



# Mountain Valley Pipeline Litigation Tests Congress's Power to Limit Federal Court Jurisdiction

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The [Mountain Valley Pipeline](#) (Pipeline), currently under construction, is planned as a 303-mile natural gas transmission pipeline that would link natural gas fields in West Virginia to the existing Transco pipeline in Virginia. Mountain Valley Pipeline, LLC (MVP), the company constructing the Pipeline, [reports](#) that the project is roughly 94% complete, but it has faced numerous permitting challenges in federal court.

In June 2023, Congress enacted the [Fiscal Responsibility Act of 2023](#) (Pub. L. 118-5, the FRA). Section 324 of the FRA sought to resolve the permitting issues related to the Pipeline by directing federal agencies to issue any necessary permits or approvals and by limiting the federal courts' jurisdiction to hear challenges to those actions. The legislation raises legal questions about [Congress's power to regulate federal courts](#) in ways that affect pending legislation. Opponents of the Pipeline argue that FRA Section 324 represents congressional interference with the judicial branch that violates the constitutional separation of powers. The federal government and MVP argue that the legislation is a valid change to the applicable substantive law and the federal courts' jurisdiction.

This Legal Sidebar provides an overview of recent litigation involving the Pipeline, focusing on the separation of powers arguments related to the FRA.

## Pipeline Litigation in *Appalachian Voices*

As outlined in a previous [CRS Insight](#), construction and operation of the Pipeline require numerous federal and state permits. Opponents of the Pipeline have filed multiple lawsuits challenging various agency actions related to the project. Many of those cases have been litigated in the U.S. Court of Appeals for the Fourth Circuit, the federal court with jurisdiction over the states where the Pipeline is being constructed. The Fourth Circuit has previously vacated approvals by the [Bureau of Land Management](#), the [U.S. Forest Service](#), the [U.S. Army Corps of Engineers](#), and [state regulators](#) that were necessary for construction of the Pipeline. The same panel of three Fourth Circuit judges has decided most of the cases

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related to the Pipeline, leading MVP to [contend](#) that there could be a perception of unfairness in that venue.

Three cases that are still pending before the Fourth Circuit—consolidated under the name *Appalachian Voices v. U.S. Department of the Interior*—are particularly relevant to the dispute over FRA Section 324. The litigation in *Appalachian Voices* began on April 10, 2023, when a group of environmental organizations filed a petition for review in the Fourth Circuit. The petitioners challenged the U.S. Fish and Wildlife Service’s Biological Opinion and Incidental Take Statement (BiOp and ITS) for the Pipeline, two elements of the [interagency consultation process](#) under the Endangered Species Act, arguing that the agency failed to properly consider relevant factors in granting the BiOp and ITS. Later, the Wilderness Society filed two additional petitions for review of decisions of the U.S. Forest Service and the Bureau of Land Management granting other needed approvals for the Pipeline. MVP intervened in each of the cases to defend validity of the challenged agency actions, and the Fourth Circuit consolidated the three cases.

The petitioners filed motions to stay the challenged agency actions pending judicial review. (A stay is a form of temporary [injunctive relief](#) that essentially serves to pause litigation or other proceedings.) In these cases, a stay of one or more agency approvals would mean that MVP would not be able to move forward with construction or operation of the Pipeline while the Fourth Circuit considered the petitioners’ challenges. The federal government and MVP opposed the stay motions.

## The Fiscal Responsibility Act of 2023 and Jurisdiction Stripping

On June 3, 2023, President Biden signed the [Fiscal Responsibility Act of 2023](#). Section 324(c) of the FRA provides:

Notwithstanding any other provision of law ... Congress hereby ratifies and approves all authorizations, permits, verifications, extensions, biological opinions, incidental take statements, and any other approvals or orders issued pursuant to Federal law necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline[.]

The same subsection further directs the relevant federal agencies to “continue to maintain” relevant approvals or orders necessary for the construction and operation of the Pipeline.

The FRA also includes language that was apparently intended to foreclose further consideration of the Pipeline by the Fourth Circuit. Section 324(e)(1) of the FRA provides: “Notwithstanding any other provision of law, no court shall have jurisdiction to review” actions of certain federal or state agencies granting approvals necessary for the construction and operation of the Pipeline, “whether issued prior to, on, or subsequent to the date of enactment of this section, and including any lawsuit pending in a court as of the date of enactment of this section.” To the extent Pipeline opponents might challenge that jurisdictional provision itself, Section 324(e)(2) grants the U.S. Court of Appeals for the District of Columbia Circuit “original and exclusive jurisdiction over any claim alleging the invalidity of this section or that an action is beyond the scope of authority conferred by this section.”

Section 324(f) of the FRA provides that Section 324 “supersedes any other provision of law ... that is inconsistent with the issuance of any authorization, permit, verification, biological opinion, incidental take statement, or other approval” for the MVP.

Provisions such as FRA Section 324(e) implicate Congress’s constitutional authority to establish and regulate the lower federal courts. The constitutional separation of powers limits such regulation. In 1871, the Supreme Court held in *United States v. Klein* that Congress violated the separation of powers when it enacted legislation that limited federal court jurisdiction in a way that “prescribe[d] a rule for the decision of a cause in a particular way.” As discussed in more detail in a [CRS Report](#), subsequent Supreme Court decisions have reiterated the limits announced in *Klein* but have distinguished that case and rejected separation of powers challenges to other legislation stripping federal courts of jurisdiction. For example,

the Supreme Court upheld a jurisdiction-stripping provision in 2018 in *Patchak v. Zinke*. Although no opinion in *Patchak* gained the support of a majority of the Court, Justice Thomas’s plurality opinion summarized this principle: “Congress violates Article III when it compels findings or results under old law. But Congress does not violate Article III when it changes the law.”

## FRA Dispute in *Appalachian Voices*

On June 5, 2023, MVP filed motions to dismiss the consolidated petitions for review in *Appalachian Voices* for lack of jurisdiction. MVP argued that Section 324(e) of the FRA deprived the Fourth Circuit of subject matter jurisdiction over the petitions for review. The company further contended that in Section 324(c) of the FRA, “Congress explicitly ‘ratifie[d] and approve[d]’ all federal authorizations, permits, and other actions necessary for the construction and operation” of the Pipeline, “[n]otwithstanding any other provision of law.” The company asserted, among other arguments, that because of that authorization, the petitioners’ challenges to agency approvals of the Pipeline based on pre-FRA law must fail, so the cases had become moot because the court could no longer award the petitioners’ requested relief.

On June 14, the federal government also moved to dismiss the petitions. Like MVP, the federal defendants principally argued that Section 324(e) of the FRA stripped the Fourth Circuit of statutory subject matter jurisdiction over the petitions and that Section 324(c) of the FRA rendered the petitions moot.

The [petitioners](#) [opposed](#) the [motions to dismiss](#), arguing that FRA Section 324 could not validly require dismissal because Section 324 was unconstitutional. The petitioners relied on *Klein*, arguing that Section 324 violates separation of powers limits by requiring courts to decide cases in a certain way. The petitioners recognized the recent decision upholding a jurisdiction-stripping provision in *Patchak*, but they argued that the case was not binding because no reasoning earned the support of more than four Justices. The *Appalachian Voices* petitioners instead asked the court to adopt the reasoning of the dissent in *Patchak*, in which Chief Justice Roberts, joined by Justices Kennedy and Gorsuch, argued that Congress impermissibly “exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending case.”

On July 10, 2023, the Fourth Circuit issued orders in *Appalachian Voices* [staying the relevant agency actions](#) during the pendency of the petition for review. As is common with orders granting or denying temporary injunctive relief, the court’s decisions disposed of the motions for stay without written analysis of the legal issues presented. The [recognized standard](#) for granting a stay requires the party seeking a stay to show a substantial likelihood of success on the merits, which includes demonstrating a likelihood that the federal courts have jurisdiction to consider the case. If the Fourth Circuit applied that standard, its order implies that it believes that FRA Section 324 may be unconstitutional.

On July 14, 2023, MVP filed with the Supreme Court an [emergency application to vacate the stays](#). At the time of writing, the petitions for review and the motions to dismiss the petitions remain pending before the Fourth Circuit.

## Looking Forward and Considerations for Congress

Following the Fourth Circuit’s stay orders, [construction of the Pipeline is stopped](#). MVP has [sought Supreme Court review](#) of the stays, and the federal government could also seek such review. It is unclear, however, whether the Supreme Court will resolve the jurisdictional questions about Pipeline approval at this stage. There are several ways the Court might act on the request for emergency relief.

First, the Supreme Court could deny the emergency application, leaving the Fourth Circuit’s existing stays in place. In that situation, the stays would likely remain in effect until the Fourth Circuit considers and decides the merits of the legal questions presented in the petitions for review. Even if the Supreme Court

denies the current request for emergency relief, it could still potentially consider the constitutionality of Section 324 via a later petition for certiorari after the Fourth Circuit issues a final ruling in the case.

Second, the Court could grant the emergency application and vacate the Fourth Circuit's stay orders, which would likely allow Pipeline construction to continue. Supreme Court review of the stay orders could include consideration of the constitutionality of FRA Section 324. If the Court granted the emergency application, for example, that might indicate the Court's view that Congress had successfully divested the Fourth Circuit of jurisdiction over *Appalachian Voices*. However, the Court could also decide to vacate the stays on other grounds—for example, by finding that the petitions for review are moot or are likely to fail on the merits.

Whether the Supreme Court grants or denies the emergency application, review of the stay orders will likely proceed on the Court's [non-merits docket](#). The Court disposes of most matters on its non-merits docket without written opinions explaining its reasoning. Absent a Supreme Court order or opinion addressing the constitutionality of Section 324, the Fourth Circuit would still be able to address the issue as it considers the merits of the cases.

Third, in rare cases, the Supreme Court has treated an application for emergency relief as a petition for certiorari and has granted certiorari [before the lower court has issued a final decision](#) in a case. For instance, the Court recently granted certiorari before judgment in high-profile cases involving [abortion](#) and [student loan forgiveness](#). If the Supreme Court took that route here, it could consider the constitutionality of FRA Section 324 before the Fourth Circuit issues any further decisions. It could also decide whether or not to leave the Fourth Circuit's stays in effect while it considered the cases.

Regardless of whether the Supreme Court allows Pipeline construction to continue, the *Appalachian Voices* litigation will likely call on the federal courts to decide whether FRA Section 324 is constitutional. It is therefore possible that the litigation will provide additional clarity on Congress's power to limit the federal courts' jurisdiction over pending cases or otherwise change the law that applies to pending litigation.

## Author Information

Joanna R. Lampe  
Legislative Attorney

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