



should be presented to the Commission in the first instance and then to the appeals court on direct review of the Commission's orders. *See* 15 U.S.C. § 717r(b).

**I. The facial label does not allow the Plaintiffs to skirt the appeals court's exclusive subject matter jurisdiction under the Natural Gas Act.**

The Plaintiffs assert that the Natural Gas Act's exclusive review scheme, 15 U.S.C. § 717r(b), does not apply to their facial challenge. Response at 4. The Plaintiffs reason that the facial label means their claims are wholly collateral to the Natural Gas Act. *Id.* Moreover, the Plaintiffs explain they are not challenging a Commission order, but rather the congressional act of attaching eminent domain authority to a Natural Gas Act section 7, 15 U.S.C. § 717f, certificate of "public convenience and necessity." *Id.*

The Plaintiffs cannot escape the Natural Gas Act's exclusive jurisdiction clause by labeling their claim as a "facial constitutional challenge." Similar "facial constitutional challenges" in *Berkley, et al. v. Mountain Valley Pipeline, LLC, et al.*, No. 17-357, 2017 WL 6327829 (W.D. Va. Dec. 11, 2017) (dismissing similar facial challenge to consideration of Mountain Valley Pipeline), *aff'd* 896 F.3d 624 (4th Cir. 2018), *cert. denied* 139 S. Ct. 941 (2019), and *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187 (3d Cir. 2018) (religious expression objections), *cert. denied*, 139 S. Ct. 1169 (2019), were held to be subject to the Natural Gas Act's exclusive jurisdiction provision under the *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), line of cases.

The Plaintiffs overestimate the power of the facial label. The Supreme Court refused to "carve[] out for district court adjudication only facial constitutional challenges to statutes," explaining that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Elgin v. Department of Treasury*, 567 U.S. 1,

15 (2012) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010)); *see also Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 675 (6th Cir. 2018) (observing that the Supreme Court in *Elgin and Thunder Basin* found a lack of district court subject matter jurisdiction “even though [those] cases involved *facial constitutional challenges*” (emphasis added)). Although *Jones Brothers* confronted the issue of waiver, not the issue (raised in proceedings here) of “the appropriate tribunal to hear claims of agency error” (*id.* at 675), the Plaintiffs cite *Jones Brothers* for the undisputed proposition that the Commission lacks the power to declare a provision of the Natural Gas Act unconstitutional. *See* Response at 15; *see also* Commission Memorandum in Support of Motion to Dismiss at 19 (“To be sure, FERC is not an Article III court and lacks the power to declare a provision of the Natural Gas Act unconstitutional.”).

**II. The appeals court has authority to resolve the type of claim the Plaintiffs advance in this case.**

Contrary to the Plaintiffs’ arguments, the appeals court has “exclusive” authority to “affirm, modify, or set aside such order in whole or in part.” 15 U.S.C. § 717r(b). *See Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010) (quoting 15 U.S.C. § 717r(b)). And “[t]hat is true for ‘all issues inhering in the controversy.’” *Bold All. v. FERC*, No. 17-1822, 2018 WL 4681004, at \*4 (D.D.C. Sept. 28, 2018) (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958)) (Leon, J.), *on appeal*, D.C. Cir. No. 18-5322 (in abeyance).

There is no basis for the Plaintiffs’ argument (Response at 9-10) that the appeals court lacks jurisdiction to consider constitutional claims such as theirs. *See Adorers of the Blood of Christ*, 897 F.3d at 195-97; *Berkley*, 896 F.3d at 629-33. The scope of the appeals court’s review is set forth by the Administrative Procedure Act, 5 U.S.C. § 706, which grants the appeals court

the authority to “decide all relevant questions of law” and “interpret constitutional and statutory provisions.” This includes constitutional claims of the type advanced by the Plaintiffs here. *See, e.g., Appalachian Voices, et al. v. FERC*, No. 17-1271, 2019 WL 847199 at \*1-2 (D.C. Cir. Feb. 19, 2019) (rejecting, on direct review of Commission orders approving the Mountain Valley Project, constitutional challenges concerning the exercise of eminent domain); *see also Berkley*, 2017 WL 6327829, at \*8 (concluding that the claims before it, “including [the] constitutional challenges, are subject to the [Natural Gas Act’s] exclusivity provision”); *Berkley*, 896 F.3d at 633 (holding that “Congress intended to divest district courts of jurisdiction to hear the claims pursued by Plaintiffs and instead intended those claims to be brought under the statutory review scheme established by the Natural Gas Act”); Commission Memorandum in Support of Motion to Dismiss at 9 (citing additional cases).

*Elgin* rejected the argument advanced by the Plaintiffs here that the appeals court could not decide a constitutional question because the underlying agency lacked the authority to do so. 567 U.S. at 18; *see also Jones Bros.*, 898 F.3d at 675 (“But [*Elgin* and *Thunder Basin*] still make good sense, *even though the agencies had no authority to invalidate the statutes at issue.*” (emphasis added)). Moreover, the Court in *Elgin* explained that “[i]t is not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge to a federal statute that the agency concluded it lacked authority to decide.” 567 U.S. at 18 n.8. *Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644 (5th Cir. 1950), is another example of appeals court authority over constitutional claims. The Plaintiffs’ discussion of *Thatcher* is limited to pointing out that it is, of course, a Fifth Circuit case decided in 1950. *See* Response at 39. But *Thatcher* is relevant here because it belies the Plaintiffs’ unsubstantiated

position that the appeals court cannot determine constitutional questions on review of Commission orders.

The Plaintiffs cite *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102 (D.C. Cir. 2018), and *NO Gas Pipeline v. FERC*, 756 F.3d 764 (D.C. Cir. 2014), in support. Response at 9. But the Plaintiffs misconstrue these cases. In both, the claims challenged the Omnibus Budget Reconciliation Act of 1986 (Budget Act), not the Natural Gas Act. It was appropriate to invoke the district court's general jurisdiction (28 U.S.C. § 1331) in those cases because the Budget Act lacked a specific provision channeling jurisdiction elsewhere. The Plaintiffs' attempt to fit into the *Delaware Riverkeeper/NO Gas Pipeline* fact pattern by citing the separation-of-powers and non-delegation doctrines (*see* Response at 11) does not make sense because at bottom the Plaintiffs challenge Commission-issued orders pursuant to the Natural Gas Act, which channels review to the appeals court. *See Berkley*, 896 F.3d at 632 (“Plaintiffs’ constitutional claims are the means by which they seek to vacate the granting of the Certificate to Mountain Valley Pipeline. Therefore, their claims are not wholly collateral to the Natural Gas Act’s statutory review scheme.”).

The Plaintiffs cite statements in *Appalachian Voices*, 2019 WL 847199 (recent decision of the D.C. Circuit affirming in all respects Commission orders issuing a “public convenience and necessity” certificate to Mountain Valley Pipeline), disclaiming jurisdiction to address: (1) the Commission’s obligation to guarantee Mountain Valley’s ability to pay just compensation for any future takings; and (2) claims related to the lack of participation of parties that did not timely intervene. *See* Response at 10. Neither statement from *Appalachian Voices* supports the Plaintiffs’ mistaken position that the appeals court cannot adjudicate a non-delegation doctrine-based challenge to the Natural Gas Act.

First, with respect to the ability to pay just compensation, the *Appalachian Voices* court was merely pointing out that such a question belongs in district court eminent domain proceedings. The determination of a company's ability to pay just compensation for specific property is outside the scope of Commission proceedings, and thus outside the scope of appellate review, because the Natural Gas Act explicitly commits such compensation issues to the district courts. *See* 15 U.S.C. § 717f(h); *see also Transcon. Gas Pipe Line Co. v. Certain Easements & Rights of Way Necessary to Construct, Operate & Maintain a 30' Nat. Gas Transmission Pipeline*, 359 F. Supp. 3d 257, 266-67 (M.D. Pa. 2019) (explaining that the district court's eminent domain jurisdiction does not extend to reviewing collateral attacks on the Commission certificate and that the district court's role is limited to enforcement). However, consistent with its scope of review under the Administrative Procedure Act, 5 U.S.C. § 706, and the Natural Gas Act, 15 U.S.C. § 717r(b), the appeals court considered (and rejected) constitutional eminent domain arguments. *See Appalachian Voices*, 2019 WL 847199, at \*2 (citing U.S. Const. amend. V and *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000), and holding that "Mountain Valley's exercise of eminent domain authority . . . poses no Takings Clause problems from either a 'public use' or 'just compensation' perspective," because the Commission's "rational public convenience and necessity determination satisfies the Fifth Amendment's 'public use' requirement").

Second, it does not help the Plaintiffs to cite the finding in *Appalachian Voices* of no jurisdiction over claims about lack of party participation when the party did not timely intervene. *See* Response at 10. When the court disclaimed jurisdiction based on the failure to intervene, it was not holding that it always lacks jurisdiction to adjudicate such claims. The appeals court lacks jurisdiction to decide questions not raised to the agency by a "party" in a timely rehearing

request. *See* 15 U.S.C. § 717r(b) (“Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order ....”); *see also* Commission Memorandum in Support of Motion to Dismiss at 3-4, 13-14.

**III. The *Thunder Basin* framework applies here and should steer this Court away from finding subject matter jurisdiction over the Plaintiffs’ claims.**

The Plaintiffs assert that *Thunder Basin* framework does not apply. Response at 12. The Plaintiffs mistakenly rely on *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), for the proposition that if the agency itself does not have jurisdiction to adjudicate the claim, it cannot be “of the type” for direct appellate review within the statutory structure. Response at 13-14. But this is not an accurate reading of that case, and, as explained above, it would be directly contrary to the subsequently decided *Elgin* case. *See supra* at 4. And in any event, this case is more like *Thunder Basin* and *Elgin* than *Free Enterprise*.

In *Free Enterprise*, the Court found that precluding district court jurisdiction would foreclose all meaningful judicial review for reasons not present here. *See Free Enter.*, 561 U.S. at 489-91. The district court had jurisdiction to hear constitutional challenges to the existence of the Accounting Oversight Board because the Sarbanes-Oxley Act’s exclusive review provision applied only to Securities and Exchange Commission (SEC) final orders or rules, and the SEC had not issued any order or rule from which there could be judicial review. 561 U.S. at 489. In addition, review in the appeals court would not be adequate because it would require plaintiffs to violate the statute (“bet the farm”), incur penalties, and then challenge the action in court. *Id.* This, the Court found, does meet the *Thunder Basin* standard for meaningful review. *Id.*

By contrast, participation in the Commission proceeding presents no such “bet the farm” conundrum for the Plaintiffs. *See Berkley*, 896 F.3d at 624 (distinguishing *Free Enterprise* as a case where “[d]istrict-court jurisdiction was the only way the plaintiffs’ claims . . . could have

been reviewed by a court, absent the plaintiffs intentionally incurring a sanction by the Board so as to create an administrative action through which to lodge their constitutional challenge”); *Berkley*, 2017 WL 6327829, at \*6-7 (calling *Free Enterprise* “something of an anomaly from a factual standpoint” and distinguishing it from Natural Gas Act cases involving “an active FERC proceeding” after which “Plaintiffs have the ability to raise their constitutional challenges before an Article III court”); *see also Bold All.*, 2018 WL 4681004, at \*4 (observing that Commission regulations under the Natural Gas Act “afforded plaintiffs the opportunity to intervene and comment during the application process, to seek rehearing, and ultimately, to petition for review before a federal court of appeals”).

The requirement of participation in Commission proceedings is merely a procedural step prior to judicial review. *See Adorers of the Blood of Christ*, 897 F.3d at 195 (holding that the Natural Gas Act “is the exclusive remedy for matters relating to the construction of interstate natural gas pipelines” and that, “[b]y failing to avail themselves of the protections thereunder, the Adorers have foreclosed judicial review of their substantive [Religious Freedom Restoration Act] claims”). Moreover, the Plaintiffs here not only had nothing to lose by participating in the Commission proceedings, but they could have benefited because the Commission often adjusts pipeline routes to accommodate landowner concerns. *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 P 128 (2017) (observing that Mountain Valley filed “a number of minor route modifications to address recommendations in the draft [environmental impact statement], avoid sensitive environmental areas, accommodate landowner requests, or for engineering design reasons”). Such route modifications could have accommodated the Plaintiffs here and obviated the need to reach a constitutional question. But to the extent such accommodations cannot be reached, participation in Commission proceedings is merely a reasonable procedural prerequisite

to receiving full review of the constitutional question in the appeals court. *See Adorers of the Blood of Christ*, 897 F.3d at 195. Finally, had the Plaintiffs challenged the Commission's Mountain Valley certificate orders at the appeals court, they would have secured a ruling prior to the start of proceedings here. *See Commission Memorandum in Support of Motion to Dismiss* at 2.

The Plaintiffs' assertion (Response at 13) that this Court has subject matter jurisdiction because the Commission does not have the expertise or authority to address constitutional claims is not correct. *See Thunder Basin*, 510 U.S. at 215 (explaining that, even if the constitutionality of a statute were beyond the administering agency's jurisdiction, constitutional claims regarding that statute can be meaningfully addressed by a court of appeals on review of final agency order); *Elgin*, 567 U.S. at 17 (same); *Bennett v. SEC*, 844 F.3d 174, 184-85 (4th Cir. 2016) (same); *Total Gas & Power N. Am., Inc. v. FERC*, No. 4:16-1250, 2016 WL 3855865, at \*12, 22 (S.D. Tex. July 15, 2016) (finding Natural Gas Act's grant of exclusive judicial review to the appeals courts includes constitutional issues), *aff'd*, 859 F.3d 325 (5th Cir. 2017) , *cert. denied*, 138 S. Ct. 2648 (2018). As the court of appeals in *Berkley* explained, when presented with a similar constitutional challenge to the Mountain Valley Pipeline, "FERC had the ability to, upon rehearing Plaintiffs' challenge here—and may still in future cases—revoke its issuance of a Certificate based upon threshold questions within its expertise." 896 F.3d at 633.

The Plaintiffs try to burnish their jurisdictional claims by citing the *Delaware Riverkeeper* and *NO Gas Pipeline* cases in support of their view of the *Thunder Basin* line of cases. Response at 14-15. But *Delaware Riverkeeper* and *NO Gas Pipeline* were both decided by the D.C. Circuit with the understanding that the law being challenged (Budget Act) does not channel review to a court other than the district court. And neither *Delaware Riverkeeper* nor

*NO Gas Pipeline* cited *Thunder Basin*, *Free Enterprise Fund*, or *Elgin* for purposes of determining the appropriate court to hear the claim. *Delaware Riverkeeper* cited *Free Enterprise* to conclude there is a “viable cause of action.” *Delaware Riverkeeper*, 895 F.3d at 107. But here, the appropriate court to hear the claim is disputed, not the viability of the claim.

The Plaintiffs assert that the language of Natural Gas Act section 19(b), 15 U.S.C. § 717r(b) (“aggrieved by an order”) indicates that their claims should be adjudicated in the district court because they are challenging here congressional action, not a Commission order. Response at 17. But any reasonable reading of the Plaintiffs’ complaint reveals that their alleged aggrievement is in fact based on the certificate issued by the Commission for the Mountain Valley Project. *See* Complaint PP 23-28 (explaining that Mountain Valley’s Commission-issued certificate authorizes Mountain Valley to obtain property from the Plaintiffs through the exercise of eminent domain). A successful non-delegation-based challenge to the Mountain Valley orders in the appeals court could have achieved exactly the outcome the Plaintiffs seek here. *See Adorers of the Blood of Christ*, 897 F.3d at 195 (“By challenging the permissibility of the Pipeline Project under [the Religious Freedom Restoration Act], the Adorers are seeking to ‘modify or set aside’ FERC’s order—a matter the [Natural Gas Act] places in the ‘exclusive’ purview of the court of appeals, only after administrative exhaustion.” (quoting 15 U.S.C. § 717r(b))); *Berkley*, 2017 WL 6327829, at \*7 (“And although plaintiffs claim they are simply raising a general constitutional challenge, the effect of a ruling in their favor would be to modify or set aside the FERC order in whole or in part.”).

The Plaintiffs argue that the same facts they rely on for establishing standing cannot also be used to demonstrate that review of their claims belongs in the appeals court, rather than the district court. *See* Response at 17-21. But there is no injustice where Congress has provided for

judicial review under the relevant statutory review scheme. See *Thunder Basin*, 510 U.S. at 215 n.20; *Total Gas*, 2016 WL 3855865, at \*12 (“[T]he [Natural Gas Act] ‘does not foreclose all judicial review . . . , but merely directs that judicial review shall occur’ in the United States courts of appeals.” (quoting *Elgin*, 567 U.S. at 10)); see also *Appalachian Voices*, 2019 WL 847199 (providing meaningful judicial review of constitutional claims under the Natural Gas Act).

### CONCLUSION

Uniform court precedent demonstrates that the Natural Gas Act’s exclusive review provision, 15 U.S.C. § 717r, divests the district court of jurisdiction over the claims advanced by Plaintiffs here. This Court’s general jurisdiction (28 U.S.C. § 1331) does not override the appeals court’s specific and exclusive jurisdiction to review Commission orders and issues (Natural Gas Act section 19, 15 U.S.C. § 717r). Accordingly, this Court should dismiss this case for lack of subject matter jurisdiction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on April 17, 2020, a copy of the foregoing was filed electronically.

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Parties may access this filing through the Court's system.

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