No. 18-1587

In the

Supreme Court of the United States

ATLANTIC COAST PIPELINE, LLC,

Petitioner,

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION; HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT; SHENANDOAH VALLEY BATTLEFIELDS FOUNDATION; SHENANDOAH VALLEY NETWORK; SIERRA CLUB; VIRGINIA WILDERNESS COMMITTEE; WILD VIRGINIA,

Respondents.

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

BRIEF FOR PETITIONER

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
WILLIAM K. LANE III
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

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QUESTION PRESENTED

Exercising its authority under the Mineral Leasing Act ("MLA"), the U.S. Forest Service granted Atlantic Coast Pipeline, LLC ("Atlantic") a right-of-way to cross a 0.1-mile stretch of the George Washington National Forest that is approximately 700 feet beneath, and without surface impacts to, the Appalachian National Scenic Trail. Despite the existence of more than 50 pipelines that presently cross under that footpath pursuant to similar rights-of-way, the Fourth Circuit concluded in the decision below that neither the Forest Service—nor *any other* federal agency—may grant rights-of-way to cross beneath the Appalachian Trail pursuant to the MLA, thus converting the footpath into a 2,200-mile barrier separating resource-rich areas to its west from consumers to its east. The Fourth Circuit reached that result by holding that the National Trails System Act ("Trails Act") had implicitly transferred more than 1,000 miles of lands traversed by the Trail under the control of various federal, state, and private entities to the National Park System, which, unlike other federal lands, are not subject to rights-of-way under the MLA. In so doing, the court abrogated a century-old statute assigning the Forest Service jurisdiction, overrode the federal government's long-settled views, called into question dozens of existing rights-of-way, and upset petitioner's massive investments in a pipeline designed to get natural gas to Virginia and North Carolina for the benefit of millions of Americans.

The question presented is:

Whether the Forest Service has the authority under the MLA and National Trails System Act to

grant rights-of-way through national forest land that the Appalachian Trail traverses.

PARTIES TO THE PROCEEDING

Petitioner is Atlantic Coast Pipeline, LLC. It was intervenor-respondent in the court of appeals.

Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee, and Wild Virginia are respondents before this Court and were petitioners in the court of appeals.

The Forest Service, an agency of the United States Department of the Agriculture; Kathleen Atkinson, in her official capacity as Regional Forester of the Eastern Region; and Ken Arney, in his official capacity as Acting Regional Forester of the Southern Region, are also petitioners and were respondents in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states as follows:

Dominion Energy, Inc. owns more than 10% of Atlantic Coast Pipeline, LLC's stock. Duke Energy ACP, LLC and Piedmont ACP Company, LLC, subsidiaries of Duke Energy Corporation, also own more than 10% of Atlantic Coast Pipeline, LLC's stock. No other company owns 10% or more of Atlantic Coast Pipeline, LLC.

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INTRODUCTION

After an arduous three-year process, involving extensive regulatory reviews and intensive due diligence, petitioner Atlantic Coast Pipeline secured the necessary approvals and permits to construct a 600-mile pipeline that will bring natural gas from resource-rich West Virginia and Pennsylvania to consumers in Virginia and North Carolina, while generating thousands of jobs, substantial tax revenues, and hundreds of millions of dollars in annual savings for residents. The approval process involved scrutiny by more than a dozen state and federal agencies, including the U.S. Forest Service, the Federal Energy Regulatory Commission, and the National Park Service. Each agency considered issues within its own jurisdiction and approved the pipeline, both with the knowledge that the pipeline would pass approximately 700 feet under the surface of a portion of the George Washington National Forest that is traversed by the Appalachian Trail, and with the understanding that the Forest Service had the power under the Mineral Leasing Act ("MLA") to grant a right-of-way for the pipeline to do so.

According to the decision below, all of those efforts were for naught, because *no* federal agency can grant a right-of-way pursuant to the MLA for a pipeline to cross beneath the Appalachian Trail. In the Fourth Circuit's view, all 2,200 miles of federal, state, and private lands through which the Trail passes are National Park System lands, and hence lands as to which rights-of-way cannot be granted under the MLA. That novel conclusion is irreconcilable with the National Trails System Act, which (in stark contrast

to other contemporaneously enacted laws) emphatically preserves the jurisdiction of federal agencies over federal lands traversed by a trail. That is underscored by the fact that even while designating the Appalachian Trail as a footpath to be administered by the Park Service, the Trails Act still required the Park Service *to obtain a right-of-way from the Forest Service* for the Trail to pass through the George Washington National Forest. Neither the designation of the Trail nor the right-of-way later granted by the Forest Service yielded more than a right-of-way or divested the Forest Service of jurisdiction over lands deemed "national forest lands" for over a century. That commonsense result is confirmed by the Trails Act's express proviso admonishing: "Nothing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System." 16 U.S.C. §1246(a)(1)(A).

The decision below not only is at profound odds with the text, structure, and history of the Trails Act (not to mention the canon against implied repeals), but threatens upheaval for the hundreds of miles of the Appalachian Trail that traverses lands owned by states or private parties. It imperils other pipelines and approvals the Forest Service has granted for other critical infrastructure to cross Forest Service lands traversed by the Trail. None of that disruption is necessary or justified. Simply put, there is no basis in any federal statute to conclude that Congress intended to convert the Appalachian Trail into a 2,200-mile barrier separating critical natural resources from the eastern seaboard.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 911 F.3d 150 and reproduced at Pet.App.1-66. The order denying rehearing and rehearing en banc is reprinted at Pet.App.67-68.

JURISDICTION

The Fourth Circuit issued its opinion on December 13, 2018, and denied rehearing and rehearing en banc on February 25, 2019. Petitioner timely filed its petition thereafter, which this Court granted on October 4, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Mineral Leasing Act, 30 U.S.C. §181 *et seq.*, and the National Trails System Act, 16 U.S.C. §1241 *et seq.*, are reproduced at Pet.App.237-301. Relevant excerpts are included as an appendix to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. In 1911, President William Howard Taft signed into law the Weeks Act, which empowered the Secretary of Agriculture to acquire certain lands to be "permanently reserved, held, and administered as national forest lands." 16 U.S.C. §521; 36 Stat. 963 (1911). Pursuant to that authority, the Secretary acquired many of today's major national forests, including what Congress initially established as the Shenandoah National Forest, *see* 40 Stat. 1779 (1918), later renamed the George Washington National Forest, *see* Exec. Order No. 5,867 (1932). Today, the

George Washington National Forest spans roughly one million acres of Virginia and West Virginia.

As part of the National Forest System, the George Washington National Forest falls under the jurisdiction of the Forest Service. 16 U.S.C. §1609. It is administered, in conjunction with the adjacent Jefferson National Forest, from a Forest Service office in Roanoke, Virginia. Congress has charged the Forest Service with ensuring the orderly development and use of the natural resources that national forests such as the George Washington and Jefferson contain. To that end, the Forest Service (through the Secretary of Agriculture) "is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom." *Id.* §529. That mandate to develop national forest lands stands in contrast to the Park Service's charge to conserve lands in the National Park System. Specifically, the National Park Service is charged with "conserv[ing] the scenery, natural and historic objects, and wild life" of national parks and "provid[ing] for the[ir] enjoyment ... in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. §100101.

2. In 1968, Congress enacted the National Trails System Act, a law designed "to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation." Pub. L. No. 90-543, §2, 82 Stat. 919 (1968) (codified as amended at 16 U.S.C. §1241(a)). The Trails Act contemplates a variety of different types of national

trails, some established administratively, 16 U.S.C. §1243, others by Congress itself, *id.* §1244. Congress established two such trails contemporaneously with the Trails Act: the Appalachian National Scenic Trail and the Pacific Crest National Scenic Trail. *See id.* §1244(a)(1)-(2).

National trails can (and do) traverse all manner of lands—lands separately owned and administered by the Forest Service, the Park Service, other federal agencies, states, and even private parties. The Appalachian Trail is a case in point. The Trail, clearing for which was begun in 1922 and completed in 1937, is a 2,200-mile footpath stretching from Maine to Georgia. JA76. Since its inception, the Trail has traversed federal, state, and private lands. Indeed, when it was designated a national trail in 1968, more than 65% of the Trail traversed private or state lands. *See* Nat'l Park Serv., U.S. Dep't of the Interior, *Trails for America: Report on the Nationwide Trail Study* 42 (1966); *Nationwide Sys. of Trails: Hearing on S. 827 Before the Comm. on Interior and Insular Affairs*, 90th Cong. 67 (1967). Today, the Trail winds through 14 states and crosses hundreds of miles of non-federal lands, which include private property, 60 state game lands, forests, and parks; one national wildlife refuge; six national parks; and eight national forests, including the George Washington National Forest. JA76.

Cognizant of the varying ownership of lands underlying national trails, Congress chose not to convert all lands, or even all federal lands, through which those trails pass into Forest System or Park System lands—as it did for certain national parkways,

see, e.g., Pub. L. No. 74-848, 49 Stat. 2041 (1936) (Blue Ridge Parkway); Pub. L. No. 75-530, 52 Stat. 407 (1938) (Natchez Trace Parkway)—or to put those lands under the exclusive jurisdiction of any one agency. Instead, Congress decided to give either the Secretary of the Interior or the Secretary of Agriculture, on a case-by-case basis, principal responsibility for administering the trail, without transferring ownership or authority over the lands traversed by the trail. For the Appalachian Trail, Congress chose the Secretary of the Interior, while for the Pacific Crest Trail, Congress chose the Secretary of Agriculture. In neither case, however, did Congress give the Secretary jurisdiction over the lands through which the Trail would pass.

Congress thus neither transferred parts of the George Washington National Forest to the Park Service nor transferred portions of Yosemite National Park to the Forest Service. Instead, in both cases, Congress provided that the *trail itself* shall be administered as a footpath by one Secretary in consultation with the other. 16 U.S.C. §1244(a)(1)-(2). And Congress authorized the relevant lead Secretary to establish the contours of the Trail by designating and then obtaining "rights-of-way"—not only for portions that would pass through private or state lands, but for portions that would pass through "Federal lands under the jurisdiction of another Federal agency." *Id.* §1246(a)(2). Thus, to obtain the necessary rights for the Appalachian Trail to pass through national forests, the Secretary of the Interior had to negotiate a right-of-way agreement with the Forest Service. *See id.* §1244(a)(1). And as the Trail has expanded, so too have the portions of it that pass

through Forest System lands. Today, roughly 1,000 of the Trail's 2,200 miles pass through national forest lands, pursuant to right-of-way agreements with the Forest Service. *See* Nat'l Park Service, U.S. Dep't of the Interior, *Appalachian National Scenic Trail: 2015 Business Plan* 18 (2015).

As with any other right-of-way agreement, these agreements leave ownership and jurisdiction over those Forest System lands unaffected—*i.e.*, they remain with the Forest Service. Lest there be any doubt about that, the Trails Act expressly provides: "Nothing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System." 16 U.S.C. §1246(a)(1)(A). Underscoring the point, Congress ordered whichever Secretary it charged with administering a trail to do so in cooperation and conjunction with any agencies that administer any federal lands the trail traverses. For example, the Secretary must "establish an advisory council" that includes "the head of each Federal department … administering lands through which the trail route passes." *Id.* §1244(d). And the Secretary may not issue regulations governing the trail without the "concurrence of the heads of any other Federal agencies administering lands through which [the] trail passes." *Id.* §1246(i). The Trails Act thus preserves, rather than overrides, the land management responsibilities that preceded it.

That treatment of federal lands stands in stark contrast to Congress' approach in other statutes. Notably, on the same day that it enacted the Trails

Act, Congress enacted the Wild and Scenic Rivers Act ("Rivers Act"), Pub. L. No. 90-542, §6, 82 Stat. 906, 912 (1968). Unlike the Trails Act, which goes out of its way to make clear that it was *not* effectuating any transfers of jurisdiction over lands through which a national trail passes, the Rivers Act expressly provides that "[a]ny component of the national wild and scenic rivers system that is administered by the Secretary of the Interior through the National Park Service *shall become a part of the national park system*." 16 U.S.C. §1281(c) (emphasis added). The Rivers Act also provides a mechanism through which agencies with jurisdiction over federal lands that are designated part of the National Wild and Scenic Rivers System may transfer their jurisdiction to the Secretary of Agriculture, at which point the lands will "become national forest lands." *Id.* §1277(e). Congress was thus well aware of how to transfer ownership and jurisdiction of federal lands from one agency to another. It chose to do so in the Rivers Act, but not in the contemporaneously enacted Trails Act.

Today, some national trails are administered by the Bureau of Land Management ("BLM"), some by the Park Service, and some by the Forest Service. *See* 16 U.S.C. §1244. As these agencies have repeatedly made clear—including in the specific context of the Appalachian Trail—each agency's administration of *the trail* does not change the nature of the underlying lands or override the administrative powers and responsibilities of other agencies over lands through which the trail passes.

For example, the Park Service, to which the Secretary of the Interior has designated his statutory

responsibility to administer the Appalachian Trail, has repeatedly explained: "While responsibility for overall Trail administration lies with the National Park Service, land-managing agencies retain their authority on lands under their jurisdiction." Nat'l Park Serv., *Appalachian Trail Management Plan* 12-13 (1981); Nat'l Park. Serv., *Appalachian Trail Management Plan* III-1 (2008); General Regulations for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252-01, 30,253 (June 30, 1983); Director's Order No. 45: National Trails System, 6-8 (2013); Dep't of the Interior, *710 Department Manual* 1.4(C)(4) (1977). The Forest Service likewise has confirmed that it retains its duty and power to administer and manage the Forest System lands through which the Trail passes. *See, e.g.*, Forest Service Manual 1531.32a, at ¶9 (2004), *available at* https://bit.ly/2xcwcr9. And the two agencies have long agreed that in working to execute the Trails Act, they retain their "rights … to manage the lands and programs, administered by them in accordance with their other basic land management responsibilities." Dep't of Interior & Dep't of Agric. Mem. of Understanding 6 (1970). Accordingly, while the Appalachian Trail passes through (among others) the George Washington National Forest, those parts of the forest that it traverses remain, as they always have been, "permanently reserved, held, and administered as national forest lands." 16 U.S.C. §521.

3. Which agency has jurisdiction over federal lands through which a national trail passes has important implications for which agency, or whether any agency, may grant rights-of-way pursuant to the MLA for pipelines to cross beneath a trail. The MLA

generally authorizes "the Secretary of the Interior or appropriate agency head" to grant "[r]ights-of-way through any Federal lands … for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom." 30 U.S.C. §185(a). Thus, as a general matter, federal agencies may grant rights-of-way for pipelines to cross the federal lands under their jurisdiction. For example, the Forest Service generally may grant rights-of-way across Forest System lands, and the Secretary of Interior may grant rights-of-way across BLM lands.

There is, however, an exception for Park System lands, as the MLA defines "Federal lands" as "all lands owned by the United States *except lands in the National Park System*, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf." *Id.* §185(b) (emphasis added). Congress can specifically authorize the Park Service to grant rights-of-way on Park System lands. It has done so, for example, with respect to the Blue Ridge Parkway, which is located on Park System lands and largely parallels the Appalachian Trail for over 400 miles. 16 U.S.C. §460a-3. But as that separate grant of statutory power reflects, if lands are National Park System lands, then the power to grant rights-of-way for pipelines must come from some authority other than the MLA, like a separate Act of Congress.

Consistent with the understanding that the Trails Act does not alter agency jurisdiction over the lands through which a national trail passes, or convert lands underlying a trail administered by the Secretary of the Interior into Park System lands, the Forest Service

has long taken the position that it may grant rights-of-way to cross Forest System lands through which a trail passes, including lands traversed by the Appalachian Trail. The Forest Service has granted such rights-of-way for a variety of purposes, including pipelines. More than 50 pipelines presently cross Forest System lands beneath the Trail, and the Forest Service has granted rights-of-way for pipelines to do so. *See, e.g.*, FERC, Giles Cty. Project Envtl. Assessment, Dkt. No. CP13-125-000 (Nov. 2013), at *5; Dep't of Agric., Mountain Valley Pipeline Project Record of Decision (Dec. 2017), *22-24, *available at* https://bit.ly/35fkn2k. The Forest Service also has granted dozens of rights-of-way for electrical transmission lines, telecommunications sites, municipal water facilities, roads, and grazing areas on Forest System lands through which the Trail passes, again on the understanding that nothing in the Trails Act divests the Forest Service of its longstanding jurisdiction over such lands.

B. Factual Background

In recent years, the mid-Atlantic region has seen demand for energy increase significantly. The United States Energy Information Administration sees that trend continuing; the agency estimates a 29 percent increase in usage by 2040. *See* Atlantic Coast Pipeline, *Powering the Future, Driving Change Through Clean Energy* 4, https://bit.ly/2XrKxfF (last visited Nov. 30, 2019) [hereinafter *Powering the Future*]. In response to public demand for clean-burning fuel, in 2014 Atlantic proposed to build a 600-mile pipeline to carry natural gas from Harrison County, West Virginia, to eastern portions of Virginia

and North Carolina. Pet.App.2-3. The pipeline will draw from the Marcellus and Utica shale formations, which, taken together, constitute one of the largest natural gas deposits in the world.

The Federal Energy Regulatory Commission (FERC) certified the necessity of the pipeline, approved its route, and authorized Atlantic to obtain the necessary rights-of-way. *See* JA30-46. As designed, the pipeline will be capable of transporting up to 1.5 billion cubic feet of natural gas per day and, as FERC found, will develop "gas infrastructure that will serve to ensure future domestic energy supplies and enhance the pipeline grid by connecting sources of natural gas to markets." JA30, 35-36. The pipeline's planned route crosses five noncontiguous miles of the Monongahela National Forest and 16 noncontiguous miles of the George Washington National Forest. Pet.App.84. Within the George Washington National Forest, approximately 700 feet beneath the surface, the pipeline would cross beneath a 0.1-mile segment of the Trail. JA69-73, 147.

Atlantic engaged in an arduous regulatory process involving many state and federal agencies, including FERC, the Forest Service, and the Park Service. They all approved the project. FERC, after consulting with the Forest Service and the Park Service, published an Environmental Impact Statement ("EIS") and issued a certificate of public convenience and necessity authorizing Atlantic to obtain the necessary rights-of-way and to construct and operate the pipeline. JA41-46, 51. The Forest Service adopted FERC's EIS and issued a Record of Decision and a Special Use Permit "authorizing

Atlantic to use and occupy NFS land to construct, operate, maintain, and eventually decommission a natural gas pipeline, the ACP Pipeline Project, on NFS lands administered by the MNF and GWNF." Pet.App.72, 84-86; *see* JA47.

As part of its application, and consistent with the longstanding understanding and universal practice of the federal government, Atlantic sought rights-of-way from the Forest Service to cross five miles of the Monongahela National Forest and 16 miles of the George Washington National Forest, including the segment of the latter through which the Appalachian Trail passes. JA60. Relying on the MLA, the Forest Service granted those rights-of-way. Pet.App.84-85; JA49. The Park Service likewise issued Atlantic a right-of-way to cross the Blue Ridge Parkway. JA90-91; Nat'l Park Serv., Right of Way Permit No. 5-140-1945 (Dec. 12, 2017). All told, Atlantic and its affiliates obtained 33 separate regulatory approvals from more than a dozen federal and state agencies, as well as numerous local approvals.

C. Proceedings Below

Throughout its efforts to secure the necessary approvals to build the pipeline, Atlantic has faced opposition and litigation by environment groups at every turn. *See, e.g.*, *Sierra Club* v. *U.S. Dept. of the Interior*, 899 F.3d 260 (4th Cir. 2018). The Forest Service approval proved no exception. Almost as soon as the Forest Service granted Atlantic the rights-of-way, a contingent of environmental groups ("respondents") petitioned the Fourth Circuit to vacate the agency's decision.

Respondents claimed that the Forest Service's decision-making process was deficient in numerous respects under the National Environmental Policy Act, 42 U.S.C. §4321 *et seq.*, the National Forest Management Act, 16 U.S.C. §1604, and the Administrative Procedure Act, 5 U.S.C. §500 *et seq.* These challenges largely attacked the technical sufficiency of the agency's assessment of impacts the pipeline might have on Forest Service lands. Not content with raising procedural roadblocks, however, respondents also asserted a novel *substantive* barrier to the pipeline: In their view, the MLA prohibits *any* agency from granting a right-of-way across federal lands through which the Appalachian Trail passes because the Park Service not only administers the Trail, but has assumed jurisdiction over all lands through which the Trail passes. In other words, respondents maintain that the Trails Act implicitly converted the entirety of the lands through which the Trail passes into National Park System lands—regardless of which agency previously possessed jurisdiction over those lands.

The Fourth Circuit granted the petition in whole, faulting the Forest Service in multiple respects. The court variously criticized the agency for a supposed change of "tenor" during its administrative review, and for modifying its views about how much information it would need to reach a decision. Pet.App.11. For example, the court objected that the Forest Service initially had asked Atlantic to present ten studies about landslide risks, but ultimately approved the pipeline after reviewing only two of these studies (though still requiring review and approval of the other eight as a precondition to construction).

Pet.App.46-49. Taking judicial notice of a newspaper article discussing a landside that had occurred in connection with an unrelated pipeline during briefing, which the court took as evidence that pipelines are inherently unsafe, the court concluded that the Forest Service's analysis of landslide risks was "insufficient." Pet.App.48-49 & n.6. The court concluded its decision by chiding the Forest Service for having "abdicated its responsibility" to "'speak for the trees, for the trees have no tongues.'" Pet.App.66 (quoting Dr. Seuss, *The Lorax* (1971)).

Like respondents, the Fourth Circuit did not content itself with identifying perceived procedural faults that could be fixed in further agency proceedings. Instead, it went on to impose the substantive barrier respondents sought. The court first put particular emphasis on the fact that "[t]he MLA specifically excludes *lands* in the National Park System from the authority of the Secretary of the Interior 'or appropriate agency head' to grant pipeline rights of way." Pet.App.59 (quoting 30 U.S.C. §185(a)). In the court's view, by giving the Secretary of the Interior authority to administer the Appalachian Trail, the Trails Act converted all of the Forest System lands through which the Trail passes into "National Park System land" across which an agency may not grant a right-of-way under the MLA. Pet.App.57-61. Thus, notwithstanding the Weeks Act's dictate that the George Washington National Forest "shall be permanently reserved, held, and administered as national forest lands," 16 U.S.C. §521, and the Trails Act's express admonition that it should not be read to "transfer among Federal agencies any management responsibilities," *id.* §1246(a)(1)(A), the

court nonetheless concluded that the latter implicitly abrogated the former.

The decision below does not stand alone, but is part of a pattern of Fourth Circuit decisions frustrating this pipeline and others like it. As noted, the Atlantic Coast Pipeline required a host of federal approvals, and environmental groups have brought successful petitions challenging many of those approvals before this same panel. For example, last year the same panel ruled against the pipeline on multiple occasions, concluding, *inter alia*, that the United States Fish and Wildlife Service's issuance of an Incidental Take Statement was arbitrary and capricious. *See Sierra Club*, 899 F.3d at 266. Even after the agency addressed the perceived deficiencies, the Fourth Circuit stayed the agency's action without explanation. *See* Order Granting Mot. for Stay, *Defs. of Wildlife v. U.S. Dept. of the Interior,* No. 18-2090 (4th Cir. Dec. 7, 2018).

A second ruling found the Park Service's grant of a right-of-way underneath the Blue Ridge Parkway to be arbitrary and capricious. Although the Blue Ridge Parkway Organic Act expressly empowers the Park Service to grant rights-of-way to cross the Parkway, 16 U.S.C. §460a-3, the panel nonetheless faulted the Park Service for insufficiently "explain[ing] how the pipeline crossing is not inconsistent with the purposes of the Parkway and the overall National Park System." *Sierra Club*, 899 F.3d at 266. As a result, the court vacated the decisions of both agencies. *See id.* at 295. Most recently, the court vacated the Fish and Wildlife Service's second-round Biological Opinion and Incidental Take Statement for the

project, remanding yet again for further agency proceedings. *See Defs. of Wildlife v. U.S. Dept. of the Int.*, 931 F.3d 339 (4th Cir. 2019).[1]

SUMMARY OF ARGUMENT

More than a century ago, Congress declared that lands like those comprising the George Washington National Forest "shall be permanently reserved, held, and administered as national forest lands." 16 U.S.C. §521. Nothing in the ensuing century has stripped the Forest Service of jurisdiction over those lands. Indeed, far from disturbing the Forest Service's jurisdiction over national forest lands through which a trail passes, the Trails Act merely confers administrative authority over the trail itself. Even after a trail is designated and its contours established, the federal agency with administrative authority over the trail must negotiate and obtain a right-of-way from the private owner or federal or state agency with authority over the lands themselves. And that right-of-way grants just that: a right-of-way through the lands, with ownership or jurisdiction over the lands undisturbed.

The Trails Act expressly confirms as much with respect to federal lands: "Nothing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System."

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[1] The pending Mountain Valley Pipeline project has suffered a similar fate. *See Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 595-96 (4th Cir. 2018), *reh'g granted in part*, 739 F. App'x 185 (4th Cir. 2018); *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 639 (4th Cir. 2018).

Id. §1246(a)(1)(A). And multiple provisions of the Act reinforce that command by repeatedly making clear that administration of a *trail* and jurisdiction over the lands through which that trail passes are decidedly not one and the same. It is no wonder, then, that Congress, the Forest Service, the Park Service, and other federal agencies have long operated on the understanding that the Trails Act does not impliedly repeal the Weeks Act or strip federal agencies of their jurisdiction over federal lands through which the Appalachian Trail passes.

That result is confirmed not just by the canon against implied repeals, but by the broader statutory context. On the same day that it enacted the Trails Act, Congress embraced a very different approach in the Rivers Act, making crystal clear that it knew how to effect a land transfer between federal agencies and did not do so in the Trails Act. Just a few days later, Congress authorized an extension of the Blue Ridge Parkway in a manner that made clear that it understood that national forest lands traversed by the Appalachian Trail remained under the jurisdiction of the Forest Service. Congress also ensured that the Parkway, which is National Park System land, would not be a 469-mile barrier to development. Given that the Trail runs in close parallel to the Parkway, the notion that Congress intended to make the Trail a 2,200 barrier to such development through the subtle stratagem of giving the Park Service authority to administer it as a footpath beggars belief.

Notwithstanding the wealth of statutory text, structure, and context supporting the commonsense result that the lands at issue here remain national

forest lands, the Fourth Circuit reached the contrary result. That decision is wrong at every turn. It misreads Park Service statements and the Park Service Act. It gives short shrift to the uniform position of the federal government that the Forest Service has jurisdiction to grant rights-of-way. It ignores the fundamental distinction between administrative responsibility over the Trail itself and the jurisdiction and ownership of the lands the Trail crosses. And the court's ultimate conclusion that Congress created a 2,200-mile barrier to pipeline rights-of-way via some combination of a definitional provision in the Park Service Act and the assignment of administrative responsibilities for the Trail ignores basic principles of statutory construction.

The decision below not only is irreconcilable with the text, structure, and context of the Trails Act, but produces results that simply do not make sense. For one, its logic would effect a massive land transfer, as it would convert *all* lands through which the Appalachian Trail passes—including the hundreds of miles of state and private lands—into Park System lands. The Fourth Circuit's reading likewise would empower the Secretary of Agriculture to grant pipeline rights-of-way through national parks like Yosemite and Sequoia because the Forest Service administers a trail that traverses them. On top of all that, the Fourth Circuit's decision not only imperils the billions of dollars of economic benefits that this pipeline would generate and future pipeline projects that would cross beneath the Trail, but also calls into question the 50-some pipelines that *already* cross beneath the Trail and the many approvals the Forest Service has granted for electrical transmission lines,

telecommunications sites, municipal water facilities, roads, and grazing areas to cross parts of national forests through which the Appalachian Trail or another national trail passes. The Court should reject respondents' novel effort to convert the entirety of the Appalachian Trail into National Park System lands and confirm that the lands in the George Washington National Forest through which the Trail passes remain, as they always have been, "permanently reserved, held, and administered as national forest lands." 16 U.S.C. §521.

ARGUMENT

I. The Forest Service Has Jurisdiction Over, And The Power Under The MLA To Grant Rights-Of-Way To Cross, Forest System Lands Through Which A National Trail Passes.

The decision below rests on the proposition that by giving the Secretary of Interior the authority to administer the Appalachian Trail as a footpath under the Trails Act, Congress transformed the 2,200 miles of federal, state, and private lands through which the Trail passes into National Park System lands, with the specific consequence that no federal agency can grant a pipeline right-of-way under the MLA for the length of the Trail. That conclusion is demonstrably incorrect. The Trails Act makes clear that it provides administrative authority over the footpath itself, but does not divest federal agencies of ownership or jurisdiction over federal lands through which a national trail passes.

The text and structure of the Trails Act leave no room for doubt on that score, and canons of

constructions and related statutes only confirm that conclusion. Congress "permanently reserved" the lands at issue here as "national forest lands" when they were acquired nearly 100 years ago, and nothing in the Trails Act or any other statute repealed that permanent reservation or transferred the lands to another agency. Moreover, the Trails Act stands in stark contrast to the many federal statutes—including one enacted *the very same day*—confirming that when Congress wants to transfer jurisdiction over federal lands to a different federal agency, it says so expressly. In the Trails Act, Congress not only did not say so; it said the opposite. Congress underscored that the Forest Service remains in control of lands traversed by the Appalachian Trail in legislation addressing the Blue Ridge Parkway and preserved the possibility of pipeline crossings of the Parkway that parallels the Trail for hundreds of miles. All relevant tools of statutory construction thus lead to the same result: The national forest lands through which the Appalachian Trail passes remain national forest lands as to which the Forest Service may permissibly grant pipeline rights-of-way under the MLA.

A. The Trails Act Expressly Preserves the Jurisdiction of Federal Agencies Over Federal Lands Through Which a National Trail Passes.

The MLA authorizes "the Secretary of the Interior or appropriate agency head" to grant "[r]ights-of-way through any Federal lands … for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom." 30 U.S.C. §185(a). The statute identifies

the "appropriate agency head" as the head of whichever agency "has jurisdiction over" the federal lands at issue. *Id.* §185(b). When it comes to the George Washington National Forest, that agency is the Forest Service. Congress declared over a century ago in the Weeks Act that all of the lands that are now the George Washington National Forest "shall be permanently reserved, held, and administered as national forest lands." 16 U.S.C. §521. As national forest lands, those lands are obviously subject to the jurisdiction of the Forest Service, which hence has the power under the MLA to grant rights-of-way for pipelines to cross them.

The fact that the particular segment at issue here is traversed by the Appalachian Trail does not alter that straightforward conclusion, for a national trail designation does not convert national forest lands into national park lands or otherwise transfer ownership or jurisdiction from one agency to another.[2] The Trails

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[2] When it comes to federal lands and which federal agency controls them, concepts of ownership and jurisdiction are largely interchangeable. As a technical manner, federal lands are owned by the United States government, rather than a particular agency. At the same time, it is often important to know which federal agency has the jurisdiction to exercise the incidents of ownership, like granting rights-of-way. Moreover, as this case demonstrates, the status of federal lands as national forest lands versus national park lands can have important consequences. While it may be more technically accurate to refer to particular agencies as having jurisdiction over the lands, "'[j]urisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings.'" *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90 (1998)). And the kind of jurisdiction that matters here is jurisdiction to

Act could not be clearer about that, as it expressly provides: "Nothing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System." *Id.* §1246(a)(1)(A). Accordingly, while the Trails Act provides that the "Appalachian Trail shall be administered primarily as a footpath by the Secretary of the Interior, in consultation with the Secretary of Agriculture," *id.* §1244(a)(1), that designation of responsibility to administer *the Trail* did not convert any (let alone all) of the lands through which the Trail passes into Park System lands. The portions of the George Washington National Forest that the Trail traverses instead remain what they were permanently reserved as nearly a century ago: national forest lands over which the Forest Service has jurisdiction.

That conclusion is reinforced by the manner in which trails are designated and established under the Trails Act. The designation of a trail, either by Congress or by agency process, does not automatically transfer any lands or even create any rights-of-way for the trail. Rather, the designation sets forth the basic parameters of the trail and authorizes the Secretary with administrative responsibility for the trail to establish its contours and then obtain the rights-of-way necessary for the public to use it. *See* 16 U.S.C. §1246(a). Neither step transfers jurisdiction or ownership of the lands traversed by the trail. The designation itself self-evidently does not have that

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exercise the incidents of ownership—or what might simply be called ownership in the context of non-governmental parties.

effect, or there would be no need for the Secretary to separately negotiate rights-of-way from state or private owners or other federal agencies through whose property the trail will pass. And the right-of-way that the Secretary ultimate obtains—*i.e.*, a "right to pass through property owned by another," Black's Law Dictionary (11th ed. 2019)—merely grants a right-of-way without transferring a broader property interest or control over the property.

The Appalachian Trail is a case in point: The Trail traverses 60 state game lands, forests, and parks; one national wildlife refuge; six national parks; eight national forests; and privately held lands. JA76. The many miles of state and private lands that are part of the Trail did not become federal lands (let alone a national park) when they were designated part of the Trail's route; instead, the Secretary of Interior was authorized to negotiate a right-of-way with each land owner, and those rights-of-way left ownership of and jurisdiction over the lands undisturbed. 16 U.S.C. §1246(a)(2).[3]

Just so with the federal lands through which a national trail passes. When the Secretary charged with administering a trail wants to give effect to a trail designation by establishing a trail route over "Federal lands under the jurisdiction of another Federal

[3] Underscoring this point, the Trails Act separately authorizes whichever Secretary is designated to administer a trail to "accept title to any non-Federal property within the right-of-way" that comprises the trail should an owner wish to transfer it—a power that would be unnecessary if the mere designation of lands as part of a trail or negotiation of a right-of-way rendered them federal lands. *Id.* §1246(f)(1).

agency," the Secretary must negotiate a right-of-way with "the head of that agency." *Id.* And when that right-of-way for the footpath is secured, ownership of and jurisdiction over the lands is undisturbed. The designation of a trail thus carefully preserves both land ownership of private parties and the jurisdiction of federal agencies over the federal lands the trail traverses. That is evident in how the Act repeatedly describes such lands—*i.e.*, as "lands through which the trail route passes," *id.* §1244(d), not as "National Trails System lands" (or Park System lands). *See also, e.g.*, *id.* §§1244(b), 1246(i).

The manner in which trails are administered under the Trails Act likewise evinces Congress' careful efforts to protect and respect the jurisdiction of federal agencies over federal lands through which trails pass. For instance, the Secretary charged with administering a trail must "establish an advisory council" that includes "the head of each Federal department … administering lands through which the trail route passes." *Id.* §1244(d)(1). That Secretary may not issue regulations governing the trail without the "concurrence of the heads of any other Federal agencies administering lands through which [the] trail passes." *Id.* §1246(i). That lack of unilateral regulatory power would be inexplicable if either trail designation or negotiation of a right-of-way *ipso facto* transferred jurisdiction or ownership. And there are a host of contexts in which that Secretary must consult with and/or obtain the consent of the heads of agencies administering lands through which the trail passes. *See, e.g.*, *id.* §1244(b) (Secretary shall study "feasibility and desirability of designating other trails … in consultation with the heads of other

Federal agencies administering lands through which such additional proposed trails would pass"); *id.* §1244(e) (Secretary "shall, after full consultation with affected Federal land managing agencies … submit … a comprehensive plan for the acquisition, management, development, and use of the trail"); *id.* §1246(b) (Secretary may relocate segments of a trail only with "the concurrence of the head of the Federal agency having jurisdiction over the lands involved"). All of these provisions would be meaningless if designating federal lands part of a trail route ousted other federal agencies of jurisdiction over those lands.

In short, at every turn, the Trails Act confirms what §1246(a)(1)(A) makes explicit: "Nothing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System." *Id.* §1246(a)(1)(A). The Trails Act thus neither alters the character of Forest System lands through which a trail passes, nor divests the Forest Service of its powers with respect to Forest System lands under "other laws"—like its power under the MLA to grant rights-of-way for pipelines to cross such lands.

That straightforward textual conclusion is powerfully reinforced by the canon against implied repeals. Congress declared more than a century ago that the lands comprising the George Washington National Forest (and other lands acquired pursuant to the Weeks Act) "shall be permanently reserved, held, and administered as national forest lands." 16 U.S.C. §521. Nothing Congress has done since then,

including enacting the Trails Act, has altered that permanent reservation of the lands at issue here "as national forest lands," let alone done so clearly. As this Court recently reaffirmed, "[w]hen confronted with two Acts of Congress allegedly touching on the same topic, [a court] is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 168, 172 (2012). Far from speaking in the unambiguous terms necessary to override the statutory command that the lands here be "permanently reserved" as "national forest lands," the Trails Act expressly leaves that earlier statutory command undisturbed.

B. Comparison to Other Laws Confirms That the Trails Act Does Not Divest Federal Agencies of Jurisdiction Over Federal Lands Through Which a Trail Passes.

It is clear on the face of the Trails Act that the Act does not deprive federal agencies of jurisdiction over federal lands through which a national trail passes. But that conclusion is particularly obvious when the Trails Act is contrasted with other federal laws—including laws enacted simultaneously—in which Congress took a decidedly different approach.

Take, for instance, the Rivers Act, which was enacted *the same day* as the Trails Act. The Rivers Act empowers the Secretaries of the Interior and Agriculture to establish the National Wild and Scenic Rivers System—not by negotiating rights-of-way, but

by acquiring federal lands. *See* 16 U.S.C. §1277. And when it comes to lands already owned by the federal government, the Rivers Act authorizes "[t]he head of any Federal department or agency having administrative jurisdiction over any lands" within the National Wild and Scenic Rivers System "to transfer to the appropriate secretary jurisdiction over such lands." *Id.* §1277(e). Where the "appropriate secretary" to whom those federal lands are transferred is the Secretary of Agriculture, then the lands "shall upon such acquisition or transfer become national forest lands." *Id.* Conversely, "[a]ny component of the national wild and scenic rivers system that is administered by the Secretary of the Interior through the National Park Service shall become a part of the national park system." *Id.* §1281(c). There is no comparable language in the Trails Act about other federal lands "becom[ing]" national forest lands or part of the National Park System. As the Rivers Act thus confirms, the Congress that enacted the Trails Act knew full well how to transfer jurisdiction over federal lands when establishing a new federal land system—and it chose not to do so in the Trails Act.

Congress has enacted numerous other statutes, both before and after the Trails Act, that, like the Rivers Act—but unlike the Trails Act—explicitly transfer lands to a federal agency or give agencies the power to effect such a transfer. In 1952, for example, Congress authorized the Secretary of the Interior "to transfer to the jurisdiction of the Secretary of Agriculture for national forest purposes lands or interests in lands acquired for or in connection with the Blue Ridge Parkway." Pub. L. No. 82-336, 66 Stat. 69 (1952). In so doing, Congress made clear that

"[l]ands transferred under this section shall become national forest lands subject to all laws, rules, and regulations applicable to lands acquired pursuant to the Weeks Law." *Id.*

In the years immediately preceding the Trails Act, Congress directed or authorized numerous land transfers between the Departments of Interior and Agriculture. In 1964, Congress authorized the Secretary of Agriculture to transfer lands from the Cherokee National Forest in Tennessee to the Secretary of the Interior to expand the Great Smoky Mountains National Park to accommodate the Foothills Parkway—a "scenic parkway" authorized by Congress two decades prior. *See* Pub. L. No. 88-415, 78 Stat. 388 (1964). Similarly in 1966, Congress authorized the Secretary of the Interior to transfer to the Secretary of Agriculture "lands under his jurisdiction that are needed in connection with the development and management of the recreation resources of the Dillon Reservoir." Pub. L. No. 89-446, 80 Stat. 199 (1966).

The prior year, Congress authorized the Secretary of the Interior "to transfer jurisdiction over project lands within or adjacent to the exterior boundaries of national forests and facilities thereon to the Secretary of Agriculture for recreation and other national forest system purposes," and declared that lands transferred pursuant to that authorization "shall become national forest lands." Pub. L. No. 89-72, §7, 79 Stat. 213, 217 (1965). Notably, however, Congress also directed that water resource projects on such transferred lands "shall continue to be administered by the Secretary of the Interior." *Id.* §7(c). As these and other statutes

confirm, when Congress wants to transfer federal lands and change their character to or from national forest lands, Congress says so explicitly. Conversely, when Congress wants to give an agency administrative responsibility over a particular *use* of federal lands without giving that agency jurisdiction over the lands themselves, it says so. In the Trails Act, Congress took the latter approach.

C. Congress and Federal Agencies Have Consistently Agreed That the Trails Act Leaves Preexisting Jurisdiction Over Federal Lands Undisturbed.

In harmony with the text, structure, and history of the statute, both Congress and the agencies tasked with administrating the Trails Act have repeatedly expressed their view that the Act does not deprive federal agencies of jurisdiction over federal lands through which a national trail—and the Appalachian Trail in particular—passes. Indeed, Congress evinced that understanding a mere week after the Trails Act was enacted, in legislation expanding the Blue Ridge Parkway, and it did so again when amending the Trails Act 15 years later.

1. First established in 1936, the Blue Ridge Parkway, which links Shenandoah National Park in Virginia to Great Smoky Mountains National Park in North Carolina, now extends 469 miles, offering some of the most beautiful scenic views in the United States. In 1968, just one week after it enacted the Trails Act and designated the Appalachian Trail a national trail to be administered by the Secretary of the Interior, Congress directed that the Parkway be extended. *See* Pub. L. No. 90-555, §1, 82 Stat. 967, 967 (1968),

codified at 16 U.S.C. §460a-6. To accomplish this task, Congress authorized the Secretary of the Interior to "relocate and reconstruct portions of the Appalachian Trail, including trail shelters, that may be disturbed by the parkway extension … *upon national forest lands* with the approval of the Secretary of Agriculture." 16 U.S.C. §460a-7(3) (emphasis added). Thus, just days after enacting the Trails Act and designating the Appalachian Trail as a footpath to be administered by the Secretary of the Interior, Congress described parts of the Trail as "national forest lands," making clear its understanding that Forest Service lands traversed by the Trail retained their character as "national forest lands."

Congress' treatment of the Blue Ridge Parkway reinforces the conclusion that the Trails Act left the status of national forest lands traversed by the Trail undisturbed in another important respect. Unlike the Trail, the Parkway is expressly designated Park System lands: "All lands and easements heretofore or hereafter conveyed to the United States by the States of Virginia and North Carolina for the right-of-way for the projected parkway … shall be known as the Blue Ridge Parkway and shall be administered and maintained by the Secretary of the Interior through the National Park Service, subject to the provisions of the" Park Service Act. 16 U.S.C. §460a-2. But to ensure that the Parkway would not be an obstacle to development of surrounding lands, Congress expressly gave the Park Service authority to grant rights-of-way through the Blue Ridge Parkway: "[T]he Secretary of the Interior may issue revocable licenses or permits for rights-of-way over, across, and upon parkway lands … for such purposes and under such

nondiscriminatory terms, regulations, and conditions as he may determine to be not inconsistent with the use of such lands for parkway purposes." *Id.* §460a-3.

The Parkway and the Appalachian Trail parallel each other for the entirety of the Parkway's 469-mile length. It is inconceivable that Congress would have made a careful point of ensuring that rights-of-way would be available to cross the former, only to render the latter a permanent and much longer barrier to pipeline rights-of-way. Indeed, given the proximity of the two, the congressionally authorized rights-of-way for the Parkway would be practically worthless if the Trail were a barrier. The Atlantic Coast Pipeline, for instance, would cross under both the Parkway and the Trail in the same bore, yet the Fourth Circuit's view would mean that it can bore under the former but not the latter. There is simply no basis to interpret the Trails Act as implicitly eviscerating the same power that Congress expressly granted with respect to the parallel Blue Ridge Parkway.

Congress reinforced its understanding that trail designations did not transfer jurisdiction or ownership of lands traversed by a trail 15 years after enacting the Trails Act and the Blue Ridge Parkway extension, when it added to the Trails Act the proviso now found in §1246(a)(1)(A)—*i.e.*, "[n]othing contained in this Act shall be deemed to transfer among Federal agencies any management responsibilities" over lands through which trails run. Pub. L. No. 98-11, 97 Stat 42 (1983). As the committee report recommending passage of that bill explained, this provision was designed to ensure that "[n]o presumption is to be made that a trail designation carries with it any transfer of

management responsibility for affected federal lands." H.R. Rep. No. 98-28, at 5 (1983). Yet that is the precise presumption that underlies the decision below.

2. The Departments of Interior and Agriculture likewise have consistently agreed—often against their own interests—that the Trails Act does not deprive federal agencies of their preexisting jurisdiction over federal lands through which a national trail passes. And each department has long taken that position as to the Appalachian Trail itself.

For instance, the Forest Service Manual explains that "significant portions of the Appalachian National Scenic Trail traverse lands under the separate administrative jurisdictions of the National Park Service and the Forest Service, as well as privately owned lands within the exterior boundaries of units administered by those Services." *Forest Service Manual* 1531.32a, at 9 (2004) (containing 1970 "Memorandum of Agreement Concerning Appalachian National Scenic Trail" with Park Service). The Park Service likewise has stated time and again that "[w]hile responsibility for overall Trail administration lies with the National Park Service, land-managing agencies retain their authority on lands under their jurisdiction." Nat'l Park Serv., *Appalachian Trail Comprehensive Plan* 12-13 (1981); *see also, e.g.*, Nat'l Park. Serv., *Appalachian Trail Management Plan* III-1 ("[T]he Appalachian Trail … crosses an extensive land base administered by many other federal and state agencies," with each entity managing its segment "in accordance with its own administrative jurisdictional responsibilities.").

Indeed, the Park Service has stated unambiguously that the Appalachian Trail is "'multi-jurisdictional,'" with only select "segments of the trail under the primary land management responsibility of the National Park Service." 48 Fed. Reg. at 30,253; *see* Director's Order No. 45, at 6-8; *710 Department Manual* 1.4(C)(4). And the Forest Service has exercised its jurisdiction over parts of the Trail (and other trails) that pass through national forests to grant rights-of-ways pursuant to the MLA. *See, e.g.*, FERC, Giles Cty. Project Envtl. Assessment, Dkt. No. CP13-125-000 (Nov. 2013), at *5. If the Trails Act really had effectuated a massive land transfer between federal agencies and impliedly repealed the Weeks Act with respect to "national forest lands" traversed by the Trail, it seems likely that the affected federal agencies would have noticed. In fact, as numerous agency statements and actions confirm, Congress enacted the Trails Act to encourage the creation of national trails, not to reallocate primary authority over long-established federal lands—let alone to convert lands "permanently reserved, held, and administered as national forest lands," 16 U.S.C. §521, into National Park System lands.

II. The Fourth Circuit's Decision Converting The Entirety Of The Appalachian Trail Into Park System Lands Is Wrong At Every Turn.

Notwithstanding the wealth of evidence to the contrary, the Fourth Circuit adopted the novel conclusion that the Trails Act converts all lands through which the Appalachian Trail passes into Park System lands, and hence ousts the Forest Service (and all other federal agencies) of the power under the MLA

to grant pipeline rights-of-way beneath the Trail. That conclusion cannot be reconciled with the text, structure, or history of the Trails Act or any other statute to which the court pointed.

A. The Fourth Circuit's Decision Cannot Be Squared With the MLA, the Trails Act, or the Park Service Act.

According to the Fourth Circuit, the entire Appalachian Trail is National Park System lands exempted from the MLA's general authorization for federal agencies to grant rights-of-way for pipeline purposes. *See* 30 U.S.C. §185(b) (defining "Federal lands" as, *inter alia*, "all lands owned by the United States except lands in the National Park System"). Indeed, the Fourth Circuit purported to view the Trail's status as Park System lands as largely uncontested, because a portion of FERC's final EIS regarding the pipeline noted that the Park Service had told FERC that "'the entire [Appalachian National Scenic Trail] corridor [is] part of the ANST park unit' and a 'unit' of the National Park System." Pet.App.57. In the Fourth Circuit's view, that characterization constituted an admission that all of the lands traversed by the Trail are Park System lands, rather than, for example, "national forest lands."

That reasoning fatally conflates the question of who administers *the Trail* with the question that matters under the MLA—namely, whether *the federal lands* through which the right-of-way is sought are national forest lands or Park Service lands. 30 U.S.C. §185(b). As the Trails Act makes crystal clear, the answer to that question is dictated by the character of those federal lands before the Trail was established

and by which agency has overall "jurisdiction over" the lands, not by which agency is tasked with administering the Trail. *See, e.g.*, 16 U.S.C. §1246(a)(1)(A).

Indeed, the notion that the designation of the Appalachian Trail converted Forest Service lands through which the Trail passes into Park System lands is belied by the very manner in which the trail was established. Just as with any other national trail, to establish the Appalachian Trail, the Secretary with lead administrative authority over the newly designated trail (here, the Secretary of the Interior) had to obtain *rights-of-way* to pass through any lands designated for inclusion in the Trail route that were not under the Secretary's own jurisdiction—including rights-of-way from the Forest Service to pass through Forest System lands. *See* 16 U.S.C. §§1244(a)(1), 1246(a)(2). It is nonsensical (not to mention fundamentally at odds with the Weeks Act and the very notion of a right-of-way) to contend that by obtaining a right-of-way from the Forest Service for the Trail to pass through national forest lands, the Secretary of the Interior not only obtained a right-of-way but converted the lands into Park System lands, and in doing so eliminated the Forest Service's jurisdiction to grant rights-of-way. It is of course possible to transfer ownership or jurisdiction over lands from one entity to another, but such a transfer is not effectuated by the mere grant of a right-of-way.

Unsurprisingly, the Park Service said nothing to the contrary in the statements on which the Fourth Circuit relied. While the Park Service described the Trail itself as a park "system unit," it expressly

recognized that the Trail and the lands through which it passes are not one and the same. For instance, the Park Service elsewhere recognized that the proposed pipeline would cross beneath the Trail "on U.S. Forest Service lands," JA98, a statement that would make no sense if the Park Service viewed all of the lands through which the Trail passes as Park System lands. The Park Service further recognized that there are "areas of the [Trail] owned or managed by other agencies such as the Forest Service," JA109, and never disputed that the Forest Service has authority to grant rights-of-way through such lands, JA94-113. Thus, the sole piece of "evidence" on which the Fourth Circuit relied in reaching a result demonstrably at odds with decades of federal government understanding and the Trails Act does not remotely support that result.

The Fourth Circuit's confusion may have stemmed from the reference to a park "system unit." But the Park Service does not use the terms "unit" and "system unit" synonymously. *See* U.S. Forest Serv. Reply Br. 5. Moreover, as the Park Service Act makes clear, not everything that the Park Service designates part of a "System unit" constitutes "lands in the National Park System." For example, Congress has authorized the Secretary of the Interior "to consolidate Federal land ownership within the existing boundaries of any System unit," 54 U.S.C. §101102(a)(1), and to "accept title to any non-Federal property or interest in property within a System unit," *id.* §102901(b)(1); *see also id.* §200306(a)(2)(A) (authorizing "the acquisition of land, water, or an interest in land or water within the exterior boundary of … a System unit"). These authorizations would be

unnecessary if everything designated part of a "System unit" was *ipso facto* converted into "lands in the National Park System."

The Fourth Circuit also focused on the fact that the Park Service Act defines "the National Park System" as "the areas of land and water described in section 100501," *id.* §100102, which in turn states that "[t]he System shall include any area of land and water administered by the Secretary [of the Interior], acting through the Director, for park, monument, historic, parkway, recreational, or other purposes." *Id.* §100501. Because the Trail is administered by the Secretary of the Interior, acting through the Park Service, the Fourth Circuit reasoned that all of the lands through which the Trail passes must be "land in the National Park System." Pet.App.57. But that just repeats the same mistake. Not all lands within a park unit or everything that the Park Service administers become Park System lands. To the contrary, there is a fundamental difference between administration of *the Trail* and jurisdiction over the lands through which the Trail passes. The Trails Act plainly does not transfer the latter to the Secretary of the Interior, and the fact that the Park Service has designated the *Trail* part of the National Park System does not change that. The conferral of authority to administer a footpath simply does not transfer the lands that the footpath traverses.

The Fourth Circuit likewise concluded that the head of the Forest Service is not the "appropriate agency head" to grant a right-of-way under the MLA because the Trails "Act is clear that the Secretary of the Interior *administers* the entire [Appalachian

Trail], while 'other affected State and Federal agencies,' like the Forest Service, *manage* trail components under their jurisdiction." Pet.App.60. That is doubly incorrect. First, the relevant statute for determining the appropriate "agency head" is the MLA, and the MLA does not define the appropriate "agency head" as the head of the agency that "administers" a trail (or other system) that crosses federal lands. It defines that "agency head" as "the head of any Federal department or independent Federal office or agency, other than the Secretary of the Interior, *which has jurisdiction over Federal lands*." 30 U.S.C. §185(b)(3) (emphasis added). The question under the MLA is thus not which agency "administers" the Trail, but which agency "has jurisdiction over" the 21-mile stretch of "Federal lands" through which the pipeline would cross (including the segment through which the Appalachian Trail passes). And that agency is the Forest Service, not the Park Service.

Second, the court was equally wrong in its claim that the Trails Act "clearly distinguishes between trail administration and management," and reserves all "*administration* responsibilities" to the Secretary tasked with "administering" the trail itself. Pet.App.60. In fact, the Trails Act recognizes that while one agency will be responsible for the "overall administration" of *the trail*, 16 U.S.C. §1246(a)(1)(A), other agencies retain their jurisdiction over the underlying lands, which they may continue to administer and manage.

For example, as noted, the Secretary charged with administering the trail may pass regulations

governing the trail only with the "concurrence of the heads of any other Federal agencies *administering* lands through which" it passes. *Id.* §1246(i) (emphasis added). And the Trails Act requires that Secretary to "establish an advisory council" that includes "the head of each Federal department … *administering* lands through which the trail route passes." *Id.* §1244(d) (emphasis added). It also makes certain resources available to "[t]he Secretary responsible for the *administration of any segment* of any component of the National Trails System." *Id.* §1246(i) (emphasis added). On top of all that, the Trails Act repeatedly uses the phrase "federally *administered* lands" to refer to parts of a trail that are within the jurisdiction of another agency—a label that would be nonsensical if, as the Fourth Circuit claimed, the act reserves all "*administration* responsibilities" over lands that a trail traverses to the Secretary tasked with "administering" the trail itself. Pet.App.60; *see, e.g.*, 16 U.S.C. §1243(b); *id.* §1244(a)(3)-(8), (10)-(11), (13)-(19), (21)(D); *id.* §1246(a)(1)(A), (e), (h)(1), (i).

While the Fourth Circuit's effort to upset decades of agency understanding based on definitional provisions in the Park Service Act or the MLA's definition of "agency head" fail on their own terms, they also suffer from a deeper flaw. The logic of the Fourth Circuit's decision is to create a 2,200-mile barrier to pipeline rights-of-way, with enormous consequences for economic development and settled ways of government administration. It is hardly plausible that a Congress that has taken multiple steps to encourage pipeline development, up to and including conferring pipelines with eminent domain authority, would want to hobble those efforts with a

2,200-mile wall separating natural gas resources from customers on the coast. But if Congress really did take such a momentous step, it would be reasonable to insist that it do so in a more obvious and discernable manner than in the definition of a park system unit or the like. Congress neither hides elephants in mouseholes nor buries major obstacles to economic development in definitional provisions. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

B. The Fourth Circuit's Interpretation Produces Results That Congress Plainly Did Not Intend.

Further confirming the error of the Fourth Circuit's ways, the court's decision would produce untenable—even downright bizarre—results.

First, if it really were the case that all of the lands through which the Appalachian Trail passes are part of the National Park System, then the Trails Act would have effected a massive uncompensated transfer of property rights. As noted, while the Trail traverses many miles of federal lands, it also passes through hundreds of miles of state and private lands, including 60 state game lands, forests, and parks. JA76. If the act of designating the Trail a "unit" of the Park System not only granted the Park Service administrative authority over the entire footpath, but also converted all lands through which it passes into "land in the National Park System," Pet.App.57, then all of those non-federal property owners have been divested of property rights, including the right to withhold or grant a right-of-way and to be compensated for the latter.

Recognizing the absurdity of that result, respondents understandably seek to disavow it, *see* BIO.14-16, but there is no basis in the Fourth Circuit's reasoning to limit it to federal lands. Either what matters is administrative authority over the Trail, or what matters is ownership and jurisdiction over the lands the Trail traverses. If the Fourth Circuit's reasoning is correct and the former is what matters, then there is no logical basis for limiting the consequences to federal lands. After all, the Park Service administers the whole Trail, not just the parts that traverse federal lands.

The court's reasoning also produces the bizarre result of allowing the Trails Act to override the MLA in the *other* direction—*i.e.*, by enabling the Secretary of Agriculture to grant rights-of-way over lands that have always been understood to be Park System lands. If what matters for purposes of the MLA is which agency is tasked with administering the trail, then the Secretary of Agriculture may grant pipeline rights-of-way pursuant to the MLA with respect to *all* of the lands traversed by the trails that he administers—even if those lands were Park System lands before they were designated part of the trail route.

That is no mere hypothetical. The Trails Act initially designated two trails, one (the Appalachian Trail) to be administered by the Secretary of the Interior, and the other (the Pacific Crest Trail) to be administered by the Secretary of Agriculture. *See* 16 U.S.C. §1244(a)(1)-(2). Spanning some 2,653 miles from the Mexican border in California to the Canadian border in Washington, the Pacific Crest Trail traverses several national parks, including Yosemite

and Sequoia. Under the Fourth Circuit's logic, all of the lands (and certainly all of the federal lands) underlying that trail—including lands in those national parks—are now Forest Service lands for purposes of the MLA, because the Secretary of Agriculture has all "*administration* responsibilities" for the trail. Pet.App.60. That, of course, makes no sense. The fact that the Pacific Crest Trail traverses Yosemite and Sequoia and is administered by the Secretary of Agriculture does not remotely convert portions of those national parks into national forest lands or open them to pipeline rights-of-way. But that would be the inevitable result of the Fourth Circuit's reasoning if transplanted to the west coast.

The oddity of that result underscores that administrative authority over a trail does not dictate the ownership or jurisdiction over the underlying federal lands traversed by the trail. It is, of course, theoretically possible that in designating the first two federal trails, Congress intended to effectuate a massive land swap that converted miles of national park lands into national forest lands in the west, while converting miles of forest lands into national park lands in the east. But the far more likely explanation is that Congress merely divvied up administrative authority over the first two trails under the Trails Act, with one going to Agriculture and the other to Interior, without intending to transfer any lands.

And the oddities do not end there. When a trail passes through a national forest, there is no dispute that the Forest Service retains jurisdiction under the MLA to grant pipeline rights-of-way for all parts of the forest through which a national trail does not pass.

Yet that jurisdiction would briefly lapse when the pipeline reached the narrow strip of land through which the trail passes. Thus, as to the Atlantic Coast Pipeline, the Forest Service concededly *can* grant a right-of-way for the vast majority of the 16 miles of the George Washington National Forest under the surface of which the pipeline would pass—including all the way up to the edges of the Appalachian Trail. But that right-of-way would be briefly interrupted for the small stretch through which the Trail passes, hence rendering the right-of-way through the rest of the forest meaningless. More broadly, if all lands through which a trail administered by the Secretary of the Interior passes were Park System lands, then the Forest Service could no longer administer national forests as cohesive units subject to its governing regulatory scheme. Instead, the Forest Service would be divested of jurisdiction on various slivers of its lands, frustrating its regulatory efforts and mission. Far from supporting that illogical result, the Trails Act affirmatively rejects it, by drawing a careful distinction between administration of a trail and jurisdiction over the lands through which it passes.

No one doubts that national park lands should be preserved, or that granting administrative authority to the Park Service to administer the Trail makes eminent sense. But concluding that the ineluctable result of conferring administrative authority over the Trail to the Park Service is to erect a 2,200 barrier to pipeline development makes no sense. And courts have an obligation "to make sense rather than nonsense out of the *corpus juris*." *W. Va. U. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991). The Fourth Circuit's attempt to convert the entirety of the

Appalachian Trail into National Park System lands lost sight of that principle. It is belied not only by the plain text of the Trails Act, but by the MLA, the Park Service Act, the very Park Service statements on which the court relied, and common sense.

C. The Fourth Circuit's Decision Frustrates Congress' Policy Judgments.

The Fourth Circuit's erroneous holding not only departs from the clear text of the governing statutes, but also departs from Congress' clear policy judgments, as embodied in those statutes. Although the objectives of the Forest Service and the Park Service are often complementary, Congress created them to carry out distinct missions, and allocated responsibility between the two agencies accordingly. In 1916, Congress provided that the "fundamental purpose of" lands under the charge of the Park Service "is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same ... unimpaired for the enjoyment of future generations." Nat'l Park Serv. Organic Act of 1916, ch. 408, §1, 39 Stat. 535, *codified as amended at* 54 U.S.C. §100101. The primary responsibility of the Park Service, therefore, is to preserve the lands under its charge.

Congress tasked the Forest Service, by contrast, with managing national forests to ensure not just conservation, but orderly resource development. Indeed, as far back as 1897, Congress provided that "[n]o national forest shall be established, except to improve and protect the forest within the [boundaries], or for the purpose of securing favorable conditions of water flows, and to furnish a continuous

supply of timber." Organic Administration Act of 1897, ch. 2, §1, 30 Stat. 35; *see also United States v. New Mexico*, 438 U.S. 696, 709 n.18 (1978) ("[T]here must always be ... as primary objects and purposes the utilitarian use of land, of water, and of timber, as contributing to the wealth of all the people." (quoting H.R. Rep. No. 64-700, at 3 (1916))). Consequently, since its creation, the Forest Service has been responsible for overseeing diverse commercial uses of the lands under its jurisdiction. *See, e.g.*, *New Mexico*, 438 U.S. at 706-09 & n.18; *United States v. Grimaud*, 220 U.S. 506, 515 (1911).

These differing policy objectives are evident in the MLA, and Congress' decision to allow pipeline rights-of-way across national forest (and virtually all other federal) lands, but not across Park Service lands. *See* 30 U.S.C. §185(a)-(b). That is not to say that any aspect of approval for a project like the Atlantic Coast Pipeline is or should be taken lightly. Petitioner spent years working with numerous agencies to secure the necessary authorizations to proceed. That process was both extensive and expensive, entailing multiple studies and periods of review. Congress, in mandating such a process, believed that it provided adequate safeguards to ensure that federal lands will be used responsibly. Moreover, as the litigation to date has demonstrated, the multiplicity of necessary approvals creates ample opportunities for opponents to attempt to delay and ultimately block pipeline development through a war of attrition. Yet in the Fourth Circuit's view, all of that process *still* does not suffice if a trail administered by the Park Service happens to traverse the George Washington National Forest.

The irony of the Fourth Circuit's decision is that its effort to preclude the Forest Service from granting pipeline rights-of-way, in the name of admonishing the agency to "speak for the trees," Pet.App.66 (quoting Dr. Seuss, *The Lorax* (1971)), will not even promote environmental protection. The pipeline itself would be nearly 700 feet below the Trail with no discernable effect on the footpath or trees above. And once operational, the Atlantic Coast Pipeline, like other natural gas pipelines, will do much for the environment. According to the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), even a "modest pipeline" eliminates the need for 750 tanker trucks per day, or 225 28,000-gallon railroad tank cars. *Id.* And, when combusted, natural gas produces half the emissions of coal. *See Powering the Future*, at 2. It is no wonder, then, that in recent years the federal government has taken steps that encourage the construction of pipelines. In 2015, for example, Congress passed the Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312, which streamlines the permitting process for significant infrastructure projects. Pipelines, and the Atlantic Coast Pipeline in particular, are included as a "covered project" under the statute. 42 U.S.C. §4370m(6)(a).

Of course, the human cost of precluding pipelines from reaching the Atlantic seaboard cannot be discounted. The Atlantic Coast Pipeline not only will help serve the energy needs of millions of Americans, but will bring with it significant additional economic benefits. The pipeline is estimated to generate $2.7 billion in economic activity and $4.2 million in tax revenue annually during construction. *See Powering*

the Future, at 2, 8. The project will support 17,240 jobs during its construction and 2,200 jobs once in operation. *See* Br. of United Assoc. of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry, *et al.*, in Support of Cert., 13-14, 16-17. Moreover, the development and delivery of cost-effective domestic energy helps to reduce reliance on foreign sources. *See Powering the Future*, at 5. And the Atlantic Coast Pipeline in particular will have the additional benefit of providing an alternative energy source for a number of military installations that currently rely on a single natural gas pipeline already operating at capacity. *See* Sarah Downey, *Military stands behind Atlantic Coast Pipeline project*, Va. Bus. Daily (Aug. 7, 2019) https://bit.ly/2Y2MUpf. Perhaps most important, the pipeline will provide substantial economic benefits to consumers. Atlantic estimates that the pipeline will bring Virginians and North Carolinians some *$377 million* in annual savings. *Powering the Future*, at 19.

And that is just this pipeline. If the Appalachian Trail really were a barrier to pipeline rights-of-way, then it likely would prevent construction of the Mountain Valley Pipeline as well, *see* 81 Fed. Reg. 71,041 (Oct. 14, 2016)—not to mention future projects that could bring critical resources to people up and down the coast. It also would cast significant doubt on the ability to obtain any future approvals necessary for the 50-some pipelines that currently cross the Appalachian Trail. *See, e.g.*, *Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402, 404-05 (6th Cir. 2016); S. Rep. No. 107-72, at 5 (2001) (statement of Hon. Jeff Bingaman, Chairman, Comm. on Energy and Nat. Res.) (discussing the "need for an authorization for existing natural gas pipelines" in the Great Smoky Mountains

National Park). And the Forest Service has granted dozens of approvals for electrical transmission lines, telecommunications sites, municipal water facilities, roads, and grazing areas on Forest System lands traversed by the Appalachian Trail. All of these approvals were granted on the understanding that these lands remain national forest lands subject to the regulatory regime that governs such lands—an understanding that the decision below expressly rejects.

In short, the decision below critically undermines the Forest Service's ability to carry out its regulatory charge of overseeing not just the conservation, but also the responsible economic use of national forest lands. Far from compelling that result, the Trails Act precludes it, by making emphatic that an agency's responsibility to administer a national trail does not displace the jurisdiction of other federal agencies over the federal lands through which the trail passes. To hold otherwise—*i.e.*, to conclude that the Trails Act effected a massive sub silentio transfer of property rights from the Forest Service, other federal agencies, states, and even private landowners to the Park Service—would betray both the governing statutes and decades of consistent congressional and agency understanding.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
WILLIAM K. LANE III
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

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