No.

In the Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL.,
PETITIONERS

v.

COWPASTURE RIVER PRESERVATION ASSOCIATION,
ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Appalachian National Scenic Trail (Appalachian Trail) is more than 2000 miles long, extending from Maine to Georgia, with approximately 1000 miles of the Trail crossing through lands within national forests. The National Trails System Act provides that the Appalachian Trail "shall be administered primarily as a footpath by the Secretary of the Interior," 16 U.S.C. 1244(a)(1), and clarifies that "[n]othing contained in [the Act] shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands," 16 U.S.C. 1246(a)(1)(A). Under the Mineral Leasing Act, 30 U.S.C. 181 *et seq.*, the United States Forest Service (Forest Service) has authority to grant certain rights-of-way through lands in the National Forest System, but no federal agency has authority under that statute to grant equivalent rights-of-way through lands in the National Park System. See 30 U.S.C. 185. The question presented is:

Whether the Forest Service has authority to grant rights-of-way under the Mineral Leasing Act through lands traversed by the Appalachian Trail within national forests.

PARTIES TO THE PROCEEDING

Petitioners were respondents in the court of appeals. They are the United States Forest Service; Bob Lueckel, in his official capacity as Acting Regional Forester of the Eastern Region of the Forest Service; and Ken Arney, in his official capacity as Regional Forester of the Southern Region of the Forest Service.[*]

The following respondents were petitioners 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, Inc.

Respondent Atlantic Coast Pipeline, LLC, was an intervenor-respondent in the court of appeals.

[*] Bob Lueckel is substituted for his predecessor, Kathleen Atkinson. See Sup. Ct. R. 35.3.

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The Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) is reported at 911 F.3d 150. The decisions of the United States Forest Service (Pet. App. 65a-101a, 102a-240a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 2018. A petition for rehearing was denied on February 25, 2019 (Pet. App. 241a-242a). On May 16, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including

June 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the appendix to this petition. Pet. App. 243a-252a.

STATEMENT

1. a. The National Forest System "consists of units of federally owned forest, range, and related lands throughout the United States and its territories." 16 U.S.C. 1609(a). The System is "vast," including 154 national forests, 20 national grasslands, and other lands that together occupy approximately 193 million acres of land in 43 States, Puerto Rico, and the Virgin Islands. *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 728 (1998); see Forest Serv., U.S. Dep't of Agric., *Land Areas of the National Forest System* (Nov. 2018).[1] The United States Forest Service (Forest Service), an agency of the United States Department of Agriculture, "administers and manages the National Forest System lands," including "land in the National Forests." 36 C.F.R. 200.3(b)(2)(i), (ii); cf. 16 U.S.C. 551.

In 1918, President Woodrow Wilson issued a proclamation establishing the Shenandoah National Forest in Virginia and West Virginia. Proclamation of May 16, 1918, 40 Stat. 1779 (1918 Proclamation); see Forest Serv., S. Region, U.S. Dep't of Agric., *George Washington National Forest: A History* 4, 11 (1993).[2] That Proclamation states that "all lands" in the relevant area "which have been or may hereafter be acquired by the

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[1] https://www.fs.fed.us/land/staff/lar/LAR2018/FY2018_LAR_Book.pdf.

[2] https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3832787.pdf.

United States * * * shall be permanently reserved and administered as part of the Shenandoah National Forest." 1918 Proclamation, 40 Stat. 1779. The Shenandoah National Forest was later renamed the George Washington National Forest, Exec. Order No. 5867 (June 28, 1932), and it now extends approximately 140 miles along the Appalachian and Blue Ridge Mountains in Virginia and West Virginia, encompassing more than one million acres of land. Joint C.A. App. 1774.

b. The Appalachian National Scenic Trail (Appalachian Trail) is "a trail of approximately two thousand miles extending generally along the Appalachian Mountains from Mount Katahdin, Maine, to Springer Mountain, Georgia." 16 U.S.C. 1244(a)(1). The Trail traverses 14 States and crosses through eight national forests, six national parks, at least one national wildlife refuge, and more than 60 state forests, game lands, or park areas. Joint C.A. App. 1778.

Private citizens, working in conjunction with the Forest Service and other agencies, began clearing and marking the Appalachian Trail in 1922 and completed it in 1937. Joint C.A. App. 1778; Nat'l Park Serv., U.S. Dep't of the Interior, *Trails for America: Report on the Nationwide Trail Study* 32-33 (1966) (*Trails for America*).[3] As of 1966, 43 percent of the Appalachian Trail's total mileage crossed private lands, 23 percent crossed state lands, and 34 percent crossed federal lands. *Trails for America* 42. Of the 682 miles of the Appalachian Trail that crossed federal lands, 507 miles were within national forests, 172 miles were within national parks, and three miles were on Tennessee Valley Authority land. *Ibid.*

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[3] https://www.nps.gov/noco/learn/management/upload/trails-for-america-1966.pdf.

In 1968, Congress enacted the National Trails System Act (or Act), 16 U.S.C. 1241 *et seq.*, which "institut[ed] a national system of recreation, scenic and historic trails." 16 U.S.C. 1241(b). As amended, the Act establishes 30 national trails and charges either the Secretary of the Interior or the Secretary of Agriculture with administering each trail. 16 U.S.C. 1244(a) (2012 & Supp. V 2017). The Appalachian Trail was one of "the initial components of" the National Trails System. 16 U.S.C. 1241(b). The National Trails System 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." 16 U.S.C. 1244(a)(1). The Secretary of the Interior, in turn, has assigned the National Park Service (Park Service) "management responsibility" for the Appalachian Trail. Office of the Assistant Sec'y for Fish & Wildlife & Parks, U.S. Dep't of the Interior, *Departmental Manual* Pt. 710, at 1.4(C)(1) (Aug. 16, 1977);[4] see *id.* at 1.4(C)(3); Pet. App. 55a.

Under the National Trails System Act, the Secretary of the Interior is responsible for selecting "the right[]-of-way" for the Appalachian Trail. 16 U.S.C. 1246(a)(2); see 16 U.S.C. 1244(a)(1). The Act further provides that, "[i]nsofar as practicable, the right-of-way for [the Appalachian Trail] shall comprise the trail depicted on" specified maps and that, "[w]here practicable, such rights-of-way shall include lands protected for it under agreements in effect as of October 2, 1968, to which Federal agencies and States were parties." 16 U.S.C. 1244(a)(1). When the right-of-way for the Appalachian

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[4] www.doi.gov/sites/doi.gov/files/elips/documents/Chapter%20%201_%20PURPOSE%2C%20POLICY%2C%20RESPONSIBILITY.doc.

Trail runs "across Federal lands under the jurisdiction of another Federal agency," however, the Act requires the Secretary of the Interior to reach "agreement" with the head of that agency regarding the "location and width of such right[]-of-way." 16 U.S.C. 1246(a)(2).

Following the enactment of the National Trails System Act, the Park Service and the Forest Service negotiated an agreement regarding "the width of the right-of-way for approximately 780 miles of Appalachian Trail route within national forests." 36 Fed. Reg. 2676 (Feb. 9, 1971); see 36 Fed. Reg. 19,802 (Oct. 9, 1971) (selecting "the official route of the Appalachian National Scenic Trail"). In the years that followed, the Forest Service acquired additional tracts of land within national forests to protect the Trail. Appalachian Trail Project Office, Nat'l Park Serv., *Comprehensive Plan for the Protection, Management, Development and Use of the Appalachian National Scenic Trail* 22 (1987) (*Comprehensive Plan*).[5] Today, approximately 1000 miles of the Appalachian Trail, nearly half of the Trail's total length, pass through eight national forests. Nat'l Park Service, U.S. Dep't of the Interior, *Appalachian National Scenic Trail: 2015 Business Plan* 18.[6] Within the Fourth Circuit, substantial sections of the Trail cross through national forests. See *id.* at 3.

In 1983, Congress amended the National Trails System Act to clarify that "[n]othing contained in [the Act] shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are

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[5] https://www.nps.gov/appa/learn/management/upload/compplan_web.pdf.

[6] https://www.nps.gov/appa/getinvolved/upload/APPA_2015_Business_Plan_page_version.pdf.

components of the National Trails System." 16 U.S.C. 1246(a)(1)(A); see National Trails System Act Amendments of 1983, Pub. L. No. 98-11, Tit. II, § 207(a)(2), 97 Stat. 45-46.

Under the general provisions of the National Trails System Act, the Secretary of the Interior, as the Secretary charged with administering the Appalachian Trail, is responsible for ensuring that uniform trail markers are erected and maintained along the Trail. 16 U.S.C. 1246(c). Where the Appalachian Trail crosses "lands administered by Federal agencies," the Park Service maintains the trail markers erected along the Trail. *Ibid.* Where the Appalachian Trail crosses "non-Federal lands, in accordance with written cooperative agreements," the Secretary of the Interior provides the trail markers to the relevant "cooperating agencies" and requires those agencies to erect and maintain them. *Ibid.* The Secretary may also provide for "trail interpretation sites" that "present information to the public about the trail," and may permit "uses along the trail" that "will not substantially interfere with the nature and purposes of the trail." *Ibid.*

2. a. In 2017, the Federal Energy Regulatory Commission (FERC) granted respondent Atlantic Coast Pipeline, LLC (Atlantic) authorization to construct, operate, and maintain a 42-inch-diameter natural gas pipeline along a 604.5-mile route that runs from Harrison County, West Virginia, to the eastern portions of Virginia and North Carolina. Pet. App. 2a, 12a; Joint C.A. App. 690. Upon its completion, the pipeline would transport up to 1.5 million dekatherms (approximately 1.5 billion cubic feet) of natural gas each day and could result in a net annual savings of $377 million to natural-gas and electricity consumers in Virginia and North

Carolina. Pet. App. 165a, 207a; Joint C.A. App. 690. Atlantic reports that "the majority of the gas supplied" by the pipeline would "be used to generate electricity for industrial, commercial, and residential uses." Pet. App. 116a.

In approving Atlantic's proposed pipeline, FERC found a "market demand" for the project, Joint C.A. App. 713, and determined that the project "would 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 in Virginia and North Carolina," *id.* at 714. FERC also found that the use of existing infrastructure, renewable energy sources, and conservation "do not presently serve as practical alternatives." *Id.* at 715. According to Atlantic, the pipeline would "facilitate cleaner air, increase the reliability and security of natural gas supplies, and provide a significant economic boost in West Virginia, Virginia, and North Carolina." *Id.* at 911.

On the 604.5-mile pipeline route approved by FERC, 21 total miles of underground pipeline would cross lands located within the George Washington and Monongahela National Forests. Pet. App. 2a-3a, 113a-114a. Approximately 0.1 miles of the proposed pipeline would cross under the Appalachian Trail within the George Washington National Forest on land acquired and administered by the Forest Service. *Id.* at 3a, 113a; Joint C.A. App. 1780, 1787. That segment of the pipeline would lie more than 600 feet beneath the surface of the forest land traversed by the Trail. Joint C.A. App. 115. Atlantic would use a horizontal directional drilling method to construct and install the pipeline underneath the Appalachian Trail, with entry and exit points located on private lands approximately 1400 feet and 3400

feet, respectively, from the Appalachian Trail footpath. Pet. App. 197a. Vegetation and intervening terrain would conceal those entry and exit points from anyone using the Appalachian Trail, and the construction of that section of the pipeline would require neither the removal of vegetation in the National Forest nor a closure or rerouting of the Appalachian Trail. *Id.* at 197a-198a.

b. The Mineral Leasing Act 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). For purposes of this provision, an "agency head" is "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). The Mineral Leasing Act defines "Federal lands" to mean "all lands owned by the United States except," as relevant here, "lands in the National Park System." 30 U.S.C. 185(b)(1). Accordingly, no federal department or agency has authority under that statute to grant a right-of-way for a pipeline through land in the National Park System. The National Park System includes "any area of land and water administered by the Secretary [of the Interior], acting through the Director [of the Park Service]." 54 U.S.C. 100501.

In its final environmental impact statement on the pipeline proposal, FERC stated that the Appalachian Trail "is a unit of the National Park System," but determined that "the lands acquired and administered by the [Forest Service] for the [Appalachian Trail] are [National Forest System] lands and subject exclusively to

[Forest System] regulations and management authority." Joint C.A. App. 1489. FERC therefore concluded that the pipeline's "proposed [Appalachian Trail] crossing on [National Forest System] lands" did not require an authorization from the Park Service. *Ibid.*

On November 17, 2017, the Forest Service issued a final record of decision stating that it was authorizing Atlantic "to use and occupy [National Forest System] land to construct, operate, maintain, and eventually decommission" the proposed pipeline along the FERC-approved route through the George Washington and Monongahela National Forests. Pet. App. 125a; see *id.* at 13a, 102a-240a. The Forest Service explained that it had based its decision on FERC's final environmental impact statement, *id.* at 112a, and had "adopted" that statement, *id.* at 118a. The record of decision also memorialized the Forest Service's determination that it had authority under the Mineral Leasing Act to grant a right-of-way for Atlantic's pipeline through the relevant sections of the George Washington and Monongahela National Forests, including through the land traversed by the Appalachian Trail. *Id.* at 117a; see *id.* at 113a. On January 23, 2018, the Forest Service issued a special use permit that granted Atlantic that authorization. *Id.* at 65a-101a; see *id.* at 13a.

Among other conditions, the Forest Service required Atlantic to ensure that "[n]o surface-disturbing activity would occur on [National Forest System] lands as part of the [pipeline] crossing under the Appalachian National Scenic Trail." Pet. App. 141a; see *id.* at 137a. The Forest Service also found that the boring operations to install the pipeline would result in temporary noise, dust, and "night-sky impacts" that might affect users of the Appalachian Trail, but that the pipeline project

"would have no long lasting impacts" on the Trail. *Id.* at 225a; see also *id.* at 229a-231a.

3. In 2018, respondents Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee, and Wild Virginia, Inc., filed a petition in the Fourth Circuit for review of the Forest Service's record of decision and special use permit, pursuant to 5 U.S.C. 702 and 15 U.S.C. 717r(d)(1). Pet. App. 13a; C.A. Joint Pet. for Review. The court of appeals granted the petition for review, vacated the record of decision and special use permit, and remanded to the Forest Service "for further proceedings consistent with" the court's opinion. Pet. App. 2a; see *id.* at 1a-64a.

a. As relevant to this petition for a writ of certiorari, the court of appeals held that the Forest Service lacked statutory authority to grant a right-of-way for the section of the proposed pipeline that would lie more than 600 feet beneath the surface of the segment of land in the George Washington National Forest traversed by the Appalachian Trail. Pet. App. 55a-59a.

The court of appeals noted that the Mineral Leasing Act "authorizes the 'Secretary of the Interior or appropriate agency head' to grant gas pipeline rights of way across 'Federal lands,'" *i.e.*, "'all lands owned by the United States *except lands in the National Park System*.'" Pet. App. 55a (quoting 30 U.S.C. 185(a) and (b)(1)). The court ruled that the Appalachian Trail "is land in the National Park System" because the National Trails System Act tasks the Secretary of the Interior with administering the Trail, and the Secretary of the Interior has "delegated that duty to [the Park Ser-

vice]." *Ibid.* The court also asserted that the government "generally * * * agree[s]" that the Appalachian Trail is "land in the National Park System," noting that the Park Service and FERC had described the Appalachian Trail as a "unit" of the National Park System. *Ibid.* (citations omitted). The court rejected the government's submission that, under the National Trails System Act, the Park Service administers the Appalachian Trail, while the Forest Service retains authority over the lands within national forests traversed by the Appalachian Trail. *Id.* at 56a-57a.

In light of its ruling that the Appalachian Trail is "land" in the National Park System, the court of appeals concluded that the Mineral Leasing Act "specifically excludes" the Trail "from the authority of the Secretary of the Interior 'or appropriate agency head' to grant pipeline rights of way." Pet. App. 57a (citing 30 U.S.C. 185(a) and (b)(1)); see *id.* at 55a. The court also concluded that the Chief of the Forest Service is not the "appropriate agency head" for the Appalachian Trail for purposes of the Mineral Leasing Act because, in the court's view, the National Trails System Act draws a distinction under which "the Secretary of the Interior *administers* the entire [trail]," while the Forest Service "*manage*[*s*] trail components under [its] jurisdiction." *Id.* at 58a; see *id.* at 58a-59a.

b. The court of appeals made several additional rulings that are not the subject of this certiorari petition. The court first held that the Forest Service violated the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, and Forest Service regulations when it modified 13 standards contained in the Forest Service's forest plans for the George Washington and Mononga-

hela National Forests to accommodate Atlantic's pipeline project. Pet. App. 14a-28a; see *Ohio Forestry Ass'n*, 523 U.S. at 729 (describing forest plans). The court held that the Forest Service acted arbitrarily and capriciously in concluding that certain Forest Service rules did not apply to those modifications. Pet. App. 16a-28a. The court next held that the Forest Service violated the National Forest Management Act and its own forest plans by granting the special use permit without first determining that the pipeline could not be reasonably accommodated on lands outside the national forests. *Id.* at 30a-34a. Accordingly, the court "remand[ed] to the Forest Service for proper application of" the relevant Forest Service rules, *id.* at 28a, and "for proper analysis of whether the [pipeline] project's needs can be reasonably met on non-national forest lands," *id.* at 34a.

In addition, the court of appeals held that the Forest Service acted arbitrarily and capriciously and in violation of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA), when it adopted FERC's analysis of alternative pipeline routes without conducting a further review of alternative routes that avoided national forests. Pet. App. 36a-42a. The court also concluded that the Forest Service violated NEPA because, in the court's view, the Forest Service had "fail[ed] to take a hard look at the environmental consequences of the [pipeline] project." *Id.* at 43a; see *id.* at 42a-55a. In light of those holdings, the court found that the Forest Service had acted arbitrarily and capriciously in adopting FERC's environmental-impact analysis and granting the special use permit. *Id.* at 54a. The court di-

rected the Forest Service to explain certain of its decisions on remand and to perform any needed "supplemental analysis." *Id.* at 55a; see *id.* at 54a-55a.[7]

Although the government disagrees with these further rulings by the court of appeals, they, unlike the court's ruling concerning the Mineral Leasing Act, can be resolved by the Forest Service on remand. The government therefore does not seek review of them here.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that national forest lands underlying the Appalachian Trail are in the National Park System and thus ineligible for the grant of a right-of-way for a pipeline under the Mineral Leasing Act. Congress spoke clearly in the National Trails System Act: the Secretary of the Interior is to "administer[]" the Appalachian Trail "primarily as a footpath," 16 U.S.C. 1244(a)(1), but that assignment of responsibility for a footpath across the surface of lands does not "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). Other provisions of the National Trails System Act confirm that the "right[]-of-way" for a national trail may run "across Federal lands under the jurisdiction of another Federal agency." 16 U.S.C. 1246(a)(2); see 16 U.S.C. 1244(e) and 1246(i). In light of that plain statutory text, the Park Service and the Forest Service have long agreed that the Park Service is responsible for administering the Appalachian Trail as a footpath, while the

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[7] The court of appeals denied petitions for rehearing filed by the government and by Atlantic, which had intervened in the court of appeals. Pet. App. 241a-242a.

Forest Service retains jurisdiction and authority over the lands within national forests traversed by the footpath.

In holding otherwise, the court of appeals misread the National Trails System Act, decreeing that long sections of the Appalachian Trail within national forests rest on lands that are rendered part of the National Park System as a result of the presence of the Trail on the surface, and therefore cannot be subject to rights-of-way granted under the Mineral Leasing Act. That ruling threatens to hamper the development of energy infrastructure in the eastern United States, including the construction and operation of the natural gas pipeline at issue in this case. The court's decision also casts doubt on the Forest Service's previously unquestioned authority to grant permits and other types of land use authorizations for power lines, communications sites, water facilities, and roads that cross the Appalachian Trail within national forests. And the decision upends the stable, longstanding allocation of responsibilities between the Park Service and the Forest Service regarding the Appalachian Trail and the national forest lands it traverses.

Although the court of appeals ordered a remand for further proceedings in this case, the outcome on remand of the Mineral Leasing Act issue is already predetermined by the court's decision. In light of the court's ruling that the Forest Service lacks statutory authority to authorize the pipeline's construction along the FERC-approved route that passes well under the surface of the land traversed by the Appalachian Trail, the Forest Service cannot grant Atlantic's application for a special use permit through national forests along that specific route. The Court should grant a writ of certiorari to

correct the court of appeals' erroneous resolution of the important question presented in this case.

A. The Court Of Appeals' Decision Is Wrong

The National Trails System Act establishes the Appalachian Trail as a footpath that crosses the surface of federal, state, and private lands without altering the legal status of the lands it traverses. Accordingly, where the Appalachian Trail crosses through a national forest, the land underlying the Trail remains in the National Forest System and subject to the jurisdiction, administration, and management of the Forest Service under its statutory and regulatory authorities, including its authority under the Mineral Leasing Act. See 36 C.F.R. 200.3(b)(2)(i), (ii); 16 U.S.C. 521 and 551; cf. *United States* v. *New Mexico*, 438 U.S. 696, 709 n.18 (1978) (recognizing that the Department of Agriculture has "jurisdiction of the national forests"). The Forest Service thus has authority under the Mineral Leasing Act to grant certain rights-of-way, including rights-of-way for natural gas pipelines, through lands in national forests traversed by the Appalachian Trail. See 30 U.S.C. 185(a) and (b). The Fourth Circuit's holding otherwise is contrary to the plain text of the National Trails System Act.

1. National forest lands traversed by the Appalachian Trail remain in the National Forest System

a. The National Trails System Act, which establishes the Appalachian Trail as an "initial component[] of" the National Trails System, 16 U.S.C. 1241(b), 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," 16 U.S.C. 1244(a)(1). "Insofar as practicable," the Act

states, "the right-of-way for [the Appalachian Trail] shall comprise the trail depicted on" certain specified maps and "shall include lands protected for it under agreements in effect" at the time of the enactment of the National Trails System Act, and to which federal agencies and States were parties. *Ibid.*

The Act further provides, in Section 1246(a)(1)(A), that "[n]othing contained in [the Act] 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 same provision also requires that the "Secretary charged with the overall administration of a trail * * * shall, in administering and managing the trail, consult with the heads of all other affected State and Federal agencies." *Ibid.*

Section 1246(a)(1)(A) thus recognizes a distinction between a national trail itself, which one agency will be charged with "administering and managing," and any "federally administered *lands* which are components of the National Trails System," which other agencies with preexisting jurisdiction will continue to have responsibility for "managing." 16 U.S.C. 1246(a)(1)(A) (emphasis added). In addition, Section 1246(a)(1) clarifies that the establishment of a national trail, such as the Appalachian Trail, does not transfer any preexisting land-management responsibilities from another agency to the Secretary who administers the trail. Accordingly, the National Trails System Act does not grant the Secretary of the Interior jurisdiction over any lands traversed by a national trail in a national forest that would otherwise be under the jurisdiction of the Department of Agriculture.

Section 1246(a)(2) reinforces that conclusion. That section provides that the Secretary charged with administering a trail "shall select the right[]-of-way" for that trail. 16 U.S.C. 1246(a)(2). Section 1246(a)(2) expressly contemplates, however, that "such rights-of-way" may be "across Federal lands under the jurisdiction of another Federal agency." *Ibid.*; see also 16 U.S.C. 1244(a)(1). In that event, Section 1246(a)(2) requires the Secretary and the head of the agency with jurisdiction over the lands to reach "agreement" regarding the "location and width of such rights-of-way." 16 U.S.C. 1246(a)(2). Section 1246(a)(2) therefore confirms that the selection of the "right[]-of-way" for a trail does not transfer responsibility for the underlying federal lands to the agency charged with administering the trail. So too does 16 U.S.C. 1246(i). That Section provides that the appropriate Secretary may issue regulations concerning a national trail, but only "with the concurrence of the heads of any other Federal agencies administering lands through which [the] trail passes." *Ibid.* Indeed, if the administration of a national trail encompassed the administration and management of the lands underlying the trail, the concurrence requirement in Section 1246(i) would have little or no effect.[8]

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[8] Similarly, 16 U.S.C. 1244(e) requires the Secretary responsible for a newly designated national trail to undertake a "full consultation with affected Federal land managing agencies" before submitting a comprehensive plan for a trail to Congress. That provision, added in 1978, also required the Secretary of the Interior to take the same steps with respect to the Appalachian Trail by the end of 1981, more than a decade after the National Trails System Act first established the Appalachian Trail. *Ibid.* Section 1244(e) therefore contemplates the continuing jurisdiction of land-management agencies over federal lands through which a national trail will pass.

Significantly, moreover, the National Trails System Act recognizes that national trails, including the Appalachian Trail, might cross lands that the federal government does not even own or manage. For example, the Act requires the "Secretary charged with the administration of" a particular national trail to "cooperate with and encourage the States to operate, develop, and maintain portions of such trails which are located outside the boundaries of federally administered areas." 16 U.S.C. 1246(h)(1) (2012 & Supp. V 2017); see *ibid.* (authorizing the Secretary to enter into "written cooperative agreements" with States, local governments, or private landowners "to operate, develop, and maintain any portion of such a trail either within or outside a federally administered area"). The Act also addresses the obligations and authorities of the relevant Secretary "[w]here the lands included in a national scenic or national historic trail right-of-way are outside of the exterior boundaries of federally administered areas." 16 U.S.C. 1246(e). The Act obviously does not vest the Secretary of the Interior with authority to administer the state, local, and private lands underlying those stretches of a trail, and there is no reason why the result should be any different where lands traversed by the trail are under the jurisdiction of another federal agency.

These statutory provisions, both individually and collectively, demonstrate that the National Trails System Act did not transfer any lands that the Appalachian Trail traverses into the National Park System. Additional provisions of the Act still further reinforce that understanding. See 16 U.S.C. 1244(d) (requiring the "Secretary charged with the administration of [a] trail"

to establish an advisory council for that trail that includes "the head of each Federal department or independent agency administering lands through which the trail route passes"); 16 U.S.C. 1246(b) (authorizing "the Secretary charged with the administration of a national scenic or national historic trail" to "relocate segments of [the] trail right-of-way, with the concurrence of the head of the Federal agency having jurisdiction over the lands involved").

b. Consistent with the plain text of the National Trails System Act, the Park Service and the Forest Service have long agreed that the Forest Service retains jurisdiction over the lands in national forests underlying the Appalachian Trail.

In 1970, for example, the Park Service and the Forest Service entered into a memorandum of agreement concerning the Appalachian Trail. See U.S. Dep't of Agric., *Forest Service Manual* 1531.32a, at 9-12 (effective June 1, 1990) (reproducing 1970 memorandum of agreement).[9] That agreement recognized 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." *Id.* at 9; see *id.* at 10. The two agencies agreed to cooperate in developing uniform regulations for "segments of the Trail located on Federal lands under their separate jurisdictions, enforcement of which will be carried out by the agency administering the lands through which the Trail passes." *Id.* at 11.

Subsequently, in 1981, the Park Service and the Forest Service jointly approved the comprehensive plan for the Appalachian Trail. The plan recognized that the

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[9] www.fs.fed.us/im/directives/fsm/1500/1531.2-1531.32e.rtf.

Park Service has "responsibility for overall Trail administration," but that "land-managing agencies retain their authority on lands under their jurisdiction." *Comprehensive Plan* 12-13. The plan identified the Forest Service as one of those agencies. See *id.* at 14.

Since that time, the Park Service and the Forest Service have continued to proceed on the shared understanding that the Forest Service remains responsible for administering and managing national forest lands traversed by the Appalachian Trail. See, *e.g.*, Nat'l Park Serv., U.S. Dep't of the Interior, *Director's Order No. 45* § 3.8, at 6 (May 24, 2013)[10] (recognizing that a national trail administered by the Park Service may "cross[] lands administered by other Federal, State, or local agencies"); U.S. Dep't of the Interior, et al., *Memorandum of Understanding for the Appalachian National Scenic Trail in the Commonwealth of Virginia* 6 (2010)[11] (memorializing the Forest Service's agreement that it "continue[s] to be responsible for all matters pertaining to the Appalachian National Scenic Trail on national forest system lands").

The court of appeals was therefore wrong to say that the government "generally * * * agree[s]" that the Appalachian Trail is "land in the National Park System." Pet. App. 55a. The court based that statement on comments that the Park Service provided to FERC during FERC's review of the pipeline proposal, which FERC then incorporated into its environmental impact statement for the pipeline project. *Ibid.* (citing Joint C.A. App. 1794, 1849, 3186). Read as a whole, however, those statements convey the Park Service's longstanding

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[10] https://www.nps.gov/policy/DOrders/DO_45.pdf.

[11] http://www.appalachiantrail.org/docs/appendix---g---table/2010-mou-for-the-anst-in-virginia.pdf.

view that lands traversed by the Appalachian Trail within national forests remain in the National Forest System. To be sure, the Park Service described the Appalachian Trail as a "unit[] of the National Park System" that includes "the entire Trail corridor." Joint C.A. App. 1849. But the Trail itself is a footpath on the surface of the land it crosses. The Park Service therefore also recognized that the proposed pipeline route would cross the Appalachian Trail at a "locat[ion] on U.S. Forest Service lands," *ibid.*, and the Park Service did not dispute the Forest Service's authority to grant a right-of-way through those lands, see *id.* at 1847-1855. See, *e.g.*, *id.* at 1854 (referring to "areas of the [Appalachian Trail] owned or managed by other agencies such as the Forest Service"). The Park Service's comments to FERC are thus fully consistent with the federal government's position here.

c. Despite the plain language of the National Trails System Act, the Fourth Circuit erroneously declared that the Appalachian Trail "is land in the National Park System." Pet. App. 55a. The court of appeals based that conclusion on a statute providing that the National Park System includes "any area of land and water administered by the Secretary [of the Interior]," acting through the Park Service. *Ibid.* (quoting 54 U.S.C. 100501) (brackets in original); see also National Park System General Authorities Act, Pub. L. No. 91-383, § 2(a), 84 Stat. 826 (predecessor statute with similar language). Under that statute, the National Park System includes lands administered by the Park Service that are traversed by the Appalachian Trail. But that statute does not apply to the Appalachian Trail itself because, for purposes of the National Trails System Act,

the Appalachian Trail is not an "area of *land and water*." 54 U.S.C. 100501 (emphasis added).[12] Rather, the National Trails System Act establishes the Appalachian Trail as a "footpath" that crosses the surface of federal, state, and private lands along a "right-of-way." 16 U.S.C. 1244(a)(1); see pp. 15-19, *supra*.

Furthermore, even if the Appalachian Trail were an "area of land" for purposes of 54 U.S.C. 100501, the national forest lands underlying the Trail are not in the National Park System because the Park Service does not "administer[]" them. *Ibid.* Although the National Trails System Act charges the Secretary of the Interior with "administer[ing]" the Appalachian Trail itself, 16 U.S.C. 1244(a)(1), that Act also specifies that it does not "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). And as explained above, other provisions of the Act confirm that the Park Service's responsibility to administer the Appalachian Trail does not extend to the lands traversed by the Trail. See pp. 16-19, *supra*. Because the Forest Service therefore remains the agency responsible for administering and managing the national forest lands crossed by the Appalachian Trail, those lands do not constitute an "area of land * * * administered by the Secretary [of the Interior], acting through [the Park Service]," that is included in the National Park System by virtue of 54 U.S.C. 100501.

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[12] The Appalachian Trail footpath traverses some lands acquired by and under the jurisdiction of the National Park Service and some lands within areas like the Great Smoky Mountains National Park. The federal parties do not dispute that those areas are "area[s] of land or water" administered by the National Park Service.

The court of appeals also was wrong to conclude that the national forest lands underlying the Appalachian Trail became "land in the National Park System" because the National Trails System Act charged the Secretary of the Interior with administering the trail, and the Secretary in turn "delegated that duty to [the Park Service]." Pet. App. 55a. Under that reasoning, the Secretary of the Interior's internal delegation decision transferred national forest lands from the National Forest System to the National Park System, and transferred jurisdiction over them from the Forest Service to the Park Service. But that construction of the National Trails System Act is contrary to the plain statutory text, see pp. 15-19, *supra*, and inconsistent with Congress's general practice of speaking clearly when it intends to empower the Secretary of the Interior to acquire jurisdiction over federal lands that were previously under the jurisdiction of another federal agency. See, *e.g.*, 16 U.S.C. 403h-14; 16 U.S.C. 450ff-5; 16 U.S.C. 460a-6; 43 U.S.C. 2632; 54 U.S.C. 100506(c)(1)(B)(i).

The court of appeals' reasoning is also difficult to square with the Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.* (2012 & Supp. V 2017). That statute, enacted on the same day as the National Trails System Act, specifically 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); see 16 U.S.C. 1274(a) (2012 & Supp. V 2017) (designating certain "rivers and the land adjacent thereto" as "components of the national wild and scenic rivers system"). Because the same Congress enacted both statutes, the Wild and Scenic Rivers Act "is cogent proof that Congress knew well

how to express its intent directly," *Bryan* v. *Itasca Cnty.*, 426 U.S. 373, 390 (1976), when that intent was to transfer lands to the National Park System.

The National Trails System Act includes no similar statement of intent. To the contrary, the provision establishing the Appalachian Trail mentions neither the Park Service nor the National Park System, see 16 U.S.C. 1244(a)(1), and, as noted above, another provision expressly states that the National Trails System Act does not "transfer among Federal agencies any management responsibilities established under any other law for federally administered lands," 16 U.S.C. 1246(a)(1)(A).

2. The Forest Service has statutory authority to grant pipeline rights-of-way through national forest lands traversed by the Appalachian Trail

The Mineral Leasing Act authorizes "the Secretary of the Interior or appropriate agency head" to grant rights-of-way through "Federal lands" for certain pipeline purposes. 30 U.S.C. 185(a). Lands in the National Forest System qualify as "Federal lands" under this provision, see 30 U.S.C. 185(b)(1), and the head of the Forest Service is the "appropriate agency head" to grant rights-of-way through such lands because the Forest Service "has jurisdiction over" those lands, 30 U.S.C. 185(b)(3); see 36 C.F.R. 200.3(b)(2)(i), (ii); *New Mexico*, 438 U.S. at 709 n.18. Because national forest lands traversed by the Appalachian Trail are in the National Forest System, not the National Park System, the Forest Service has authority under the Mineral

Leasing Act to grant pipeline rights-of-way that run through only those lands.[13]

In holding otherwise, the Fourth Circuit relied on its erroneous determination that the lands traversed by the Appalachian Trail within national forests are in the National Park System. See Pet. App. 55a-59a. The court also concluded that the Forest Service "is not the 'appropriate agency head' for the [Appalachian Trail]" because "the Secretary of the Interior *administers* the entire [Trail]," while the Forest Service and other state and federal agencies merely "*manage* trail components under their jurisdiction." *Id.* at 58a (emphasis omitted). But that reasoning shows that even the court of appeals recognized the Forest Service's ongoing "jurisdiction" over national forest lands underlying the Appalachian Trail. *Ibid.* The plain text of the Mineral Leasing Act therefore dictates that the Forest Service is the "appropriate agency head" to grant rights-of-way through such lands, because the Forest Service is the federal agency "which has jurisdiction over [those] lands." 30 U.S.C. 185(a) and (b)(3); see 30 U.S.C. 185(b)(1). The court of appeals was wrong to hold otherwise.

B. The Question Presented Warrants This Court's Review

1. Certiorari is warranted "because of the importance of the [court of appeals'] decision to the utilization of the public lands." *United States* v. *Coleman*, 390 U.S. 599, 601 (1968). Within the Fourth Circuit, long sections of the Appalachian Trail cross through national forests. Under the court of appeals' decision, all

[13] If a pipeline right-of-way would cross both through lands in the National Forest System and through other "Federal lands," 30 U.S.C. 185(b)(1), under the jurisdiction of another federal agency, the Mineral Leasing Act authorizes the Secretary of the Interior to grant the right-of way. 30 U.S.C. 185(c).

federal lands underlying those segments of the Trail are now in the National Park System, which means that no federal agency is authorized to grant rights-of-way through those lands under the Mineral Leasing Act. That holding threatens significant and immediate adverse consequences for the development and maintenance of the nation's energy infrastructure in the eastern United States.

The pipeline for which the Forest Service approved the right-of-way could transport as much as 1.5 billion cubic feet of natural gas to Virginia and North Carolina each day.[14] Joint C.A. App. 1464. Without that pipeline, natural-gas and electricity customers in those States could end up paying an additional $377 million in energy costs each year because of decreased access to natural-gas supplies. Pet. App. 165a. The court of appeals' ruling could also impede the construction of other proposed pipelines that would cross the Appalachian Trail within national forests. See, *e.g.*, 82 Fed. Reg. 25,761, 25,763 (June 5, 2017) (Forest Service notice regarding a proposal under the Mineral Leasing Act to grant the Mountain Valley Pipeline a right-of-way to cross be-

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[14] A capacity of 1.5 billion cubic feet of natural gas per day would enable the pipeline to transport more than 500 billion cubic feet of natural gas per year, an amount that, for example, exceeds the total quantity delivered in 2017 directly to more than seven million residential natural-gas consumers in Delaware, the District of Columbia, Maryland, New Jersey, North Carolina, South Carolina, and Virginia. U.S. Energy Info. Admin., *Natural Gas Consumption by End Use: Volumes Delivered to Residential*, https://www.eia.gov/dnav/ng/ng_cons_sum_a_EPG0_vrs_mmcf_a.htm; U.S. Energy Info. Admin., *Number of Natural Gas Customers: No. of Residential Consumers*, https://www.eia.gov/dnav/ng/ng_cons_num_a_EPG0_VN3_Count_a.htm.

neath the Appalachian Trail within the Jefferson National Forest); *Sierra Club, Inc.* v. *United States Forest Serv.*, 897 F.3d 582 (4th Cir. 2018) (vacating federal agency decisions regarding the Mountain Valley pipeline).[15]

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[15] As reported in a recent filing with the Securities and Exchange Commission (SEC), Mountain Valley Pipeline, LLC (MVP), following discussions with the Department of the Interior, recently submitted a "Land Exchange Proposal" to the federal government in connection with the Mountain Valley Pipeline. EQM Midstream Partners, LP (EQM), U.S. Secs. & Exch. Comm'n, *Form 8-K* (June 17, 2019), https://www.sec.gov/Archives/edgar/data/1540947/000110465919035766/a19-11613_18k.htm. The MVP proposal would grant the United States "full ownership" of certain private lands traversed by the Appalachian Trail, including a tract of private land adjacent to the Jefferson National Forest. *Id.* at 2. The submission proposes that "the applicable federal agencies" would grant MVP an easement and right-of-way that would enable the Mountain Valley Pipeline to cross the Appalachian Trail at the location within the Jefferson National Forest that FERC approved in 2017. *Ibid.* (The MVP proposal does not address the Atlantic pipeline at issue in this case.) The SEC filing explains that the MVP proposal "is subject to the approval of the respective federal agencies and will be reviewed by such agencies under land exchange procedures," and states that in light of that proposal and "the resolution of a few remaining legal and regulatory components," one of MVP's owners "now expects a mid-2020 full in-service date for the [Mountain Valley Pipeline] project." *Ibid.*

The National Trails System Act includes a provision that authorizes the Secretary of the Interior to "accept title to any non-Federal property" within a national trail right-of-way and, "in exchange therefor," to "convey to the grantor of such property any federally owned property under his jurisdiction," provided that certain statutory conditions are met. 16 U.S.C. 1246(f)(1); see 16 U.S.C. 1246(e) and (f)(2). Section 1246(f)(1) also allows the Secretary of Agriculture to "utilize authorities and procedures available to him in connection with exchanges of national forest lands." 16 U.S.C.

More generally, several infrastructure projects have been planned, proposed, or approved to increase the capacity to transport natural gas in the geographic region at issue here. See 161 F.E.R.C. 61042 ¶ 282, 2017 WL 4925429, at *69 (Oct. 13, 2017). Under the court of appeals' decision, much of the Appalachian Trail's total length within the Fourth Circuit now traverses federal lands, including national forests and national parks, that are categorically ineligible for pipeline rights-of-way under the Mineral Leasing Act. Accordingly, if that decision stands, it could thwart the construction of future natural gas and oil pipelines with proposed crossings under the Appalachian Trail on those lands.

Additional problems would flow from the court of appeals' holding that national forest lands underlying the Appalachian Trail are in the National Park System. The Secretary of Agriculture has statutory authority under the Federal Land Policy and Management Act to grant, issue, or renew rights-of-way "over, upon, under, or through" lands in the National Forest System for power, telephone, and cable lines; cellular-telephone,

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1246(f)(1). The Departments of the Interior and Agriculture, however, have informed this Office that, in their judgment, there are substantial questions that would have to be resolved to determine whether Section 1246(f)(1) would authorize the exchange described in MVP's proposal. Section 5(b) of the Act of July 15, 1968, Pub. L. No. 90-401, 82 Stat. 356, contains more general land-exchange authority for the Interior Department, but that Department has informed this Office that there similarly are substantial questions concerning Section 5(b).

Regardless, the government should not be required to undertake such complex transactions based on an erroneous interpretation of the National Trails System Act. And even if it could, such a possibility would not address the other problems created by the Fourth Circuit's decision, discussed at pp. 28-30, *infra*.

radio, and television towers; roads, railroads, and canals; water facilities; and "such other necessary transportation or other systems or facilities which are in the public interest and which require rights-of-way." 43 U.S.C. 1761(a). Other statutes empower the Secretary of Agriculture and the Forest Service to grant easements for similar purposes on national forest lands. See 16 U.S.C. 533; 43 U.S.C. 961 (2012 & Supp. V 2017). The court of appeals' ruling casts doubt on the Forest Service's authority to issue such authorizations on national forest lands traversed by the Appalachian Trail.

The court of appeals' ruling, if allowed to stand, would also disrupt the Forest Service's administration and management of national forests in the Fourth Circuit and impose new burdens on the Park Service. For decades, the Forest Service and the Park Service have proceeded on the shared understanding that the Forest Service retains authority and jurisdiction over national forest lands traversed by the Appalachian Trail. See pp. 19-21 , *supra*. And in light of the Forest Service's authority over national forest lands, the Park Service and the Forest Service have agreed that the Forest Service is responsible for developing, protecting, maintaining, and managing the sections of the Appalachian Trail that traverse national forests. See U.S. Dep't of the Interior et al., *The National Trails System Memorandum of Understanding* 5 (2017).[16] The Park Service, in turn, oversees the Forest Service's activities on those segments of the Trail and provides technical support. See *id.* at 4.

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[16] https://www.nps.gov/subjects/nationaltrailssystem/upload/National_Trails_System_MOU_2017-2027.pdf.

That division of responsibilities has allowed the Forest Service to administer and manage each national forest traversed by the Appalachian Trail as a coherent whole, subject to a uniform set of authorities, priorities, and objectives and a single land-management plan. Under the court of appeals' decision, however, the Appalachian Trail would rest upon a ribbon of land deemed by the Fourth Circuit to be part of the National Park System, bisecting national forests within the Fourth Circuit. If the court's ruling were to stand, questions would arise whether the Park Service would be required to manage the narrow slices of national forest land crossed by the Appalachian Trail's footpath, while the Forest Service would retain responsibility for the surrounding federal lands. Any such division of authority would upset the longstanding division of responsibilities between the Forest Service and the Park Service and could lead to confusion and significant administrative difficulties, especially in circumstances where the statutory objectives, authorities, and missions of the National Park System and National Forest System diverge.

2. Although the Forest Service can address the court of appeals' other concerns on remand, the Forest Service cannot grant Atlantic a right-of-way for a pipeline through federal lands in national forests traversed by the Appalachian Trail. The Court therefore should grant a writ of certiorari to remove that barrier imposed by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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