

NO. 18-1042

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In The  
**United States Court of Appeals**  
For The Fourth Circuit

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

*Plaintiffs – Appellants,*

v.

**MOUNTAIN VALLEY PIPELINE, LLC, *et al.*,**

*Defendants – Appellees.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
AT ROANOKE**

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**BRIEF OF APPELLEE  
MOUNTAIN VALLEY PIPELINE, LLC**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
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Mountain Valley Pipeline, LLC

(name of party/amicus)

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(appellant/appellee/petitioner/respondent/amicus/intervenor)

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2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
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See attached.

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6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Wade W. Massie

Date: 2/15/18

Counsel for: Mountain Valley Pipeline, LLC

**CERTIFICATE OF SERVICE**

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/s/ Wade W. Massie  
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Pursuant to 26.1 of the Federal Rules of Appellate Procedure, Mountain Valley Pipeline, LLC makes the following disclosure:

- a. MVP Holdco, LLC, is a member of Mountain Valley Pipeline, LLC that owns more than 10% of the interest in Mountain Valley Pipeline, LLC, and is a subsidiary of EQT Midstream Partners, L.P. EQT Midstream Partners, LP is a publicly traded limited partnership, more than 10% of which is owned by EQT GP Holdings, LP, another publicly traded limited partnership, which is owned by at least 10% by EQT Gathering Holdings, LLC, an indirect subsidiary of EQT Corporation, a publicly traded company.
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- e. Vega NPI IV, LLC, a subsidiary of Vega Energy Partners, Ltd., a privately held company, owns less than 10% of the interest in Mountain Valley Pipeline, LLC, but may also have a financial interest in the outcome of this litigation.
- f. RGC Midstream, LLC, a subsidiary of RGC Resources, Inc., a publicly traded company, owns less than 10% of the interest in Mountain Valley Pipeline, LLC, but may also have a financial interest in the outcome of this litigation.

## TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE	
TABLE OF AUTHORITIES .....	iii
I. INTRODUCTION .....	1
II. JURISDICTIONAL STATEMENT .....	3
III. STATEMENT OF THE ISSUES .....	3
IV. STATEMENT OF THE CASE .....	4
<i>A. FERC Proceedings</i> .....	4
<i>B. Condemnation Actions</i> .....	8
<i>C. Proceedings in this Case</i> .....	10
V. SUMMARY OF ARGUMENT .....	12
VI. ARGUMENT .....	14
A. SECTION 19 OF THE NATURAL GAS ACT PROVIDES FOR EXCLUSIVE JURISDICTION IN THE COURTS OF APPEALS .....	14
B. THERE IS NO DISTRICT COURT JURISDICTION UNDER THE <i>THUNDER BASIN</i> FRAMEWORK .....	21
(1) <i>Congress's Intent to Preclude District Court         Jurisdiction Is Fairly Discernable in the         Natural Gas Act</i> .....	22
(2) <i>Plaintiffs Are Not Deprived of All Meaningful         Judicial Review</i> .....	22

(3) *Plaintiffs' Claims Are Not Wholly Collateral*.....27

(4) *Agency Expertise*.....29

VII. CONCLUSION.....30

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

## TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Adorers of the Blood of Christ v. FERC</i> , No. 17-cv-3163, 2017 WL 4310369 (E.D. Pa. Sept. 28, 2017), <i>appeal docketed</i> , No. 17-3163 (3d Cir. Oct. 2, 2017) .....	15, 17
<i>American Energy Corp. v. Rockies Express Pipeline LLC</i> , 622 F.3d 602 (6th Cir. 2010) .....	14, 16
<i>Appalachian Voices v. FERC</i> , No. 17-1271 (D.C. Cir. Dec. 22, 2017) .....	8, 24
<i>Arkansas La. Gas Co. v. Hall</i> , 453 U.S. 571 (1981).....	15
<i>Bennett v. SEC</i> , 844 F.3d 174 (4th Cir. 2016) .....	<i>passim</i>
<i>Blue Ridge Envtl. Defense League v. FERC</i> , No. 18-1002 (D.C. Cir. Jan. 3, 2018) .....	8, 24
<i>Bold Alliance v. FERC</i> , 1:17-cv-01822 (D.D.C. Sept. 5, 2017) .....	10
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 357 U.S. 320 (1958).....	15
<i>Consolidated Gas Supply Corp. v. FERC</i> , 611 F.2d 951 (4th Cir. 1979) .....	15
<i>East Tenn. Nat. Gas Co. v. Sage</i> , 361 F.3d 808 (4th Cir. 2004) .....	26
<i>Elgin v. Department of the Treasury</i> , 567 U.S. 1 (2012).....	23, 27, 28, 29

<i>Free Enterprise Fund v. Public Co. Accounting Oversight Bd.</i> , 561 U.S. 477 (2010).....	26
<i>In re Appalachian Voices</i> , No. 18-1006 (D.C. Cir. Jan 8, 2018) .....	7, 8, 24
<i>Jarkesy v. SEC</i> , 803 F.3d 9 (D.C. Cir. 2015) .....	27
<i>Kreschollek v. Southern Stevedoring Co.</i> , 78 F.3d 868 (3d Cir. 1996) .....	27
<i>Lovelace v. United States</i> , No. 3:15-cv-30131-MAP, 2016 WL 10826764 (D. Mass. Feb. 18, 2016) .....	17
<i>Maine Council of A. Salmon Fed’n v. National Marine Fisheries Serv. (NOAA Fisheries)</i> , 858 F.3d 690 (1st Cir. 2017).....	15, 18
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	26, 27
<i>McNary v. Haitian Refugee Center</i> , 498 U.S. 479 (1991).....	27
<i>Mid A. Express, LLC v. Baltimore County</i> , 410 F. Appx. 653 (4th Cir. 2011) .....	25
<i>Midcoast Interstate Transmission, Inc. v. FERC</i> , 198 F.3d 960 (D.C. Cir. 2000).....	23
<i>Minisink Residents for Env’tl. Pres. and Safety v. FERC</i> , 762 F.3d 97 (D.C. Cir. 2014).....	25
<i>Moreau v. FERC</i> , 982 F.2d 556 (D.C. Cir. 1993).....	23, 25
<i>Mountain Valley Pipeline, LLC</i> , 161 FERC ¶ 61,043 (Oct. 13, 2017).....	4



*Mountain Valley Pipeline, LLC v. Easement to Construct, Operate & Maintain 42-Inch Gas Transmission Line*,  
 No. 1:17-cv-211-IMK, 2018 WL 701297  
 (N.D. W. Va. Feb. 2, 2018) .....9, 26

*Mountain Valley Pipeline, LLC v. Easement to Construct Operate & Maintain 42-Inch Gas Transmission Line*,  
 No. 2:17-cv-04214-JTC, 2018 WL 1004745  
 (S.D. W. Va. Feb. 21, 2018) .....10, 26

*Mountain Valley Pipeline, LLC v. Easements to Construct, Operate & Maintain Natural Gas Pipeline*,  
 No. 7:17-cv-492-EKD, 2018 WL 648376  
 (W.D. Va. Jan. 31, 2018), *appeal docketed*,  
 Nos. 18-1159 *et al.* (4th Cir. Feb. 8, 2018) .....9, 19, 26

*Nexus Gas Transmission, LLC*,  
 160 FERC ¶ 61,022 (Aug. 25, 2017) ..... 16-17

*Southwest Center for Biological Diversity v. FERC*,  
 967 F. Supp. 1166 (D. Ariz. 1997) .....18, 19

*Thunder Basin Coal Co. v. Reich*,  
 510 U.S. 200 (1994).....*passim*

*Town of Dedham v. FERC*,  
 No. 15-cv-12352, 2015 WL 4274884  
 (D. Mass. July 15, 2015).....7, 18

*Transcontinental Gas Pipe Line Co.*,  
 160 FERC ¶ 61,042 (Aug. 31, 2017).....25

*Transcontinental Gas Pipe Line Co. v. Permanent Easement for 5.67 Acres*,  
 No. 4:17-cv-00544, 2017 WL 3412374  
 (M.D. Pa. Aug. 9, 2017) .....19

*Transcontinental Gas Pipe Line Co. v. Permanent Easement for 2.14 Acres*,  
 No. 17-cv-1715, 2017 WL 3624250  
 (E.D. Pa. Aug. 23, 2017), *appeal docketed*,  
 No. 17-3116 (3d Cir. Sept. 29, 2017) ..... 19

*Urban v. FERC*,  
 No. 5:17-cv-1005, 2017 WL 5068452  
 (N.D. Ohio Aug. 7, 2017), *report and recommendation adopted*, 2017 WL 6461823 (Dec. 19, 2017) ..... 16, 17

*Williams Nat. Gas Co. v. Oklahoma City*,  
 890 F.2d 255 (10th Cir. 1989) ..... 14, 15, 21

Statutes:

15 U.S.C. § 717f(h) ..... 1, 7, 22

15 U.S.C. § 717r ..... *passim*

15 U.S.C. § 717r(a) ..... 7, 14, 21

15 U.S.C. § 717r(b) ..... *passim*

15 U.S.C. § 717r(c) ..... 7, 14, 25

15 U.S.C. § 717u ..... 13, 22

28 U.S.C. § 1291 ..... 3

Regulations:

18 C.F.R. § 157.6(d) ..... 5

Other:

81 Fed. Reg. 66268-02 (Sept. 27, 2016) ..... 6

Defendant/appellee Mountain Valley Pipeline, LLC (“MVP”), by counsel, respectfully submits this brief of appellee in response to the opening brief of appellant, Doc. 19, filed by plaintiffs Orus Ashby Berkley, *et al.*

## I. INTRODUCTION

The plaintiff/appellant landowners own property that will be crossed by a new natural gas pipeline being constructed and operated by MVP. They filed this action against MVP and the Federal Energy Regulatory Commission (“FERC”) “to secure their property from a government-sanctioned land grab.” Joint Appendix (“JA”) 14 at ¶ 2. In their complaint, plaintiffs alleged that FERC is obligated to “exercise power lawfully and in accordance with its jurisdictional mandate.” JA 19 at ¶ 24. “Rather than exercise its delegated powers in accordance with Congress’ instructions and well-established intelligible principles,” plaintiffs charged that FERC has unlawfully authorized “natural gas infrastructure expansion by private companies for private gain.” *Id.* In particular, plaintiffs alleged that “[t]he Commission’s interpretation and application of the Natural Gas Act’s eminent domain powers, 15 U.S.C. § 717f(h), are facially unconstitutional and unconstitutional as applied to the MVP project.” JA 20 at ¶ 26.

With their complaint, the landowners filed a motion seeking:

1. A preliminary injunction prohibiting FERC from granting MVP the power of eminent domain under 15 U.S.C. § 717f(h) via issuance of a Certificate of Public Convenience and Necessity.

2. A preliminary injunction prohibiting MVP from claiming or exercising any power of eminent domain under 15 U.S.C. § 717f(h), whether to enter any landowner's property without consent to conduct any activities at all.

JA 82.

MVP and FERC filed motions to dismiss for lack of subject-matter jurisdiction. JA 126, 178. Under Section 19 of the Natural Gas Act, 15 U.S.C. § 717r, a person aggrieved by an order of FERC is entitled to judicial review, but review is in designated courts of appeals, not in the district courts. The jurisdiction of the courts of appeals is “exclusive.” 15 U.S.C. § 717r(b).

Ever since MVP and FERC filed their motions to dismiss, plaintiffs have been attempting to walk back their claims. Now, in their brief to this Court, plaintiffs say they “have brought challenges to a Congressional action, not to an action of FERC limited to, or dependent upon a particular FERC order.” Opening Brief of Appellant, Doc. 19 at 49 of 63. But the district court correctly saw this case for what it is—a challenge to the pipeline project. JA 539. As the district court stated in its memorandum opinion, “plaintiffs’ own complaint—and their standing arguments—make clear that they are concerned not with some abstract constitutional violation, but with the fact their land will be affected by MVP’s proposed pipeline.” *Id.* The district court therefore dismissed the landowners’ complaints for lack of subject-matter jurisdiction. JA 546.

To the extent that plaintiffs and other landowners are aggrieved by the project, they have a remedy. It is to ask FERC to rehear the case, and, failing that, to seek review in an appropriate court of appeals. 15 U.S.C. § 717r; JA at 540. In fact, numerous landowners and landowner groups have pending requests for rehearing with FERC and petitions for review with the D.C. Circuit.

As all courts considering the issue have held, district courts do not have jurisdiction to hear challenges to projects under the Natural Gas Act. The district court below recognized this well-established rule and dismissed the case. JA 548. The district court's decision was plainly right, and the Court should affirm.

## II. JURISDICTIONAL STATEMENT

The district court correctly found that it lacked subject-matter jurisdiction. JA 532-48. This Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's decision.

## III. STATEMENT OF THE ISSUES

Section 19 of the Natural Gas Act, 15 U.S.C. § 717r, gives designated courts of appeals exclusive jurisdiction to review orders of FERC. The question is whether the district court properly dismissed this case as being a challenge to the Certificate Order issued to MVP.

#### IV. STATEMENT OF THE CASE

##### A. *FERC Proceedings*

The project includes 303.5 miles of 42-inch diameter pipeline, three compressor stations, and other associated facilities along a route from Wetzel County, West Virginia, to Pittsylvania County, Virginia. JA 330 and 332-33 at PP 1, 7 (*Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (Oct. 13, 2017)). The pipeline will transport up to two million dekatherms of natural gas per day. *Id.* The project is fully subscribed under long-term contracts with shippers and will provide the necessary new pipeline infrastructure to meet existing and growing demand for natural gas in the Northeast, Mid-Atlantic, and Southeast regions of the United States. JA 346-47 and 356-57 at PP 41, 62.

Before applying for a certificate of public convenience and necessity for the project, MVP engaged in the Commission's environmental pre-filing review process for nearly a year. FERC Docket No. PF15-3, No. 20141027-5136 (Oct. 27, 2014). During pre-filing, MVP submitted drafts of each of the detailed environmental resources reports and responded to numerous comments from Commission Staff, other governmental entities, and the public. *Id.*, No. 20141027-5073.

On April 17, 2015, FERC issued a notice of intent to prepare an environmental impact statement. FERC Docket No. PF15-3, No. 20150417-3022

(Apr. 17, 2015). The notice informed affected landowners that their property could be condemned if FERC approved the project. *Id.* at 2. The notice also informed landowners of their right to comment and intervene. *Id.* at 1-3, 8. The notice was mailed to landowners and published in the Federal Register. JA 378 at P 122.

On October 23, 2015, MVP filed its application for the project. FERC Docket No. CP16-10, No. 20151023-5035 (Oct. 23, 2015). In addition to extensive engineering, design, cost, rate, tariff, financing, transportation agreements and other required information, the application included an environmental report consisting of comprehensive resource reports covering all relevant resource areas, including: a general project description; water use and quality; fish, wildlife, and vegetation; cultural resources; socioeconomics; geological resources; soils; land use, recreation, and aesthetics; air quality and noise; alternatives; reliability and safety; and engineering and design material. *Id.*

On November 5, 2015, FERC issued a notice of MVP's application. FERC Docket No. CP16-10, No. 20151105-3025 (Nov. 5, 2015). FERC regulations required MVP to provide the notice and a pamphlet explaining the certificate process to the affected landowners by mail or in person. 18 C.F.R. § 157.6(d). The notice was published in the Federal Register. JA 338 at P 21.

On September 16, 2016, FERC issued a draft environmental impact statement ("EIS") for the project. JA 380 at P 127. The draft EIS was mailed to

the affected landowners, and a notice of the draft EIS was published in the Federal Register. *Id.*; 81 Fed. Reg. 66268-02, at \*66269 (Sept. 27, 2016).

Responding to the various notices, numerous landowners, including many of the plaintiffs in this case, intervened and filed objections and comments. JA 378-81 at PP 123-24, 127-28, and 437-47.

The Commission issued its final EIS on June 23, 2017. JA 381 at P 129. Before doing so, the Commission considered more than 400 oral comments made at 13 public comment sessions and more than 2,000 written comments. JA 378-81 at PP 122-24, 127-28.

After almost three years of comprehensive review, FERC issued the Certificate Order on October 13, 2017. JA 330-465. The Certificate Order finds that the MVP project and a related project constitute a public convenience and necessity:

The proposed projects in this proceeding, are designed to primarily serve natural gas demand in the Northeast, Mid-Atlantic, and Southeast regions. Through the transportation of natural gas from the projects, the public at large will benefit from increased reliability of natural gas supplies. Furthermore, upstream natural gas producers will benefit from the project by being able to access additional markets for their product. Therefore, we conclude that the proposed project is required by the public convenience and necessity.

JA 357 at P 62.



Upon issuance of the Certificate Order, MVP was authorized by the Natural Gas Act to condemn the land necessary for the project. 15 U.S.C.

§ 717f(h). The Certificate Order authorizes MVP to construct and operate the project upon satisfying certain environmental conditions. JA 434, 449-60.

Section 19 of the Natural Gas Act provides for administrative and judicial review of a certificate order. 15 U.S.C. § 717r. The aggrieved party must first seek rehearing before FERC. *Id.* § 717r(a). If rehearing is denied, the party may then obtain review in a court of appeals by filing a petition for review. *Id.* § 717r(b). Upon the filing of the petition, the court of appeals has “exclusive” jurisdiction to affirm, modify, or set aside the order. *Id.* Seeking rehearing and petitioning for review does not automatically stay a certificate order. *Id.* § 717r(c). But an aggrieved party can seek a stay from FERC pending rehearing and from the court of appeals pending a petition for review. *Id.* Some parties have also sought a stay from the court of appeals under the All Writs Act. *In re Appalachian Voices*, No. 18-1006 (D.C. Cir. Jan 8, 2018); *see also Town of Dedham v. FERC*, No. 15-cv-12352-GAO, 2015 WL 4274884, at \*2 (D. Mass. July 15, 2015).

Numerous landowners, including some of the plaintiffs in this case, have applied to FERC for rehearing and a stay. *E.g.*, FERC Docket No. CP16-10, No. 20171113-5375 (Nov. 13, 2017). The applications include both statutory and constitutional objections. *Id.* at 6-12.

On December 13, 2017, FERC issued a tolling order allowing itself additional time to consider the requests for rehearing. FERC Docket No. CP16-10, No. 20171213-3061 (Dec. 13, 2017). The requests for rehearing and stay motions remain pending before FERC.

In December 2017 and January 2018, landowner groups petitioned the D.C. Circuit for review of the Certificate Order and a stay pending appeal. *Appalachian Voices v. FERC*, No. 17-1271 (D.C. Cir. Dec. 22, 2017); *Blue Ridge Envtl. Defense League v. FERC*, No. 18-1002 (D.C. Cir. Jan. 3, 2018). The petitioners contend that review is available under § 717r(b) because the tolling order is invalid and all requests for rehearing have been denied by operation of law. *Id.* The petitioners also filed a separate proceeding seeking a stay under the All Writs Act. *In re Appalachian Voices*, No. 18-1006 (D.C. Cir. Jan 8, 2018).

On February 2, 2018, the D.C. Circuit denied the motions for a stay. Order, No. 17-1271 (consolidated with Nos. 18-1002, 18-1006), Doc. 1716262. The court found that petitioners had not met the requirements for a stay. *Id.*

### *B. Condemnation Actions*

MVP has filed three condemnation actions under the Natural Gas Act and the Certificate Order. *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate & Maintain Natural Gas Pipeline*, No. 7:17-cv-492-EKD (W.D. Va. Oct. 24, 2017); *Mountain Valley Pipeline, LLC v. Easement to*

*Construct, Operate & Maintain 42-Inch Gas Transmission Line*, No. 2:17-cv-04214 (S.D. W. Va. Oct. 24, 2017); *Mountain Valley Pipeline, LLC v. Easement to Construct, Operate & Maintain 42-Inch Gas Transmission Line*, No. 1:17-cv-211-IMK (N.D. W. Va. Dec. 8, 2017).

On January 31, 2018, the Western District of Virginia issued an opinion confirming MVP's authority to condemn the property and finding that MVP has satisfied the requirements for an injunction allowing immediate possession. *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate & Maintain Natural Gas Pipeline*, No. 7:17-cv-492-EKD, 2018 WL 648376, at \*2 (W.D. Va. Jan. 31, 2018). The court conditionally granted MVP's motion for immediate possession pending determination and posting of security for just compensation. No. 7:17-cv-492-EKD, ECF No. 340 at ¶ 4.

Likewise, on February 2, 2018, the Northern District of West Virginia granted MVP's motion for partial summary judgment and immediate possession of the property. *Mountain Valley Pipeline, LLC v. Easement to Construct, Operate & Maintain 42-Inch Gas Transmission Line*, No. 1:17-cv-211-IMK, 2018 WL 701297, at \*21 (N.D. W. Va. Feb. 2, 2018). MVP must deposit funds and post a security bond before taking possession. *Id.* at \*19-20.

Finally, on February 21, 2018, the Southern District of West Virginia granted MVP's motion for partial summary judgment and immediate possession of

the property. *Mountain Valley Pipeline, LLC v. Easement to Construct, Operate & Maintain 42-Inch Gas Transmission Line*, No. 2:17-cv-04214-JTC, 2018 WL 1004745, at \*13 (S.D. W. Va. Feb. 21, 2018). MVP must deposit funds and post a security bond before taking possession. *Id.* at \*12.

Landowners in the Western District of Virginia and Northern District of West Virginia cases, including some of the plaintiffs in this case, have filed appeals to this Court and moved for a stay pending appeal. Nos. 18-1159 (consolidated with 18-1175, 18-1181, and 18-1187), and 18-1165. The Court has denied the motion to stay the case in the Northern District of West Virginia. No. 18-1165, Doc. 12. The motion to stay the case in the Western District of Virginia is still being briefed.

### C. *Proceedings in this Case*

This case is one of two preemptive actions filed to stop FERC from issuing a certificate.<sup>1</sup> The complaint describes plaintiffs as landowners in the path of MVP's proposed pipeline who seek to prevent their property from being taken. JA 14 at ¶ 2. Count One alleges that FERC is "precluded from granting MVP a

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1. The plaintiffs in the other preemptive action, *Bold Alliance v. FERC*, 1:17-cv-01822 (D.D.C. Sept. 5, 2017), assert statutory and constitutional claims and seek an injunction prohibiting MVP from exercising the power of eminent domain under the Certificate Order. *Id.*, Doc. 19. MVP and FERC have moved to dismiss the action on grounds that the district court has no jurisdiction to review a FERC order. *Id.*, Docs. 20, 21.

certificate” because the test FERC uses in determining whether to issue a certificate violates the Fifth Amendment. JA 41 at ¶¶ 76-77. Count Two alleges that FERC cannot lawfully confer the power of eminent domain by issuing a certificate to MVP because Congress’s delegation of the power of eminent domain to FERC is unconstitutional. JA 41-42 at ¶¶ 78-81. Count Three alleges that FERC cannot “lawfully delegate the power of eminent domain to MVP by issuing MVP a Certificate” because such action would be an unconstitutional sub-delegation.<sup>2</sup> JA 42 at ¶¶ 83-84. Based on these claims, plaintiffs moved for a preliminary injunction prohibiting FERC from issuing a certificate and MVP from exercising the power of eminent domain under a certificate. JA 82.

MVP and FERC moved to dismiss the claims on grounds that § 717r confers exclusive jurisdiction on FERC and the courts of appeals. JA 126, 138-43, 178, 184-91. While the motions were pending, FERC issued its Certificate Order. JA 533.

In considering the motions to dismiss, the district court observed that plaintiffs’ complaint makes clear that plaintiffs “are concerned not with some abstract constitutional violation, but with the fact that their land will be affected by MVP’s proposed pipeline.” JA 539. The court also noted plaintiffs’ concession

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2. The complaint also included a Count Four, but plaintiffs voluntarily dismissed the claim with prejudice. JA 550, 5523.

that, if their claims prevail, the Certificate Order will no longer convey eminent domain authority. JA 545. Consequently, the court found that the claims involve the Certificate Order and are within the scope of § 717r. JA 538-39.

The district court further held that it would have no jurisdiction using the analysis in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). JA 540-46. Applying the *Thunder Basin* analysis, the court found that the intent of Congress to preclude district court jurisdiction is fairly discernible from the Natural Gas Act and that plaintiffs' claims are of the type Congress intended to be reviewed under § 717r. JA 544-46.

In dismissing the claims for lack of jurisdiction, the court noted that plaintiffs had not cited “a single case where a district court exercised jurisdiction over claims—whether characterized as constitutional challenges or otherwise—that would require a modification of a FERC order if the claims were successful.” JA 538.

On February 1, 2018, plaintiffs in this case filed a motion under the All Writs Act to stay the condemnation case in the Western District of Virginia. Doc. 21-1. The Court denied the motion. Doc. 30.

## V. SUMMARY OF ARGUMENT

The district court correctly dismissed this case for lack of subject-matter jurisdiction.

Section 19 of the Natural Gas Act, 15 U.S.C. § 717r, provides an exclusive scheme of review for a FERC order. The Act allows aggrieved parties to seek rehearing before FERC and, if they remain aggrieved, to have review in an appropriate court of appeals. The jurisdiction of the courts of appeals is “exclusive,” and district courts do not have jurisdiction to review a FERC order. The express purpose of this case was to preempt the issuance of a certificate order for a project that plaintiffs opposed. Now that the certificate order has been issued, the purpose of this case is to invalidate the order. Because the controversy in this case involves a FERC order, the district court lacked subject-matter jurisdiction.

The district court also determined that it would have no jurisdiction using the analysis in *Thunder Basin*. As the court found, Congress’s intent to preclude district court jurisdiction is fairly discernable in the Natural Gas Act because § 717r vests “exclusive” jurisdiction in the courts of appeals to affirm, modify, or set aside FERC orders. The Natural Gas Act further reinforces that district courts cannot decide the validity of a FERC order by expressly preserving district court jurisdiction in other areas of the Act. 15 U.S.C. § 717u (conferring jurisdiction on the district courts over violations of the Act).

The district court also correctly determined that plaintiffs’ claims are “of the type” intended to be subject to § 717r. In making this determination, the court found that meaningful review is available in the courts of appeals even if

FERC cannot decide constitutional claims, and that plaintiffs' claims are not wholly collateral to § 717r.

## VI. ARGUMENT

### A. SECTION 19 OF THE NATURAL GAS ACT PROVIDES FOR EXCLUSIVE JURISDICTION IN THE COURTS OF APPEALS

Section 19 of the Natural Gas Act, 15 U.S.C. § 717r, provides a “highly reticulated” and “exclusive” procedure for challenging a FERC certificate. *American Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010); *Williams Nat. Gas Co. v. Oklahoma City*, 890 F.2d 255, 261-62 (10th Cir. 1989). The aggrieved party must first apply to FERC for a rehearing and “set forth specifically the ground or grounds upon which [the] application is based.” 15 U.S.C. § 717r(a). The rehearing request is mandatory. *Id.* A party who remains aggrieved after rehearing may obtain review in designated courts of appeals. 15 U.S.C. § 717r(b). The courts of appeals have “exclusive” jurisdiction “to affirm, modify, or set aside” a certificate order “in whole or in part.” *Id.* Seeking rehearing and petitioning for review does not automatically stay a certificate. *Id.* § 717r(c). However, the aggrieved party may seek a stay from FERC pending rehearing and from a court of appeals pending review. *Id.*

As this Court has recognized, under the Natural Gas Act “there is no area of review, whether relating to final or preliminary orders, available in the



district court.” *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 957 (4th Cir. 1979). The scope of exclusive jurisdiction in the courts of appeals includes all issues “inhering in the controversy.” *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *Maine Council of A. Salmon Fed’n v. National Marine Fisheries Serv. (NOAA Fisheries)*, 858 F.3d 690, 693 (1st Cir. 2017);<sup>3</sup> *Williams Nat. Gas*, 890 F.2d at 261-62. “[One] would be hard pressed to formulate a doctrine with a more expansive scope.” *Williams Nat. Gas*, 890 F.2d at 262.

It is “well-settled” that a district court cannot hear a dispute involving a FERC certificate. *Adorers of the Blood of Christ v. FERC*, No. 17-cv-3163, 2017 WL 4310369, at \*2-3 (E.D. Pa. Sept. 28, 2017), *appeal docketed*, No. 17-3163 (3d Cir. Oct. 2, 2017). As discussed below, courts uniformly find no district court jurisdiction over claims that directly or indirectly challenge a FERC order or that attempt to preempt a FERC order.

In *Consolidated Gas Supply*, this Court vacated the district court’s order enjoining FERC from continuing an administrative hearing. 611 F.2d at 957-58. The Court rejected the argument that “preliminary matters” that had not yet culminated in final agency action are within the jurisdiction of district courts. *Id.*

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3. *City of Tacoma* and *Maine Council* involve the Federal Power Act. Because the judicial review provisions of the Federal Power Act and the Natural Gas Act are “in all material respects substantially identical,” courts routinely cite “interchangeably decisions interpreting the pertinent sections of the two statutes.” *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

In *American Energy*, the Sixth Circuit held that the district court lacked jurisdiction over claims for an injunction and declaratory relief associated with a certificate authorizing construction of a pipeline. 622 F.3d at 605. The court made “short work” of the plaintiff’s attempt to “sidestep” the Natural Gas Act’s exclusive review procedure. *Id.* The court stated that “[e]xclusive means exclusive, and the Natural Gas Act nowhere permits an aggrieved party otherwise to pursue collateral review of a FERC certificate . . . in federal district court.” *Id.*

In *Urban v. FERC*, No. 5:17-cv-1005 (N.D. Ohio May 12, 2017), landowners sought to enjoin FERC from issuing a certificate that allegedly would violate the Constitution and Natural Gas Act. ECF Nos. 1 at ¶¶ 94-95 and 105-08, and 6 at 8-10. The landowners agreed that exclusive jurisdiction would reside in the courts of appeals if FERC had issued a certificate. *Urban v. FERC*, No. 5:17-cv-1005, 2017 WL 5068452, at \*1 (N.D. Ohio Aug. 7, 2017), *report and recommendation adopted*, 2017 WL 6461823 (Dec. 19, 2017). The issue was whether the landowners could “launch a preemptive strike” in district court to prevent FERC from acting on the pipeline application. *Id.* The magistrate judge recommended that the motion for injunctive relief be dismissed for lack of subject-matter jurisdiction. *Id.*, at \*1, 5. After the report and recommendation was issued, but before a ruling on the landowners’ objections, FERC issued a certificate to the gas company. *Nexus Gas Transmission, LLC*, 160 FERC ¶ 61,022 (Aug. 25,

2017). The district court judge adopted the report and recommendation and dismissed the case for lack of jurisdiction. *Urban v. FERC*, No. 5:17-cv-1005, 2017 WL 6461823, at \*3 (N.D. Ohio Dec. 19, 2017). In doing so, the judge found that the review scheme of the Natural Gas Act would be entirely undermined if landowners could avoid that process by bringing suit before a certificate was issued. *Id.* at \*2.

In *Adorers*, the plaintiffs alleged that a FERC certificate violated the Religious Freedom Restoration Act. Finding that claim to be an impermissible collateral attack on the certificate, the court dismissed the action for lack of subject-matter jurisdiction. 2017 WL 4310369 at \*1, 3. The Third Circuit has denied a stay pending appeal “[f]or essentially the reasons given by the District Court.” *Adorers of the Blood of Christ v. FERC*, No. 17-3163, Doc. 003112752784 (3d Cir. Oct. 13, 2017).

In *Lovelace v. United States*, No. 15-cv-30131-MAP, 2016 WL 10826764 (D. Mass. Feb. 18, 2016), landowners sought to enjoin FERC from approving a pipeline application on grounds that the Natural Gas Act violates the Constitution. *Id.* at \*1. The court dismissed the case for lack of subject-matter jurisdiction, stating that “it is simply clear beyond dispute” that district courts have “no role in litigation of this kind.” *Id.*

In *Town of Dedham*, FERC issued a certificate, and the plaintiff requested an injunction staying construction until FERC decided the request for rehearing. The court rejected the argument that a stay would merely preserve “the status quo.” Finding that a stay would override the notice to proceed issued by FERC, the court dismissed the case for lack of subject-matter jurisdiction. 2015 WL 4274884 at \*1-2.

In *Maine Council*, power companies sought to modify the terms of their licenses from FERC to operate dams on a river. Because the river was a spawning ground for endangered fish species, FERC was required to obtain opinions from the National Marine Fisheries Service. 858 F.3d 691-92. When the Fisheries Service issued opinions finding no jeopardy to the species, environmental groups sued the Fisheries Service and the power companies in district court. *Id.* at 692. While the case was pending, FERC granted the license modifications by adopting the opinions. The district court then dismissed the case for lack of subject-matter jurisdiction under the Federal Power Act review provision. *Id.* The First Circuit affirmed, finding that the courts of appeals have exclusive jurisdiction over the attack on the opinions. *Id.* at 693.

In *Southwest Center for Biological Diversity v. FERC*, 967 F. Supp. 1166 (D. Ariz. 1997), the plaintiff alleged that FERC had violated the Endangered Species Act by not consulting the United States Fish and Wildlife Service about

the impact of the project on a species of fish. *Id.* at 1168, 1172. The plaintiff argued that it was not challenging FERC's authority to issue a license under the Federal Power Act, but rather FERC's independent duties under the Endangered Species Act. *Id.* at 1172-73. The court rejected the argument and dismissed the claims for lack of subject-matter jurisdiction. *Id.* at 1175. The court found that "[t]he law is clear that any attempt to challenge a license issued by the FERC, however artfully pleaded, will fall under the exclusive jurisdiction" of the courts of appeals. *Id.* at 1173.

Finally, in several recent condemnation actions, district courts have found no jurisdiction to hear constitutional challenges to FERC certificates. *Mountain Valley Pipeline*, 2018 WL 648376, at \*4 n.7 (finding no jurisdiction to hear a claim that FERC does not make a determination of "public use" as required by the Fifth Amendment<sup>4</sup>); *Transcontinental Gas Pipe Line Co. v. Permanent Easement for 2.14 Acres*, No. 17-cv-1715, 2017 WL 3624250, at \*3-4 (E.D. Pa. Aug. 23, 2017) (finding no jurisdiction to hear due process challenges to the FERC certificate), *appeal docketed*, No. 17-3116 (3d Cir. Sept. 29, 2017); *Transcontinental Gas Pipe Line Co. v. Permanent Easement for 5.67 Acres*, No. 4:17-cv-00544, 2017 WL 3412374, at \*3 (M.D. Pa. Aug. 9, 2017) (finding no

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4. The same claim is in Count One of plaintiffs' complaint. JA 40-41.

jurisdiction to hear the argument that the FERC certificate authorized unconstitutional taking). As in this case, the district courts had no jurisdiction to hear a collateral attack on the FERC certificate. *Id.*

Plaintiffs' argument that no other case involves the same constitutional claims, Doc. 19 at 48-60 of 63, misses the point. The review provision of the Natural Gas Act applies to all claims that would invalidate or modify a FERC order.

Plaintiffs describe this action as only involving a "Congressional Act," Doc. 19 at 23 and 60 of 63, but the complaint tells a different story. Count One alleges that the Certificate Order violates the Fifth Amendment because "FERC does not evaluate proposed pipeline projects according to a constitutional standard." JA 41 at ¶ 75. And Counts Two and Three allege that the Certificate Order cannot convey eminent domain power because the delegation of eminent domain power to FERC is unconstitutional and the Order is an unconstitutional sub-delegation. JA 41-42 at ¶¶ 78-84. Based on these claims, plaintiffs seek a preliminary injunction prohibiting MVP from condemning their property. JA 82. Plaintiffs concede that the Certificate Order will no longer convey eminent domain authority if they prevail. JA 82, 545. And plaintiffs have requested a stay of the condemnation case in the Western District of Virginia. Doc. 21-1.

Finally, plaintiffs' argument that Section 19 does not include constitutional claims finds no support in the language of the statute. Section 19 allows courts of appeals to review all objections that were urged before the Commission. 15 U.S.C. § 717r(a), (b). Section 19 does not provide an exception for constitutional challenges. *See Williams Nat. Gas*, 890 F.2d at 262. Moreover, the policy underlying Section 19 "disfavors bifurcating jurisdiction over various substantive grounds." *Id* at 262-63 ("[W]e cannot imagine that Congress intended the exclusivity *vel non* of statutory review to depend on the substantive infirmity alleged.").

Consequently, the district court correctly dismissed the case for lack of subject-matter jurisdiction.

B. THERE IS NO DISTRICT COURT JURISDICTION  
UNDER THE *THUNDER BASIN* FRAMEWORK

The district court also correctly determined that it would have no jurisdiction using the analysis in *Thunder Basin*. JA 540-46. In *Thunder Basin*, the Supreme Court established a framework for determining when a statutory scheme of administrative adjudication and judicial review in the courts of appeals impliedly forecloses district court jurisdiction. The first factor is whether Congress's intent to preclude district court jurisdiction is "fairly discernable" in the statute. 510 U.S. at 207. The second factor is whether the plaintiff's claims are "of the type Congress intended to be reviewed within th[e] statutory structure." *Id.*

at 212. This requires the court to consider whether the statutory scheme would “foreclose all meaningful judicial review,” whether the plaintiff’s claims are “wholly collateral” to the statute’s review provision, and whether agency expertise can be brought to bear on the question presented. *Id.* at 212-13.

As discussed below, there is no district court jurisdiction under the *Thunder Basin* framework.

(1) *Congress’s Intent to Preclude District Court Jurisdiction Is Fairly Discernable in the Natural Gas Act*

The district court correctly determined that Congress’s intent to preclude district court jurisdiction is fairly discernable from the Natural Gas Act. JA 544. The Act vests exclusive jurisdiction in the courts of appeals to affirm, modify, or set aside a FERC order. 15 U.S.C. § 717r(b). The Act reinforces that a district court cannot decide the validity of a FERC order because the Act expressly preserves district court jurisdiction in other areas. 15 U.S.C. §§ 717f(h), 717u; *Bennett v. SEC*, 844 F.3d 174, 181 (4th Cir. 2016) (finding exclusive jurisdiction in courts of appeals where “Congress demonstrated it knew how to preserve district-court jurisdiction, but declined to do so”).

(2) *Plaintiffs Are Not Deprived of All Meaningful Judicial Review*

The district court also correctly determined that plaintiffs’ claims are of the type intended to be reviewed under § 717r. JA 544-46. The fact that FERC



discussed and analyzed plaintiffs' constitutional claims, but did not decide the claims, does not deprive plaintiffs of "all meaningful judicial review." The review process does not end with FERC; constitutional challenges can be heard in the courts of appeals. *E.g.*, *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967, 973 (D.C. Cir. 2000) (reviewing FERC order under § 717r(b) and rejecting Fifth Amendment Challenge); *Moreau v. FERC*, 982 F.2d 556, 564, 568-70 (D.C. Cir. 1993) (reviewing FERC order under § 717r(b) and finding order did not violate Due Process Clause). Review in the courts of appeals is meaningful review under *Thunder Basin*. *E.g.*, *Elgin v. Department of the Treasury*, 567 U.S. 1, 17 (2012); *Thunder Basin*, 510 U.S. at 215; *Bennett*, 844 F.3d at 186.

Review in the courts of appeals is not limited to matters decided by FERC. *See, e.g.*, *Elgin*, 567 U.S. at 16-17, 18 n.8 (holding that court of appeals could decide constitutional challenge even if agency could not); *Thunder Basin*, 510 U.S. at 215 (same). As the Supreme Court has observed, "[i]t is not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge to a federal statute that the agency concluded it lacked authority to decide." *Elgin*, 567 U.S. at 18 n.8

Plaintiffs' assertion that the Certificate Order "[did] not analyze, evaluate, or pass judgment on" the claims in this case, Doc. 19 at 45 of 63, is incorrect. In the Certificate Order, FERC referred specifically to the claims in this

case. JA 354-57 at PP 58-63. While FERC stated that it did not have jurisdiction to address the constitutionality of the Natural Gas Act, it concluded plaintiffs' other claims are "unfounded." JA 355 at P 60. The agency also noted that the constitutionality of the eminent domain provisions in the Act have been upheld by the courts. JA 357 at P 63 n.88.

Plaintiffs also complain they are deprived of all meaningful judicial review because MVP may be granted access to their property before the Certificate Order is reviewed by a court of appeals. The premise of the argument is that construction of the project will "moot" plaintiffs' claims and deny plaintiffs the right to "challenge the almighty power of government and big business." Doc. 19 at 13-15, 22, and 30-32 of 63. These contentions are without merit.

First, landowner groups are already challenging the Certificate Order in the D.C. District. In *Appalachian Voices*, No. 17-1271, and *Blue Ridge Environmental Defense League*, No. 18-1002, petitioners contend that judicial review is available because the tolling order is invalid and all requests for rehearing have been denied by operation of law. *Id.* Although the D.C. Circuit denied petitioners' motion for a stay, the case remains pending.

Landowner groups also filed a separate proceeding in the D.C. Circuit challenging the Certificate Order under the All Writs Act. *In re Appalachian Voices*, No. 18-1006 (D.C. Cir. Jan. 8, 2018). The D.C. Circuit likewise denied a

stay in that case. Order, No. 17-1271 (consolidated with Nos. 18-1002 and 18-1006), Doc. 1716262.

While plaintiffs say that landowners are being denied all meaningful judicial review, they do not discuss the cases filed in the D.C. Circuit.

Second, courts hold that construction of the project does not moot objections to a certificate order. *E.g., Minisink Residents for Env'tl. Pres. and Safety v. FERC*, 762 F.3d 97, 106 (D.C. Cir. 2014); *Moreau*, 982 F.2d at 566 n.4. FERC has also warned that proceeding with construction may risk that the certificate order will be overturned. *E.g., Transcontinental Gas Pipe Line Co.*, 160 FERC ¶ 61,042, at P 18 (Aug. 31, 2017) (stating that certificate holder who elects to proceed with construction may risk that FERC order will be overturned on rehearing or appeal).

Third, plaintiffs' complaint that a certificate order "automatically" conveys the power of eminent domain, Doc. 19 at 12-13, 19, and 27 of 63, ignores the authority of FERC to stay a certificate and otherwise prohibit the exercise of eminent domain until conditions in the certificate are satisfied. 15 U.S.C. § 717r(c); *Mid A. Express, LLC v. Baltimore County*, 410 F. Appx. 653, 657 (4th Cir. 2011). Plaintiffs do not mention their pending motions before FERC to stay the Certificate Order.

Finally, it is important to note that the issuance of a certificate order does not convey title or possession. To obtain possession, the natural gas company must satisfy the requirements for an injunction and provide security. *East Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 825 (4th Cir. 2004). And title does not pass until just compensation is determined and paid. *Id.* In the condemnation actions filed by MVP, the district courts have issued injunctions for immediate possession setting security at five and six times the appraised value of the easements, and the landowners can draw down the full appraised value. *Mountain Valley Pipeline*, 2018 WL 648376, at \*26; W.D. Va. No. 7:17-cv-492, ECF No. 340 at 5-6; *Mountain Valley Pipeline*, 2018 WL 701297, at \*19-21; *Mountain Valley Pipeline*, 2018 WL 1004745, at \*12-13. The Court has denied the motion to stay the case in the Northern District of West Virginia. No. 18-1165, Doc. 12.

The cases that plaintiffs cite are all distinguishable. In *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), a report critical of an accounting firm was not reviewable under the Exchange Act. To obtain review, the firm would have had to challenge a rule “at random” or voluntarily “incur a sanction.” *Id.* at 487, 490-91. Here, plaintiffs face no such dilemma. The Certificate Order is reviewable under the Natural Gas Act.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court allowed the plaintiff to challenge the termination of his Social Security disability benefits in

district court because “his physical condition and dependency” upon the benefits meant “an erroneous termination would damage him in a way not recompensable through retroactive payments.” 424 U.S. at 326-32. Likewise, in *Kreschollek v. Southern Stevedoring Co.*, 78 F.3d 868 (3d Cir. 1996), Kreschollek was allowed to challenge the termination of his benefits under the Longshore and Harbor Workers’ Compensation Act in district court because the termination deprived him of all income for almost two-and-a-half years. 78 F.3d at 874-75. And, in *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991), undocumented individuals were allowed to challenge the constitutionality of an amnesty program in district court because unsuccessful applicants for the program could obtain review in the court of appeals only by surrendering themselves for deportation. *Id.* at 483-84. The Court found “that price” to be “a complete denial of judicial review” for such individuals. *Id.* at 496-97.

(3) *Plaintiffs’ Claims Are Not Wholly Collateral*

The district court also correctly determined that plaintiffs’ claims are not “wholly collateral” to § 717r because the claims are a “vehicle” to invalidate the Certificate Order. JA 545; *e.g.*, *Elgin*, 567 U.S. at 21-22; *Bennett*, 844 F.3d at 186-87; *Jarkesy v. SEC*, 803 F.3d 9, 13-14, 22-23 (D.C. Cir. 2015). As discussed above, plaintiffs seek a declaratory judgment that the Certificate Order is unconstitutional and an injunction prohibiting MVP from exercising eminent

domain authority. JA 43, 82. Plaintiffs concede that the Certificate Order will no longer confer eminent domain authority if they prevail. JA 545.

On appeal, plaintiffs assert that their claims do not focus on “the policies, procedures, or analysis of some issue by FERC or even a decision by FERC.” Doc. 19 at 22-23 of 63. In fact, Count I alleges that the policy FERC uses to determine whether to issue a certificate violates the Fifth Amendment. JA 40-41 ¶¶ 74-77. Count Three likewise focuses on FERC, alleging that FERC violates the Constitution when it issues a certificate. JA 42 ¶¶ 82-84. While Count Two challenges the constitutionality of the Natural Gas Act, the claim is being used as a means to invalidate the Certificate Order. *See, e.g.*, Doc. 21-1 at 3 (using the constitutional challenge to Natural Gas Act as a ground to stay order conditionally granting immediate possession under Certificate Order).

In plaintiffs’ view, a claim is wholly collateral if it challenges the constitutionality of “a Congressional Act.” Doc. 19 at 60 of 63. But both the Supreme Court and this Court have refused to adopt such a test. *Elgin*, 567 U.S. at 12-13; *Bennett*, 844 F.3d at 176-78, 188. The *Elgin* court found nothing in the CSRA suggesting its review scheme does not apply to a constitutional challenge. 567 U.S. at 13. The *Bennett* court reached the same conclusion for the Exchange Act. 844 F.3d at 181-82. And the same is true here. Interested parties can present

their claims both to FERC and the court of appeals. If there is a constitutional claim that FERC cannot decide, the court of appeals can decide it.

Finally, plaintiffs argue that § 717r does not apply to their claim under the nondelegation doctrine because the challenge is different from other constitutional claims. Doc. 19 at 39 of 63. The Supreme Court has warned against any jurisdictional rule based on the type of constitutional claim alleged, describing such an approach as “hazy at best and incoherent at worst.” *Elgin*, 567 U.S. at 15. And this Court has used even stronger language, stating that it is “a fool’s errand” to attempt to “distinguish[] among types of constitutional claims for jurisdictional purposes.” *Bennett*, 844 F.3d at 188. In *Bennett*, the Court noted that there is “no limiting principle” for such an approach” and “[a]nyone could bypass the judicial-review scheme established by Congress simply by alleging a constitutional challenge and framing it as ‘structural,’ ‘prophylactic,’ or ‘preventative.’” *Id.*

#### (4) *Agency Expertise*

The final factor—agency expertise—does not support district court jurisdiction. In analyzing jurisdiction, courts take a broad view of agency expertise. *E.g.*, *Elgin*, 567 U.S. at 22-23; *Bennett*, 844 F.3d at 187–88. In *Elgin*, the Court noted that the agency could “fully dispose of the case” by resolving questions it “routinely considers.” *Id.* at 22-23. Thus, the agency’s expertise can be “brought to bear.” *Id.* The same is true here. FERC’s determination of the

numerous challenges to the Certificate Order will be important to any subsequent judicial review.

## VII. CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing this case for lack of subject-matter jurisdiction should be affirmed.

Respectfully submitted,

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Dated: March 2, 2018

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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 2nd day of March, 2018, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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