No. 18-561

In the Supreme Court of the United States

ORUS ASHBY BERKLEY, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether provisions of the Natural Gas Act (Act), 15 U.S.C. 717-717w, conferring "exclusive" jurisdiction on courts of appeals to review orders of the Federal Energy Regulatory Commission (Commission), 15 U.S.C. 717r(a)-(b), precluded the district court from exercising jurisdiction over petitioners' constitutional challenge to provisions of the Act implicated by the Commission's approval of a natural-gas pipeline.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 896 F.3d 624. The opinion of the district court (Pet. App. 23-42) is not published in the Federal Supplement but is available at 2017 WL 6327829.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18-19) was entered on July 25, 2018. The petition for a writ of certiorari was filed on October 23, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are landowners who live along the path of the Mountain Valley Pipeline, a natural-gas pipeline project in West Virginia and Virginia. Pet. App. 3, 54. Petitioners opposed the pipeline project in proceedings before the Federal Energy Regulatory Commission

(FERC or Commission) and also filed a complaint in federal district court challenging the constitutionality of certain provisions of the Natural Gas Act (NGA or Act), 15 U.S.C. 717-717w. See Pet. App. 3-4, 23-24. FERC granted a certificate approving the pipeline. *Id.* at 5-6. The district court dismissed petitioners' complaint for lack of jurisdiction. *Id.* at 23-42. The court of appeals affirmed. *Id.* at 1-17.

1. Under the NGA, FERC has exclusive authority to regulate sales and transportation of natural gas in interstate commerce. 15 U.S.C. 717f. As part of that authority, FERC determines whether to approve a proposed interstate natural-gas pipeline. 15 U.S.C. 717f(c). To construct or expand such a pipeline, a company must first obtain from FERC a "certificate of public convenience and necessity." *Ibid.*; see *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 302-303 (1988). FERC may issue a certificate only if it finds the proposed facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. 717f(e). The certificate may include conditions that the holder must satisfy before it commences work on the project. *Ibid.* A certificate holder unable to reach agreement with property owners on necessary rights of way for pipeline construction may initiate eminent domain proceedings in "the district court of the United States for the district in which such property may be located, or in the State courts." 15 U.S.C. 717f(h).

FERC decisions relating to the issuance of certificates are subject to review under a framework set forth in 15 U.S.C. 717r. Upon FERC's issuance of a certificate, any party to the proceeding "aggrieved" may seek rehearing by the Commission. 15 U.S.C. 717r(a). If the Commission denies rehearing, the aggrieved party may

petition for review in the D.C. Circuit or designated regional court of appeals. 15 U.S.C. 717r(b). The court of appeals has "exclusive" jurisdiction to "affirm, modify, or set aside" the FERC order. *Ibid.* The court of appeals, however, may not consider an "objection to the order of the Commission" unless that objection was raised in a petition for rehearing before the Commission or "there is reasonable ground for failure so to do." *Ibid.*

2. In 2015, respondent Mountain Valley Pipeline, LLC (MVP) applied for a FERC certificate authorizing construction of a natural-gas pipeline in West Virginia and Virginia. *Mountain Valley Pipeline, LLC*, 161 F.E.R.C. ¶ 61,043, at ¶ 1 (2017) (Certificate Order). Several petitioners, who are landowners along the path of the proposed pipeline, participated in the FERC proceeding considering MVP's application. *Id.* Apps. A-B. Those petitioners contended, *inter alia*, that "the use of eminent domain in connection to the project would be unconstitutional because the project would only benefit private entities, not the public." *Id.* ¶ 58.

While the FERC proceedings were ongoing, petitioners filed an action in federal district court asserting a "constitutional challenge to the eminent domain provisions of the Natural Gas Act * * * and the resulting unconstitutional acts of FERC and ultimately MVP." Pet. App. 53. Petitioners sought "declaratory and injunctive relief to protect their constitutional rights to secure their private property from" what they called "a government-sanctioned land grab for private pecuniary gain." *Id.* at 54. Specifically, petitioners asserted that "FERC should be precluded from granting MVP a [c]ertificate." *Id.* at 87. Petitioners also sought 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. *Id.* at 196.

Before the district court ruled in petitioners' action, FERC granted MVP's certificate application. Pet. App. 5; see Certificate Order ¶ 3. FERC's order set forth the Commission's reasoning for its determination that the pipeline is required by the "public convenience and necessity" under 15 U.S.C. 717f(e). Certificate Order ¶¶ 33-55. As to petitioners' constitutional claims, the Commission noted that the matter was "currently before the [district] court," and that "only the courts can determine whether Congress' action in passing" 15 U.S.C. 717f(h) "conflicts with the Constitution." Certificate Order ¶¶ 60, 63. The Commission observed that "courts have found eminent domain authority in" 15 U.S.C. 717f(h) "to be constitutional." Certificate Order ¶ 63.

Numerous parties, including some petitioners, filed requests for rehearing of FERC's order. *Mountain Valley Pipeline, LLC*, 163 F.E.R.C. ¶ 61,197, at ¶ 2 n.6 (2018). Petitioner Berkley, for example, filed a rehearing request presenting numerous arguments against FERC's issuance of the certificate, including constitutional eminent domain arguments. *Ibid.* The Commission denied the rehearing requests. *Id.* ¶ 5. Several parties, not including petitioners, filed petitions for review in the D.C. Circuit. See *Appalachian Voices* v. *FERC*, No. 17-1271 (oral argument scheduled for Jan. 28, 2019).

3. After FERC granted MVP the certificate (but before FERC denied rehearing), the district court dismissed petitioners' complaint for lack of jurisdiction. Pet. App. 23-42. The court relied on 15 U.S.C. 717r(b), which confers "exclusive" jurisdiction on the courts of appeals "to affirm, modify, or set aside" a FERC order.

Pet. App. 28-34. The district court concluded that petitioners' constitutional challenges "'inher[ed]' in the issuance of the FERC order" and accordingly fell "within the scope of the exclusivity provision" in 15 U.S.C. 717r(b). Pet. App. 32. The court added that "all of [petitioners'] challenges can be raised in the appropriate court of appeals reviewing the FERC order." *Id.* at 33-34.

The district court separately concluded that, even if petitioners' claims did not fall within the exclusive-review provision of 15 U.S.C. 717r(b), Congress had nevertheless "impliedly precluded jurisdiction in the district courts 'by creating a statutory scheme of administrative adjudication and delayed judicial review in'" the court of appeals. Pet. App. 34 (quoting *Bennett* v. *U.S. SEC*, 844 F.3d 174, 178 (4th Cir. 2016)). The district court based its conclusion on the "*Thunder Basin* framework," which was "derived originally from" *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), and further elaborated in *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), and *Elgin* v. *Department of Treasury*, 567 U.S. 1 (2012). Pet. App. 34-35.

Specifically, the district court found "Congress' intent to preclude district-court jurisdiction" to be "'fairly discernible in the statutory scheme,'" Pet. App. 34 (quoting *Thunder Basin*, 510 U.S. at 207)), because the NGA provides for exclusive jurisdiction to review a FERC order in the court of appeals while separately providing "for district court jurisdiction over other aspects of FERC decisions, such as presiding over condemnation proceedings," *id.* at 39. The district court also concluded that petitioners' constitutional claims were "of the type Congress intended to be reviewed within this statutory structure," *ibid.* (quoting *Thunder*

Basin, 510 U.S. at 212), because the statute did not "foreclose all meaningful judicial review" and the claims were not "wholly collateral" to the statutory review scheme, *id.* at 39-40. The court accordingly dismissed petitioners' complaint. *Id.* at 42.

4. The court of appeals affirmed. Pet. App. 1-17. The court "agree[d] with the district court that Congress implicitly divested the district court of jurisdiction to hear claims of the kind brought by [petitioners] and instead intended for such claims to come to federal court through the administrative review scheme established by the" NGA. *Id.* at 7. The court of appeals accordingly affirmed the district court's dismissal for lack of jurisdiction. *Ibid.*[1]

Like the district court, the court of appeals applied a "two-step inquiry" distilled from this Court's decisions in *Thunder Basin*, *Free Enterprise Fund*, and *Elgin*. Pet. App. 7 (quoting *Bennett*, 844 F.3d at 181). The court of appeals first concluded that "Congress's intent to preclude district-court jurisdiction" was "fairly discernible in the statutory scheme." *Id.* at 8 (citations omitted). The court explained that the NGA "establishes an extensive review framework, including review before FERC and eventually by a court of appeals," *id.* at 9 (citing 15 U.S.C. 717r), but also "specifically allows for district court jurisdiction over certain actions, such as condemnation proceedings," *ibid.* (citing 15 U.S.C. 717f(h)). The court of appeals reasoned that the statutory structure of the NGA "indicates that Congress

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[1] The court of appeals found it unnecessary to address the district court's separate conclusion that that petitioners' constitutional claims "inher[e]" in the FERC certificate proceedings and therefore fall expressly within 15 U.S.C. 717r(b). Pet. App. 17 n.5 (citation omitted; brackets in original).

knew how to allow for district court jurisdiction, yet it chose not to do so when it came to issues related to review of a [c]ertificate." *Ibid.*

The court of appeals next concluded that petitioners' constitutional claims were "of the type Congress intended to be reviewed within th[e NGA's] statutory structure." Pet. App. 9 (citation omitted). The court based that determination on three factors: (1) "whether the statutory scheme foreclose[s] all meaningful judicial review," (2) "the extent to which" petitioners' "claims are wholly collateral to the statute's review provisions," and (3) "whether agency expertise could be brought to bear on the . . . questions presented." *Id.* at 10 (citation omitted; brackets in original).

The court of appeals first concluded that petitioners were not deprived of "meaningful judicial review" merely because they had to first bring their constitutional claims before FERC before raising them in the court of appeals. Pet. App. 10. Rather, the court explained, this Court's decisions have recognized that "eventual review of the constitutional question before the court of appeals would still be meaningful." *Id.* at 11. The court also concluded that petitioners' claims were "not wholly collateral to the [NGA's] statutory review scheme" because petitioners' constitutional claims were "the means by which they seek to vacate the granting of the" certificate to MVP. *Id.* at 14-15. Finally, the court concluded that FERC could "bring its expertise to bear" on petitioners' claims by resolving them on threshold grounds that obviated the need to address the constitutional questions. *Id.* at 16 (citation omitted). The court accordingly affirmed the district court's dismissal of the complaint for lack of jurisdiction. *Id.* at 16-17.

ARGUMENT

Petitioners contend (Pet. 4) that the courts below erred by concluding that the district court lacked "subject matter jurisdiction to hear [their] constitutional challenges." That contention lacks merit. The courts below correctly applied the framework outlined by this Court in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), and subsequent cases to conclude that the NGA required petitioners to assert their claims before FERC and then in a court of appeals, not by bringing a suit against FERC in a district court. No other court that has addressed the question has reached a contrary conclusion. Further review is unwarranted.

1. The court of appeals correctly applied this Court's *Thunder Basin* framework to conclude that the NGA precludes the exercise of district-court jurisdiction over petitioners' claims. Pet. App. 7-17. "In cases involving delayed judicial review of final agency actions," *Thunder Basin* directs courts to determine first whether Congress's intent to "allocate[] initial review to an administrative body" is "'fairly discernible in the statutory scheme,'" and then to consider whether the claims at issue "are of the type Congress intended to be reviewed within this statutory structure." 510 U.S. at 207, 212 (citations and footnote omitted); accord *Elgin* v. *Department of Treasury*, 567 U.S. 1, 9-22 (2012); *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 489-491 (2010). The court below correctly applied that framework to the statutory scheme at issue here.

a. The court of appeals first concluded that Congress's intent to preclude district-court review of claims challenging FERC orders is "fairly discernible in the

statutory scheme." *Thunder Basin*, 510 U.S. at 207 (citations omitted); see Pet. App. 8-9. The NGA's text strongly supports that conclusion because it expressly provides for "exclusive" jurisdiction in the courts of appeals to "affirm, modify, or set aside" FERC's orders. 15 U.S.C. 717r(b); see Pet. App. 9. As the Sixth Circuit explained in construing that provision, "[e]xclusive means exclusive." *American Energy Corp.* v. *Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (2010); cf. *Maine Council of Atl. Salmon Fed'n* v. *National Marine Fisheries Serv. (NOAA Fisheries)*, 858 F.3d 690, 693 (1st Cir. 2017) (Souter, J.) (interpreting "exclusive" jurisdiction provision in the Federal Power Act, 16 U.S.C. 825*l*(b)). Congress reinforced its intent to channel review of FERC orders exclusively to the courts of appeals by providing elsewhere in the NGA for district-court jurisdiction over other types of actions, such as condemnation proceedings. 15 U.S.C. 717f(h). Together, those provisions demonstrate that "Congress knew how to allow for district court jurisdiction, yet it chose not to do so when it came to issues related to review of" the FERC order at issue here. Pet. App. 9.

b. The court of appeals also correctly concluded that petitioners' constitutional claims "are of the type Congress intended to be reviewed" exclusively by a court of appeals. *Thunder Basin*, 510 U.S. at 212. This Court has identified three factors relevant to that inquiry: whether "a finding of preclusion could foreclose all meaningful judicial review," whether the claims are "wholly collateral to a statute's review provisions," and whether the claims are "outside the agency's expertise." *Elgin*, 567 U.S. at 15 (quoting *Free Enter. Fund*, 561 U.S. at 489, and *Thunder Basin*, 510 U.S. at 212-213). Here, each of those factors indicates that petitioners' claims

fall within the exclusive scheme of review created by the NGA. See Pet. App. 9-17.

i. As the statutory text makes clear, the NGA does not "foreclose all meaningful judicial review" of petitioners' claims. *Elgin*, 567 U.S. at 15 (citations omitted). To the contrary, the statute expressly provides for judicial review in the court of appeals. 15 U.S.C. 717r(b). Indeed, some parties to the FERC proceeding in question here (but not petitioners) are seeking judicial review of FERC's order in the court of appeals. See p. 4, *supra*. In reviewing FERC orders, moreover, courts of appeals have resolved constitutional claims of the kind petitioners assert. See, *e.g.*, *Midcoast Interstate Transmission, Inc.* v. *FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (rejecting constitutional eminent-domain argument on review of final FERC orders issuing certificate for pipeline construction).

Although petitioners criticize the prospect of FERC reviewing their constitutional claims (Pet. 4, 11-13, 33-38), they never explain why review in the court of appeals would not provide "meaningful judicial review" of their claims. *Elgin*, 567 U.S. at 15 (citations omitted). This Court, however, has repeatedly concluded that similar statutory schemes provide meaningful judicial review. In *Elgin*, for example, the Court explained that the statute at issue did "not foreclose all judicial review of [the plaintiffs'] constitutional claims, but merely directs that judicial review shall occur in the" court of appeals, which "is fully capable of providing meaningful review of [the plaintiffs'] claims." *Id.* at 10. Likewise, in *Thunder Basin*, the Court explained that the "statutory and constitutional claims * * * can be meaningfully addressed in the [c]ourt of [a]ppeals," and that the

case accordingly did "not present the 'serious constitutional question' that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim." 510 U.S. at 215 & n.20 (citation omitted); see also, *e.g.*, *Lucia* v. *SEC*, 138 S. Ct. 2044, 2050 (2018) (resolving constitutional claims that were reviewed by a court of appeals after a final decision by the agency). Petitioners' failure to distinguish the NGA's review scheme from the schemes at issue in *Elgin* and *Thunder Basin* undermines any suggestion that the court of appeals could not provide meaningful review of their claims.[2]

ii. The court of appeals also correctly determined that petitioners' claims are "not wholly collateral to" the NGA's statutory review scheme. Pet. App. 14-15. Petitioners frame (Pet. 29) their challenge as a request for "judicial review of a [c]ongressional act, not review of a FERC [o]rder." But petitioners' complaint expressly stated that "FERC should be precluded from granting MVP a [c]ertificate," Pet. App. 87, and petitioners sought a preliminary injunction "prohibiting FERC from granting MVP the power of eminent domain * * * via issuance of a" certificate, *id.* at 196. As the court below correctly observed, petitioners' constitutional claims are "the means by which they seek to vacate the granting of the [c]ertificate to" MVP. *Id.* at 14.

This Court's decision in *Elgin* strongly supports that conclusion. There, as here, the challengers' constitutional claims were "the vehicle by which they" sought

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[2] Petitioners do not reprise their contention below that review in the court of appeals would not be meaningful because pipeline construction could commence while agency rehearing proceedings were ongoing. In any event, the court correctly rejected that argument. See Pet. App. 12-14.

"to reverse" an agency action. 567 U.S. at 22; see Pet. App. 15. By contrast, in *Free Enterprise Fund*, this Court allowed a constitutional challenge to proceed in federal district court because the challengers had no other meaningful mechanism to obtain review. 561 U.S. at 490-491. The challengers objected to the structure of the Public Company Accounting Oversight Board (Board), but the statutory-review scheme provided "only for judicial review of [*Securities and Exchange*] *Commission* action," not all actions of the Board. *Id.* at 490. Moreover, the challengers did not object to any reviewable Board rule or standard, so they could have obtained review only by subjecting themselves to a sanction—a step the Court concluded they were not required to take. *Ibid.* By contrast, the NGA provides for review of FERC orders, including the very order petitioners sought to block—FERC's approval of MVP's certificate application. Pet. App. 87, 196. The court of appeals was accordingly correct to conclude that petitioners' claims were not "wholly collateral" to the statutory review scheme. *Id.* at 14.

iii. Finally, the court of appeals was correct that FERC could bring its expertise to bear on petitioners' claims. Pet. App. 15-17. As petitioner observes (Pet. 3-4, 11-12, 35), FERC lacks jurisdiction to resolve a constitutional challenge to a federal statute. See Certificate Order ¶¶ 60, 63. But FERC could nevertheless "apply [its] expertise to threshold questions that may accompany" the constitutional claims at issue. Pet. App. 16 (citation omitted). For example, FERC could "revoke its issuance of a [c]ertificate based upon threshold questions within its expertise," which would moot petitioners' constitutional claims. *Ibid.* That reasoning follows directly from *Elgin*, which similarly concluded that an

agency could bring its expertise to bear on "preliminary questions unique to the employment context" and thereby "obviate the need to address the constitutional challenge." 567 U.S. at 22-23; see also *Thunder Basin*, 510 U.S. at 214-215 (similar).

In sum, the court of appeals correctly applied the *Thunder Basin* framework to conclude that the NGA required petitioners to assert their challenges to the MVP certificate application in the FERC proceeding and then in the court of appeals, not directly in the district court. Pet. App. 4, 16-17.

2. Petitioners contend (Pet. 25) that the decision below conflicts with decisions of other courts of appeals that have "acknowledged [d]istrict [c]ourt jurisdiction for delegation challenges." No such conflict exists. The court below did not address the reviewability of delegation challenges as a general matter. It concluded only that the district court lacked jurisdiction over petitioners' constitutional claims challenging the FERC order because 15 U.S.C. 717r(b) requires those claims to be asserted before FERC and in the court of appeals. Pet. App. 4, 16-17. Other courts of appeals have similarly interpreted Section 717r(b). See, *e.g.*, *Adorers of the Blood of Christ* v. *FERC*, 897 F.3d 187, 194-197 (3d Cir. 2018) (concluding that the district court lacked jurisdiction to hear the plaintiffs' claim that the siting of a pipeline violated the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*), petition for cert. pending, No. 18-548 (filed Oct. 19, 2018); *Rockies Express Pipeline*, 622 F.3d at 605-606. Petitioners cite no decision to the contrary.

Petitioners instead invoke (Pet. 19-20, 25-28) a host of decisions in which district courts have entertained

delegation challenges to federal statutes. Critically, however, none of those decisions involved the application of statutory review provisions providing for judicial review only at the conclusion of agency proceedings. There is accordingly no conflict warranting review.

3. Petitioners contend at length (Pet. 2-4, 11-20) that the NGA's system of review violates separation-of-powers principles. But petitioners did not raise those arguments below, see Pet. App. 267 (describing issues presented in the court of appeals), and the court of appeals did not address them, so they are not properly before this Court, see *United States* v. *Williams*, 504 U.S. 36, 41 (1992). In any event, petitioners' claims lack merit. Petitioners' argument proceeds (Pet. 11) largely on the mistaken premise that the NGA "exempt[s]" their claims "from judicial review." But as explained above—and as the court below recognized, Pet App. 11—the NGA expressly authorizes judicial review in the court of appeals after a final decision by FERC, 15 U.S.C. 717r(b). This Court has repeatedly upheld similar schemes "involving delayed judicial review of final agency actions" without any suggestion that such a scheme is constitutionally problematic. *Thunder Basin*, 510 U.S. at 207 (footnote omitted); see *Elgin*, 567 U.S. at 5. The same is true here. This Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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