No. 23-1592 (L)
(consolidated with No. 23-1594)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE WILDERNESS SOCIETY
Petitioner,

v.

UNITED STATES FOREST SERVICE, et al.,
Respondents,

&

MOUNTAIN VALLEY PIPELINE, LLC,
Intervenor

PETITIONER'S OPPOSITION TO FEDERAL RESPONDENTS' MOTION TO DISMISS AND INTERVENOR'S MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY DENIAL

Three weeks ago, Congress shoehorned a rider into the Fiscal Responsibility Act tailored to mandate victory for the Mountain Valley Pipeline in four pending lawsuits, including these two consolidated petitions for review. That rider—Section 324—is unconstitutional because it violates Article III and the separation of powers under *United States v. Klein*, 80 U.S. 128 (1871), and its progeny.

Congress cannot pick winners and losers in pending litigation by compelling findings or results without supplying new substantive law for the courts to apply. *Bank Markazi v. Peterson*, 578 U.S. 212, 225 n.17 (2016). Nor can Congress manipulate jurisdiction "as a means to an end" in pending cases. *Klein*, 80 U.S. at 145. Yet that is precisely what Section 324 attempts.

This Court has the authority and obligation to review Section 324, declare it unconstitutional, and deny the motions to dismiss.[1] "A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely," and this Court "cannot overlook the intrusion" of Section 324. *Stern v. Marshall*, 564 U.S. 462, 502–03 (2011).

BACKGROUND

The Mountain Valley Pipeline ("MVP") is a proposed 303-mile natural gas pipeline that would cut through the Jefferson National Forest in West Virginia and Virginia. To build its project across this public land, Intervenor Mountain Valley Pipeline, LLC ("Mountain Valley"), was required to obtain approval from the Forest Service and the Bureau of Land Management ("BLM"). Because the pipeline cannot be built in compliance with the rules that govern the Jefferson National Forest, the Forest Service could and should have rejected the project.

[1] Section 324 is severable from the rest of the Fiscal Responsibility Act, so declaring Section 324 unconstitutional will not affect the debt ceiling. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2209 (2020).

36 C.F.R. § 219.15(c)(2). Instead, the Forest Service tried changing the rules to accommodate the pipeline.

This case challenges the agencies' third attempt to approve MVP after their prior efforts were vacated in *Wild Virginia v. U.S. Forest Service*, 24 F.4th 915 (4th Cir. 2022), and *Sierra Club, Inc. v. U.S. Forest Service*, 897 F.3d 582 (4th Cir. 2018). On May 15, 2023, the Forest Service issued a record of decision, choosing to amend the Revised Land and Resource Management Plan for the Jefferson National Forest, waive the rules Mountain Valley cannot satisfy, and provide a necessary concurrence to BLM. *See* U.S. Forest Serv., Record of Decision: Mountain Valley Pipeline and Equitrans Expansion Project (May 15, 2023). Two days later, BLM issued its own record of decision, granting Mountain Valley a right-of-way across the Jefferson National Forest and a permit for construction. *See* Bureau of Land Mgmt., Record of Decision: Mountain Valley Pipeline and Equitrans Expansion Project (May 17, 2023).

Petitioner The Wilderness Society ("Petitioner") filed these petitions for review two weeks later. ECF No. 2 (No. 23-1592); ECF No. 2 (No. 23-1594). The petitions present claims under the Administrative Procedure Act, 5 U.S.C. § 704, over which this Court has original and exclusive jurisdiction pursuant to Section 19(d)(1) of the Natural Gas Act, 15 U.S.C. § 717r(d)(1), alleging that the Forest Service and BLM approvals violate the National Environmental Policy Act,

National Forest Management Act, Mineral Leasing Act, and Administrative Procedure Act. ECF No. 16 (No. 23-1592); ECF No. 15 (No. 23-1594).

Two days later, President Biden signed into law the Fiscal Responsibility Act of 2023 (the "Act"), Pub. L. No. 118-5. The Act was a must-pass bill to raise the nation's debt ceiling and avoid default. But the Act also carried a rider, Section 324, intended to help Mountain Valley escape a "judicial hellhole," because the pipeline "would be finished today if it weren't for the rulings by the Fourth Circuit." 169 Cong. Rec. S1877, 1890 (daily ed. June 1, 2023) (statement of Sen. Capito).

Section 324 includes several provisions at issue here:

- Section 324(c)(1) provides that "[n]otwithstanding any other provision of law … Congress hereby ratifies and approves" all authorizations necessary for the construction and initial operation of MVP.
- Section 324(c)(2) provides that "[n]otwithstanding any other provision of law," Congress directs applicable agencies "to continue to maintain" authorizations for MVP.
- Section 324(e)(1) provides that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review" any approval necessary for the construction and initial operation of MVP, "including [in] any lawsuit pending in court as of the date of enactment."
- Section 324(e)(2) provides that the D.C. Circuit "shall have original and exclusive jurisdiction over any claim alleging the invalidity of" Section 324 "or that an action is beyond the scope of authority" Section 324 confers.
- Section 324(f) provides that Section 324 "supersedes any other provision of law" that is "inconsistent with the issuance of any authorization" for MVP.

Shortly after the Act became law, Mountain Valley filed motions to dismiss or, in the alternative, for summary denial under Local Rule 27(f). ECF No. 12-1 (No. 23-1592); ECF No. 11-1 (No. 23-1594).[2] The Court then consolidated the petitions, ECF No. 19 (No. 23-1592), and Respondents Forest Service and BLM, et al. ("Federal Respondents"), moved to dismiss, ECF No. 20 (No. 23-1592).

ARGUMENT

As an initial matter, this Court has the jurisdiction and obligation to consider Section 324's constitutional infirmities. On the merits, Section 324 violates Article III and the separation of powers under *Klein* and its successors. As a result, the case is not moot, the Court has statutory subject matter jurisdiction over the petitions, and the motions must be denied.

I. The Court has jurisdiction to consider constitutional arguments in response to the pending motions.

This Court has the power and responsibility to consider Section 324's constitutional defects in response to the pending motions. Federal Respondents are wrong that Section 324(e)(2) demands otherwise.

Section 324(e)(2) does not apply to this case by its plain terms. It directs that the D.C. Circuit "shall have original and exclusive jurisdiction over any *claim alleging* the invalidity of this section or that an action is beyond the scope of

[2] References to Mountain Valley's arguments cite the motion in No. 23-1592.

authority conferred by this section." (emphasis added). This is a venue provision that prescribes where post-enactment claims directly challenging Section 324 must be filed originally. It does not apply here because the claims in these consolidated petitions arise under the Administrative Procedure Act, alleging violations of environmental statutes. ECF No. 16 (No. 23-1592); ECF No. 15 (No. 23-1594). They do not "alleg[e] the invalidity of" Section 324 or "that an action is beyond the scope of authority" it confers. Nor could they. Section 324 had not been enacted when these petitions were filed.

Federal Respondents (at 5 and 7) would rewrite Section 324(e)(2) to say only the D.C. Circuit can hear "contentions" and "suggestion[s]" that Section 324 is unconstitutional. But the statute Congress enacted does not mention contentions, suggestions, or arguments—it governs only *claims*.

When Congress employs a legal term of art like "claim," courts must give that term its accepted legal meaning absent instruction to the contrary. *McDermott Int'l v. Wilander*, 498 U.S. 337, 342 (1991). The accepted legal meaning of the word "claim" is a claim for relief or an "interest or remedy recognized at law" such as a cause of action. *Claim*, Black's Law Dictionary (11th ed. 2019). This definition spans jurisdictional statutes. *E.g.*, *Prince v. Sears Holdings Corp.*, 848 F.3d 173, 177 (4th Cir. 2017) ("District courts have original jurisdiction over claims 'arising under the Constitution, laws, or treaties of the United States.'"

(quoting 28 U.S.C. § 1331)). It governs how to plead. *See* Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain … a short and plain statement of the claim showing that the pleader is entitled to relief[.]"). And it shapes foundational doctrines like res judicata. *E.g.*, *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp.*, 140 S. Ct. 1589, 1595 (2020) ("Suits involve the same claim (or cause of action) when they arise from the same transaction or involve a common nucleus of operative facts." (cleaned up)). At bottom, a claim is not equivalent to an argument. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal *claim* is properly presented, a party can make any *argument* in support of that claim." (emphases added)).

In addition, Section 324(e)(2) cannot apply to arguments raised in defense of claims predating the Act because Section 324(e)(2) applies only to new cases. Section 324(e)(2) uses the future tense "shall have" to describe when its terms control, indicating that Congress "designed the statute to apply only prospectively," *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 175 (4th Cir. 2010), and its focus on "original and exclusive jurisdiction" confirms this understanding. If Congress had intended for Section 324(e)(2) to affect arguments in pending cases, it knew how to say so. Unlike the statute in the outlier case Mountain Valley (at 8) cites, *James v. Hodel*, 696 F. Supp. 699 (1988), *aff'd sub nom. James v. Lujan*, 893 F.2d 1404 (D.C. Cir. 1990) (unpublished), Section 324 expressly distinguishes between

pending lawsuits and future claims. Just a few lines above Section 324(e)(2), Subsection (e)(1) purports to eliminate judicial review over "any lawsuit pending in court as of the date of enactment." Because Congress "knows how to make … a requirement manifest" elsewhere in the same statute, the lack of such specific language in Section 324(e)(2) confirms it applies only prospectively to new *claims*, not retrospectively to *arguments* in pending cases. *Wilmington Shipping Co. v. New England Life Ins. Co.*, 496 F.3d 326, 339 (4th Cir. 2007).

II. The pending motions should be denied because Section 324 violates the separation of powers under *Klein*.

Section 324 trespasses on Article III and can be given no effect in this case. Under *Klein*, Congress violates the separation of powers when it arrogates to itself the judicial power by picking winners and losers in pending litigation without supplying new substantive law or by manipulating jurisdiction to the same end. *See Klein*, 80 U.S. at 145–47. The Framers made this limitation central to our Constitution—they knew that if "the power of judging [were] joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control," The Federalist No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961)—and *Klein* describes its basic contours.

Klein invalidated a law targeting suits by pardoned Confederates seeking compensation for property seized during the Civil War. In a prior case, the Supreme Court had held that a pardon was proof of loyalty and entitled claimants

to damages. Congress responded by passing a new law while *Klein* was pending that required courts to consider a pardon as proof of *dis*loyalty and stripped jurisdiction over any cases where a claimant prevailed based on a pardon, requiring the claims to be dismissed. 80 U.S. at 143–44. *Klein* held the new law unconstitutional because it withdrew jurisdiction "as a means to an end" in pending cases, imposing an "arbitrary rule of decision" on the judiciary and thereby "pass[ing] the limit which separates the legislative from the judicial power."[3] *Id.* at 145–47.

In contemporary cases, the details of *Klein*'s prohibition vary depending on whether Congress is prescribing a rule of decision or manipulating jurisdiction, but *Klein*'s core holding is the same in both contexts: Congress may not direct the Article III courts to reach particular results in pending cases. *Id.* Section 324 is unconstitutional because it tries multiple avenues to do just that.

A. This case is not moot because Section 324(c)(1) and Section 324(f) violate the separation of powers by compelling results under old law.

This case is not moot because the statutory provision that supposedly moots it—Section 324(c)(1)—unconstitutionally compels a result in pending litigation

[3] *Klein* also held the law unconstitutional on the alternative ground that it infringed on the President's control over the pardon power. 80 U.S. at 147–48. This was a separate basis for decision. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 404–05 (1980) ("[T]he proviso [in *Klein*] was unconstitutional in two respects[.]").

without supplying a new substantive standard for the Court to apply. Mountain Valley and Federal Respondents do not emphasize Section 324(f), but it suffers from the same constitutional defect and likewise cannot moot this case.

In contemporary cases involving *Klein*, the Supreme Court instructs that a statute affecting pending litigation violates the separation of powers when it "compel[s] … findings or results under old law" but not when it (1) "change[s] the law by establishing new substantive standards" and (2) leaves the courts to apply those new standards in the first instance. *Bank Markazi*, 578 U.S. at 231 (quoting *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992)); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (statute that "set out substantive legal standards for the Judiciary to apply, and in that sense change[d] the law," satisfied *Klein* but violated Article III on other grounds).

Not every change in law will clear this hurdle. For example, *Bank Markazi* explains that Congress may not pass a law saying, in the case of "*Smith v. Jones*, Smith wins," or a law that is a fig leaf for the same, like one "directing judgment for Smith if the court finds that Jones was duly served." 578 U.S. at 231. Because they do not "supply any new legal standard," these hypothetical laws would violate the separation of powers.[4] *Id.*

[4] This Court's decision in *United States v. Brainer*, 691 F.2d 691 (4th Cir. 1982), which took a "quite narrow" view of *Klein*, *id.* at 695, does not control here

So too here. Section 324(c)(1) and Section 324(f) run afoul of *Klein* under the Supreme Court's rubric because they compel specific results in pending cases without supplying new substantive standards for this Court to apply. Section 324(c)(1) "ratifies and approves" agency authorizations for MVP, including those from the Forest Service and BLM. But ratification merely confirms the decisions the Forest Service and BLM already made under then-existing law, so Section 324(c)(1) offers nothing new. *See United States v. Heinszen*, 206 U.S. 370, 384 (1907) (endorsing Latin maxim meaning "every ratification relates back and is equivalent to a prior command").

Section 324(f) is even more egregious. It states that Section 324 "supersedes any other provision of law" that is "inconsistent with the issuance of any authorization" for MVP. This blank check offers no specificity except to say that it overrides "any other section of [the Act] or other statute, any regulation, any judicial decision, [and] any agency guidance." Neither Section 324(c)(1) nor Section 324(f) provide any clues about how their edicts might supply a new

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because it is inconsistent with subsequent Supreme Court decisions, *K.I. v. Durham Pub. Sch. Bd. of Educ.*, 54 F.4th 779, 790 (4th Cir. 2022). *Brainer* supposed that *Klein* forbids only statutes that "dictate how the Court should decide an issue of fact (under threat of loss of jurisdiction)" *and* "bind the Court to decide a case" in a way that is independently unconstitutional. 691 F.2d at 695. But the hypothetical laws from *Bank Markazi* would not have violated the separation of powers if *Brainer* were correct because they did not compel factual findings, threaten jurisdiction, or necessarily transgress some other constitutional rule.

substantive standard for the Court to apply—aside from the result that Federal Respondents and Mountain Valley win.

The general power of Congress to ratify agency actions cannot save Section 324(c)(1). Congress may exercise the power to ratify only "by enactment not otherwise inappropriate," *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301 (1937), which means Congress cannot use ratification in a way that violates the separation of powers. For example, Congress may ratify agency rules of general applicability that impact pending litigation, *Heinszen*, 206 U.S. at 387, consistent with Congress's power to supply new substantive standards that affect pending litigation when the courts apply them, *Bank Markazi*, 578 U.S. at 231. But Congress cannot employ ratification in a way that fails to supply any legal standard besides the result that a favored party in a pending case must win.[5] *See id.*

Statutes that have survived *Klein* challenges stand in stark contrast to Section 324. *Robertson* upheld a statute known as the Northwest Timber Compromise intended to resolve two lawsuits over logging in Oregon and Washington that threatened the northern spotted owl. 503 U.S. at 431–33. The statute prescribed substantive standards governing where, how, and how much timber could be harvested on federal public lands, and it authorized judicial review

[5] *Patchak v. Zinke*, 138 S. Ct. 897 (2018), did not bless such targeted ratification because the case did not involve the ratification provision of the challenged statute, *id.* at 904 n.2.

of timber sales according to those standards. *Id.* at 433–34. The statute also identified the two lawsuits by caption and case number, stating that compliance with the new substantive standards would be adequate to satisfy the laws underlying those cases. *Id.* at 434–35. The Supreme Court found no *Klein* problem because the statute replaced the laws involved in the two lawsuits with new standards for courts to apply and did not direct "particular applications under either the old or the new standards." *Id.* at 437.

Bank Markazi upheld a provision of the Iran Threat Reduction and Syria Human Rights Act of 2012 codified at 22 U.S.C. § 8772. Section 8772 allowed victims of state-sponsored terrorism to execute judgments against assets of the Central Bank of Iran in a pending consolidated proceeding following judgments against Iran in sixteen cases. *Bank Markazi*, 578 U.S. at 219–23 & n.5. Specifically, the statute allowed execution after the district court made findings about the location and ownership interest of the assets, whether they were subject to an Iran-specific executive order, their value, and whether anyone had a constitutionally protected interest in them. *Id.* at 218–19. The district court tasked with these determinations noted they were "not mere fig leaves" and Section 8772 left "plenty … to adjudicate." *Id.* at 229–30 & n.20. The Iranian bank argued Section 8772 violated *Klein*, but the Supreme Court disagreed because the statute

"establish[ed] new substantive standards" and "entrust[ed] to the District Court application of those standards." *Id.* at 231.

Unlike the statutes in *Robertson* and *Bank Markazi*, Section 324(c)(1) and Section 324(f) offer no replacement standards that the Court can apply, and they leave no questions of law or fact to adjudicate. The Northwest Timber Compromise in *Robertson* guaranteed judicial review of agency compliance with the statute's new substantive standards, 503 U.S. at 438–39, and Section 8772 in *Bank Markazi* depended on the district court to interpret the statute and apply the law to the facts it found, 578 U.S. at 229–30 & n.20. In contrast, Section 324 would leave the Court nothing to do but enter judgment for Federal Respondents and Mountain Valley. This is just "Smith wins" with different verbiage.

It does not matter that Section 324(c)(1) says it applies "[n]otwithstanding any other provision of law" or that Section 324(f) says it "supersedes any other provision of law." This superordinating language may help prioritize competing provisions "in the event of a clash," Antonin Scalia & Bryan Garner, Reading Law 126 (2012), but it does not mark a substantive change in law within the meaning of *Klein* and its kin. It would be empty formalism to conclude that "Smith wins" violates Article III, *Bank Markazi*, 578 U.S. at 231, but that "Smith wins notwithstanding any other provision of law" does not.

Federal Respondents and Mountain Valley try to buttress their mootness arguments with two additional points that misread Section 324. ***First***, Federal Respondents (at 9) and Mountain Valley (at 6) invoke *Friends of the Earth v. Haaland*, No. 22-5036, 2023 WL 3144203 (D.C. Cir. Apr. 28, 2023) (unpublished), but the comparison ignores dispositive differences between that case and this one. In *Haaland*, the district court vacated several offshore oil and gas leases because the responsible agency violated the National Environmental Policy Act. *Id.* at *1. While that order was on appeal, an intervening statute directed the agency to reinstate the leases subject to terms and conditions specified in the new statute. Pub. L. No. 117-169, § 50264(b) (2022). The D.C. Circuit concluded the new statute made effective relief impossible because the leases would be reissued pursuant to the new law. *Haaland*, 2023 WL 3144203, at *1.

Unlike the statute in *Haaland*, Section 324 does not require the Forest Service and BLM to issue or reinstate anything. Consequently, if the Court vacates the challenged approvals for MVP, Petitioner's injuries will be redressed. *See* Ex. 1, Gottesman Decl. ¶ 20; Ex. 2, Majors Decl. ¶ 20; Ex. 3; Olson Decl. ¶ 25. Meanwhile, the differences between the statute in *Haaland* and Section 324 highlight why the latter is unconstitutional. The statute in *Haaland* provided specific terms and conditions that would govern the reinstated leases and did not attempt to eliminate jurisdiction over compliance with their terms. Pub. L. No.

117-169, § 50264(b). In contrast, Section 324(c)(1) and Section 324(f) provide nothing besides approval of past decisions made under old law paired with an attempted end run around the judiciary in Section 324(e)(1).

Second, Mountain Valley (at 5) argues the Court cannot award Petitioner any effective relief because Section 324(c)(2) directs the Forest Service and BLM "to continue to maintain" their approvals for MVP going forward. The implication of this argument is that Section 324(c)(2) would require the agencies to maintain the existing approvals even if Petitioner prevails and the Court vacates them.

Mountain Valley misunderstands the statute. Section 324(c)(2) precludes the agencies themselves from vacating or staying approvals for MVP, such as an agency-issued stay pending judicial review under 5 U.S.C. § 705. But if this Court reaches the merits and vacates the agencies' approvals, there will be nothing for them to maintain. Any broader reading of Section 324(c)(2) that instructs the agencies to maintain their approvals in the face of vacatur would invite its own constitutional problems. *See Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) (political branches may not ignore Article III judgments).

B. The Court has statutory subject matter jurisdiction because Section 324(e)(1) violates the separation of powers by manipulating jurisdiction in pending cases as a means to an end.

This Court retains statutory subject matter jurisdiction because the provision that supposedly strips it—Section 324(e)(1)—is unconstitutional. Although

Congress enjoys tremendous power "to define and limit the jurisdiction" of the lower federal courts, *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938), its power over jurisdiction is not limitless. *Klein* itself "stresses that Congress'[s] attempt to regulate jurisdiction is not a talisman that renders any such legislative effort constitutional." Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 323 (7th ed. 2015).

One key limitation is that Congress violates the separation of powers when it manipulates jurisdiction over pending cases "as a means to an end." *Klein*, 80 U.S. at 145; *see also United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980) (jurisdiction-stripping provision in *Klein* was unconstitutional because it "required the courts to decide a controversy in the Government's favor"). Put differently, "Congress may not achieve through jurisdiction stripping what it cannot permissibly achieve outright, namely, directing entry of judgment for a particular party." *Patchak v. Zinke*, 138 S. Ct. 897, 913 (2018) (Sotomayor, J., concurring in the judgment). But that is what Section 324(e)(1) sets out to do.

Section 324(e)(1) provides that "no court shall have jurisdiction to review any action taken by the [relevant agencies] … that grants an authorization … or any other approval necessary for the construction and initial operation" of MVP. Section 324(e)(1) strips jurisdiction over the same approvals that Section 324(c)(1)

purports to ratify, and it explicitly strips jurisdiction over "any lawsuit pending in a court as of the date of enactment."

The text, history, and practical effect of Section 324 confirm that its jurisdiction-stripping provision is an unconstitutional "means to an end." *Klein*, 80 U.S. at 145. The title of Section 324 itself makes plain that Congress attempted to eliminate jurisdiction over MVP approvals—including pending cases—to "[e]xpedit[e] completion" of the pipeline. Likewise, one Senator backing Mountain Valley confirmed that the purpose of Section 324(e)(1) is to "insulate[]" agency approvals "from judicial review to prevent further delays." 169 Cong. Rec. at S1877 (statement of Sen. Capito). Section 324(e)(1) also gerrymanders jurisdiction to disadvantage cases challenging MVP. It eliminates jurisdiction over any lawsuit challenging an agency action that "*grants* … any … approval necessary" for MVP, but it does not preclude Mountain Valley from suing over permit denials. Finally, as a practical matter, Section 324(e)(1) would require this Court to enter judgment for two particular parties—Federal Respondents and Mountain Valley. As *Klein* put it, "[w]hat is this but to prescribe a rule for the decision of a cause in a particular way?" 80 U.S. at 146.

Section 324(e)(1) closely parallels the statute in *Klein* in two important ways. Both here and there, "one party to the controversy"—the government—stripped jurisdiction "as a means" to decide a pending case "in its own favor."

Klein, 80 U.S. at 145–46. According to *Klein*, asking whether such transparent self-dealing offends Article III is a question that seems "to answer itself." *Id.* at 147. The same answer applies here.

Further, in this case and in *Klein*, the jurisdiction-stripping provision is facially broad but practically bespoke. Section 324(e)(1) officially applies to "any" pending lawsuit but is practically tailored to four pending cases challenging approvals for MVP from the Forest Service, BLM, Fish and Wildlife Service, and the Federal Energy Regulatory Commission.[6] Likewise, the *Klein* statute broadly applied to "all cases" involving "any claimant" invoking a pardon "as evidence in support of any claim," 16 Stat. 235, but was practically tailored to govern *Klein* and its companion cases including *Armstrong v. United States*, 80 U.S. 154 (1871), and *Pargoud v. United States*, 80 U.S. 156 (1871).

Klein held that this practical targeting effect distinguished the case from a hypothetical jurisdiction strip over a broad "class of cases." 80 U.S. at 145; *see also United States v. Winstar Corp.*, 518 U.S. 839, 897 (1996) ("[G]enerality in the terms by which the use of power is authorized will tend to guard against its misuse to burden or benefit the few unjustifiably."). Because Section 324(e)(1) eliminates

[6] *See* 169 Cong. Rec. at S1877 (statement of Sen. Capito) (targeting these four approvals to be "insulated from judicial review").

jurisdiction as a means to an end in a similarly narrow set of cases all challenging the same project, it is likewise unconstitutional.

The same two factors also distinguish this case from *Ex parte McCardle*, 74 U.S. 506 (1868). In *McCardle*, the Supreme Court upheld a statute stripping appellate jurisdiction over a broad class of habeas cases. *Id.* at 512–14. But *McCardle* emphasized that (1) the habeas petitioner in that case had alternative avenues of judicial review and (2) the statute at issue entirely repealed an earlier provision conferring appellate jurisdiction over habeas cases based on the Constitution or federal law, thereby affecting a "broad" class of cases. *Id.* Neither factor is present here. Congress has left no other avenues of judicial review. Instead, it has attempted to definitively resolve four pending cases in favor of the government and Mountain Valley. And Section 324(e)(1) does not effect a change in jurisdiction over a broad class of cases. Congress has not amended, let alone entirely repealed, the Administrative Procedure Act and the Natural Gas Act. Instead, Congress has stripped jurisdiction over a restricted set of pending cases all involving the same private party, Mountain Valley. If *Klein* stands for anything, it stands for the proposition that this "means to an end" violates the separation of powers.

Federal Respondents (at 7) suggest that *Patchak v. Zinke*, 138 S. Ct. at 905–07 (Thomas, J., plurality op.), proves Section 324(e)(1) is definitively

constitutional, and Mountain Valley (at 4) hints at the same thing. But the plurality opinion on which they rely is neither controlling nor persuasive.

Patchak was the first Supreme Court case in the *Klein* canon since *Klein* itself to consider whether a jurisdiction-stripping provision violated Article III. In the plurality that Federal Respondents and Mountain Valley invoke, four Justices reasoned that Section 2(b) of the Gun Lake Act, which required dismissal of any pending action relating to a specified parcel of land, did not violate *Klein* because it was a jurisdiction-stripping provision that changed the law. 138 S. Ct. at 904–05.

But they did not command a majority. Justices Ginsburg and Sotomayor concurred in the judgment on wholly separate grounds involving sovereign immunity. *See id.* at 912–13 (Ginsburg, J. and Sotomayor, J., concurring in the judgment). As a result, there is no "common denominator of … reasoning" in *Patchak* to render any of its fractured opinions controlling. *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 236 (4th Cir. 2002) (internal quotation marks omitted).

In fact, the only common denominator in *Patchak* is that five Justices declined to adopt the plurality's reasoning. And four Justices lined up *against* the plurality's seemingly boundless acceptance of jurisdiction stripping. *See* 138 S. Ct. at 919 (Roberts, C.J., Kennedy, J., and Gorsuch, J., dissenting) ("Congress cannot, under the guise of altering federal jurisdiction, dictate the result of a pending proceeding."); *id.* at 913 (Sotomayor, J., concurring in the judgment) (same). For

good reason. All new jurisdiction-stripping statutes necessarily change the law in a literal sense. *See Bank Markazi*, 578 U.S. at 247 (Roberts, C.J., dissenting) ("Changing the law is simply how Congress acts."). If Congress's enactment of a new jurisdiction-stripping measure is constitutional because Congress has enacted a new jurisdiction-stripping measure, Article III "'provides no limiting principle' on Congress's ability to assume the role of judge and decide the outcome of pending cases." *Patchak*, 138 S. Ct. at 920 (Roberts, C.J., dissenting) (citation omitted).

In any event, the Court need not parse *Patchak* to conclude that Section 324(e)(1) is unconstitutional. This case presents a question that the fractured *Patchak* decision did not answer, and one that *Klein* already does: can Congress eliminate jurisdiction as "a means to an end" in particular pending cases? Under *Klein*, the answer is no. Section 324 violates the separation of powers. Any other conclusion would reduce Article III to a mere "parchment barrier[] against the encroaching spirit of power." The Federalist No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

CONCLUSION

Section 324 is unconstitutional. As a result, this case is not moot and the Court has statutory subject matter jurisdiction to hear it. Mountain Valley's arguments for summary denial under Local Rule 27(f) are coextensive with its

arguments for mootness and fail for the same reasons. Accordingly, the Court should deny the pending motions.

DATED: June 26, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this response complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This response contains 5,165 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

I further certify that this response complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this response has been prepared in Times New Roman 14-point font using Microsoft Word.

/s/ Spencer Gall
Spencer Gall
Southern Environmental Law Center

CERTIFICATE OF SERVICE

I certify that on June 26, 2023, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system. *See* Fed. R. App. P. Local Rule 25(a)(4).

/s/ Spencer Gall
Spencer Gall
Southern Environmental Law Center