)(citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001)(reasoning that **an agency cannot cure "an unconstitutionally standardless delegation of power** by declining to exercise some of that power" because "[t]he very choice of which portion of the power to exercise -- that is to say, the prescription of the standard that Congress had omitted -- would itself be an exercise of the forbidden legislative authority. **Whether the statute delegates legislative power is a question for the courts,** and an agency's voluntary self-denial has no bearing upon the answer." *Id*. at 473.)); *United States v. Cooper*, 750 F.3d 263 (3rd Cir. 2014)(on an appeal from the denial of a motion to dismiss in the District Court, where defendant argued SORNA's delegation of power was unconstitutional; the Court of Appeals then holding that the delegated authority to the United States Attorney General under the Sex Offender Registration and Notification Act, 42 U.S.C. § 16913(d), to determine the applicability of the Act's registration requirements to pre-SORNA sex offenders did not violate the federal non-delegation doctrine, which is assessed under the "intelligible principle" standard); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d

650 (7th Cir. 2004)(holding that a provision of the Indian Gaming Regulatory Act of 25 U.S.C. § 2719(b)(1)(A) did not violate the federal non-delegation doctrine, the separation of powers, or other principles of federalism; adjudicating the delegation challenge on appeal from the Western District of Wisconsin).

Though not dealing with an application of the federal non-delegation doctrine to the NGA and this particular set of facts presented by Petitioners, all of these cases nonetheless represent fairly recent decisions of Circuit Courts across the country that have recognized jurisdiction to adjudicate federal delegation challenges (i.e., as opposed to the Fourth Circuit's affirmance of dismissal for lack of subject matter jurisdiction).

III. TO THE EXTENT THAT CONGRESS DIVESTED THE DISTRICT COURT OF JURISDICTION OVER *FERC* ORDERS OR *FERC* ACTIONS, THAT DIVESTMENT DID NOT STRIP THE DISTRICT COURT OF JURISDICTION TO REVIEW THE CONSTITUTIONALITY OF *CONGRESSIONAL* ACTIONS THAT ENABLED THE AGENCY TO ISSUE THOSE ORDERS IN THE FIRST PLACE.

The Natural Gas Act (15 U.S.C. § 717r) does not divest the District Court of subject matter jurisdiction for three reasons:

A. The Administrative Review Scheme Requiring Complainants To Apply To FERC For A Rehearing And Then Go To The Court Of Appeals Applies Only To Those Wishing To Obtain A "Review of An [Agency] Order" Under The Agency's Own Rules, Not A Judicial Review of A Congressional Act Under The Constitution.

First, 15 U.S.C. § 717r applies only to complainants wishing to obtain a review "of an [agency] order," not a review of a constitutional challenge to a Congressional act. Petitioners are requesting judicial review of a Congressional act, not review of a FERC Order. The rehearing and exclusivity provisions are therefore inapplicable. The plain language of sections 717r(b) and r(d) at issue reads as follows:

> **SECTION (b)Review of Commission order**
>
> Any party to a proceeding under this chapter aggrieved by an order ***issued by the Commission*** in such proceeding may obtain a ***review of such order*** in the court of appeals of the United States for any circuit . . .
>
> . . .
>
> **SECTION (d)Judicial review**
>
> **(1)In general**
>
> The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or

> operated shall have original and exclusive jurisdiction over any civil action ***for the review of an order or action of a Federal agency*** (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

15 U.S.C. § 717r(b) and (d)(emphasis added). The plain language directs only those requesting a "review *of an order*" or "action *of a Federal agency*" to do two things: (1) File for rehearing with the agency (i.e., ask FERC to reconsider its own decision under its own regulatory scheme); (2) If the agency does not reverse itself, ask the Court of Appeals to then "review an order" or "action of [the] Federal agency."

But Petitioners here are not asking for review "of an order," or even for review of an "action of a Federal agency." Petitioners, rather, are asking for judicial review of an Act of Congress. They are asking the Court to review whether *Congress* violated the Constitution, not whether FERC violated its own self-imposed regulatory rules.

The difference is this: an administrative challenge (which is *not* the subject of Petitioners' Complaint) argues that an administrative decision is wrong *per* the administrative agency's own rules. A constitutional challenge (which *is* the subject of Petitioners' Complaint) argues that Congress's action was wrong *per* the Constitution.

An administrative challenge questions whether the agency's action was within the scope of the agency's existing apparatus (i.e., "*Did FERC follow its own rules when issuing this Certificate?*"). An administrative challenge, by nature, *submits* to the agency's authority because it asks the agency—and then the Court—to review whether the agency acted properly or improperly under its own administrative apparatus. A constitutional challenge, on the other hand, does *not* submit to the agency's authority because its challenge questions the constitutionality of the entire administrative apparatus, which made it possible for the agency to create those self-imposed rules and issue Orders in the first place. A constitutional challenge thus asks, "*Did Congress comply with the Constitution when it gave FERC this power to issue Orders in the first place*?" To illustrate this distinction further: the remedy in an administrative challenge—which, again, is *not* the subject of Petitioners' claims—is for an agency to review its own Order under its own rules and, if the Order is found to be in violation of the regulatory rules, to reverse or alter course. The remedy in a constitutional challenge—which *is* the subject of Petitioners' Complaint—is for the District Court to render the statute—and thus all regulatory powers derived from the statute—unconstitutional. Thus, although FERC's Order would indeed be invalidated if Petitioners succeeded on the merits, that invalidation (i.e., of the Order issued in this particular case) would merely be a consequence of the facial challenge to the legislation that vested FERC with what Petitioners allege was "unfettered discretion" to issue Certificates in the first place.

Because the plain language in both sections 717r(b) and 717 r(d) explicitly states that it applies to parties seeking a review "of such order," and "of an order or action of a Federal agency," and because Petitioners here are not at all seeking either a "review of an order" or a "review of an action of a Federal agency," the provisions are inapplicable and do not bar Petitioners' suit. Petitioners are seeking review of an action of Congress, not review of an action of a Federal agency. The provisions, therefore, do not divest the District Court of jurisdiction to hear constitutional challenges to Congressional action.[29]

Thus, the plain language indicates that Congress intended only to divest the District Court of jurisdiction to hear petitions for review of FERC Orders or FERC actions, not constitutional challenges seeking review of Congressional action.

The Fourth Circuit therefore erred when it directed the Petitioners to go through the "administrative review scheme."

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[29] *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010)(holding that 15 U.S.C. § 78y ***did not strip the district court of jurisdiction*** over the claims and that the dual for-cause limitations on the removal of Board members contravened the Constitution's separation of powers).

B. Even If Congress Intended To Divest The District Court Of Jurisdiction To Hear Constitutional Claims (Which It Did Not), The Procedural Review Scheme Requiring Complainants To First Submit Constitutional Challenges To The Agency Before Going To The Fourth Circuit Is An Unconstitutional Breach Of The Separation Of Powers And Therefore Invalidates The Entire Provision.

Second, assuming, *without conceding*, that Congress did intend to divest the District Court of jurisdiction to hear constitutional challenges (which it did not), the mandatory, administrative pre-requisite of first filing for review with the agency prior to filing suit in the Court of Appeals invalidates the entire provision. To put this another way: even if we assume, for the sake of argument, that Congress:

1) actually did somehow predict future constitutional challenges to its own actions, and

2) decided—way back when it wrote the statute—that it really only wanted those anticipated future constitutional challenges to its own actions to be filed in the Court of Appeals,

the fact that it [Congress] also required anticipated future challengers to first submit those constitutional questions to FERC as a prerequisite to filing in the Court of Appeals is an unconstitutional procedural requirement that invalidates the entire scheme. Why

is it unconstitutional? Because it would concentrate all three governmental powers—executive, legislative, and now judicial—into a single administrative agency (a circumstance perhaps even worse than concentrating it into one of the branches itself; since, of course, an administrative agency is not a branch in and of itself but merely a creation of an executive branch).

To require complainants to first go through the "review process with FERC" before being able to file with the Court of Appeals is unconstitutional because it violates the separation of powers doctrine by making FERC the judge, jury, and executioner. As explained in Part I, the Framers, by *careful design*, separated the governmental powers into three branches of government: Legislative, Executive, and Judicial. The legislature makes the law, the executive enforces the law, and the judiciary interprets the law. This was done in order to preserve individual liberty and prevent the concentration of power into a single entity.

Applying that constitutional principle to these facts, if we assume that Congress, when it wrote the administrative review scheme of the NGA, actually did intend to send constitutional questions to the Court of Appeals (and not the District Court), the fact that it also required those questions to first be submitted for review by FERC—an agency—invalidates the entire scheme because it conflicts with the separation of powers doctrine.

By forcing complainants to first file their constitutional challenges with FERC, the statute (if interpreted to mean Congress divested the District Court of jurisdiction) would effectively vest FERC, an executive regulatory agency, with both legislative power

to define "public use" and, now, apparently also judicial power to review whether Congress violated the Constitution. This is so because the statute—if, again, interpreted to mean as the Fourth Circuit interpreted it to mean that Congress divested the District Court of jurisdiction—would require Petitioners to ***first*** ask FERC whether it [FERC], an unaccountable regulatory agency, thinks that Congress violated the Constitution before being able to file in the Court of Appeals. As the Fourth Circuit explained, its interpretation would mean:

> Congress gave "exclusive" jurisdiction to the appropriate court of appeals—***but only after going through the review process with FERC.***[30]

Going through that "review process with FERC" would mean asking FERC whether it—an agency—thinks Congress violated the Constitution. *This*—a separation of powers breach perhaps even worse than the infamous "delegation running riot" of *Schechter*.[31] The Fourth Circuit repeated this interpretation multiple times, noting in its analysis that "the Natural Gas Act establishes an extensive review framework, including review before FERC and eventually by a court of appeals."[32] It further reasoned that under the *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and *Bennett v. U.S. Sec. & Exch. Comm'n*, 844 F.3d 174 (4th

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[30] App. 9 (emphasis added).

[31] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935).

[32] App. 9.

Cir. 2016), decisions, "a question about the administrative law judge's authority to hear cases must also go through the agency review process, and that eventual review of the constitutional question before the court of appeals would still be meaningful."[33]

It would thus be perfectly permissible, on the Fourth Circuit's view, to ask the administrative law judge whether the administrative law judge thinks his own administrative authority is legitimate. And once the administrative apparatus has judged its own legitimacy, that administrative recommendation can then be appealed to the Court of Appeals, which seemingly would not at all be impacted by the administrative findings (even though it would issue an opinion only after a review of none other than the administrative agency's findings on the constitutionality of a Congressional act—findings which, as we have said, even FERC has *twice* acknowledged are outside the scope of its jurisdiction and expertise).

To the extent that the Fourth Circuit believes that the agency could "apply [its] expertise to threshold questions that may accompany a constitutional claim against a federal statute," in the belief that "FERC had the ability to, upon rehearing Plaintiffs' challenge here —and may still in future cases—revoke its issuance of a Certificate based upon threshold questions within its expertise,"[34] Petitioners challenge both the premise and

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[33] App. 11.

[34] App. 16. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001)(reasoning that an agency ***cannot*** cure "an

the conclusion: ***First***, it is undisputed that the agency has no "expertise" whatsoever on constitutional questions, particularly not those challenging Congress. ***Second,*** assuming the agency did adjudicate those questions, such an adjudication would be invalid, not only because the agency admits it lacks expertise to adjudicate, but because the Constitution prohibits the concentration of executive, legislative, and judicial powers into one branch—or in this case, one agency. ***To thus conclude*** that there is "meaningful review" available because:

> "The agency could theoretically use expertise (which it admits it doesn't possess) to decide a constitutional question (which it also admits is outside its jurisdiction) and then, based on that admittedly uninformed, invalid analysis, it could theoretically decide to revoke the Certificate,"[35]

is a peculiar conclusion indeed, wholly divorced from the Constitution and its pivotal separation of powers doctrine.

The Petitioners' challenge, however, is not "about the administrative law judge's authority to hear cases," as the Fourth Circuit characterized it, but about Congress's authority under the Constitution to delegate to that administrative agency (and all of its judges) authority in the first place. The Fourth Circuit

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unconstitutionally standardless delegation of power by declining to exercise some of that power.").

[35] Note this is a paraphrased summary of what Petitioners understand to be the Fourth Circuit's reasoning in its Opinion. App. 1-17.

therefore mischaracterizes the question and errs in its conclusion.

C. Assuming There Is Tension Between The Constitution's Original Meaning And The Current Line Of Cases On Deference To Administrative Agencies Regarding Constitutional Questions, This Court Should Not Hesitate To Resolve The Tension In Favor Of The Constitution's Original Meaning.

In his dissenting opinion in *Kelo v. City of New London*, Justice Thomas stated:

> When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning.

Kelo, 545 U.S. at 523 (Thomas, J., dissenting). Petitioners argue that there is no tension between the case law and Petitioners' ability to seek judicial review in the District Court. To the extent that there is tension between the current line of case law, which the Fourth Circuit believes would permit Congress to send constitutional questions concerning its own actions through an administrative review process, Petitioners alternatively argue that this Court—if it perceives such tension to exist—should not hesitate to resolve the tension in favor of the original meaning of the Constitution, that is, in favor of the separation of powers doctrine that secures our individual liberty.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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