RECORD NO. 18-1042

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

ORUS ASHBY BERKLEY, *et al.*,

Plaintiffs - Appellants,

v.

MOUNTAIN VALLEY PIPELINE, LLC, *et al.*,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

JOINT REPLY BRIEF OF APPELLANTS

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Defendants MVP and FERC adopt the district court's reasoning that the Landowners' standing arguments defeat their ability to raise a constitutional challenge.[1] In other words, because the Landowners have standing, the district court concluded that they cannot assert a "facial" challenge. According to MVP's and FERC's reading of the district court's opinion, such a challenge is concerned with an "abstract" constitutional violation but because the Landowners have asserted that they have standing, i.e., they have demonstrated an injury-in-fact that is concrete and particularized to them and their particular parcels of land, they cannot then simultaneously claim to be concerned with an abstract or facial constitutional issue. And since they are not concerned solely with an abstract facial issue but, rather, with a particularized injury-in-fact to their own properties, they clearly are not able to raise a facial challenge and thus the Court has no subject

[1] *See* Brief of Appellee Mountain Valley Pipeline, Doc. 34 at 12 of 42 ("As the district court stated in its memorandum opinion, 'plaintiffs' own complaint—and their standing arguments—make clear that they are concerned not with some abstract constitutional violation, but with the fact that their land will be affected by MVP's proposed pipeline") (citing Joint Appendix ("JA") 539); *see also* Brief for Defendants-Appellees FERC, Doc. 33-1 at 16-17 of 35 ("As the district court correctly recognized, Landowners' Complaint and arguments demonstrate that they are challenging Mountain Valley's ability to exercise eminent domain authority under a FERC issued certificate order. That is, Landowners are not just concerned with an abstract constitutional violation, but with the impact of the FERC-authorized Mountain Valley pipeline on their land.").

matter jurisdiction. This reasoning is fundamentally flawed. The district court—as well as MVP and FERC—has erred.

Instead, the law ***requires*** plaintiffs to assert standing ***in order to*** raise a constitutional challenge. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that plaintiffs asserting a constitutional challenge ***must*** establish the "constitutional minimum" elements of an injury-in-fact that is "concrete" and "particularized," "actual" or "imminent," "'not conjectural or hypothetical,'" causally connected, and likely to be redressed by the court).

If the Fourth Circuit were to adopt the district court's reasoning, no plaintiff could ever bring a constitutional challenge. There would be no route to do so: the plaintiff would have to choose between *not* proving standing (in which case they would be dismissed for lack of standing) or proving standing (in which case they would be dismissed, on the district court's reasoning, for proving standing and somehow defeating their own challenge). The reasoning is clearly erroneous and contrary to a fundamental principle of constitutional law.

Standing does not defeat a constitutional challenge. It is instead an indisputable ***prerequisite*** of raising that challenge in the first place. The fact that the Landowners here have demonstrated an injury-in-fact that is concrete and particularized to them does not undermine their challenge, but bolsters it.

Had the Landowners *not* alleged an injury-in-fact, they would not have standing to raise the challenge. Courts across the country consistently dismiss such constitutional challenges for lack of standing where plaintiffs do not have injuries-in-fact, i.e., where they only bring what the district court in the case at bar called "abstract" challenges but have no concrete injury themselves. *See, e.g.*, *Toghill v. Clarke*, 877 F.3d 547, 552 (4th Cir. 2017) (*quoting County Court v. Allen*, 442 U.S. 140, 154-55 (1979)) ("A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.")); *see also McDonald v. Commonwealth*, 48 Va. App. 325 (Va. Ct. App. 2006); *Metrolina Family Practice Group, P.A. v. Sullivan*, 1991 U.S. App. LEXIS 4727 (4th Cir. 1991) (holding in part that plaintiff doctors—who brought facial constitutional challenges to Medicare Part B—did not "assert the rights of others" but rather alleged that they "suffered 'injury in fact' as a result of being regulated by the federal government" and therefore had standing to challenge the Medicare provisions); *see also ACLU of New Mexico v. City of Albuquerque*, 142 N.M. 259, 265 (Ct. App. N.M. 2007) (dismissing plaintiffs' facial challenge that an ordinance is overbroad because plaintiffs did not prove they suffered an injury-in-fact or faced an imminent threat of injury: "In order to

advance a facial challenge, Plaintiffs are required to meet the traditional requirements for standing . . . Plaintiffs have failed to demonstrate that they have suffered an injury in fact or experienced the imminent threat of an injury. Therefore, Plaintiffs have not met the standing requirements needed to mount a facial challenge to the Ordinance.").

On a final note, proof of standing (i.e., injury-in-fact to particular parcels of land) does not mean that the Landowners are concerned only with the effect of the statute and FERC's Certificate on their particular land and none other (a line of reasoning Defendants adopt as an attempt to sidestep jurisdiction by claiming the Landowners have no genuine constitutional concerns); rather, the injury-in-fact to the Landowners' land is the factual basis that allows the Landowners to raise their constitutional challenge in the first place. The injury-in-fact is merely a natural and probable *consequence* of the obvious problems with the statute. Its existence does not defeat the ability to raise a constitutional challenge but, rather, necessitates it. Put simply, it is not possible for a plaintiff to raise a constitutional challenge without first demonstrating an injury-in-fact.

Furthermore, as to Defendant MVP's assertion that the Landowners are "walk[ing] back their claims" and have only now, on appeal, challenged a "Congressional act" but beforehand allegedly only challenged a "pipeline

project,"[2] such allegations are baseless. It is indisputable that Landowners' very first pleadings immediately raised a constitutional challenge to the *delegation* of power from Congress to FERC via the Natural Gas Act ("NGA"). The Landowners not only asserted the "delegation" challenge in the substantive counts plead, but also provided a detailed and lengthy legal analysis and comparison to other delegation cases previously brought before the Supreme Court,[3] all of which were appropriately decided upon *on the merits* since the Court was—and still is—the only entity with subject matter jurisdiction to decide overly broad delegations of power by Congress. The Defendants' present attempt to defeat subject matter jurisdiction over a Congressional act by mischaracterizing on appeal the Landowners' initial constitutional challenge is contradicted by the pleadings on record.

As to the Defendants' interpretations of *Thunder Basin*, the Landowners re-assert their position in the Opening Brief: there is no meaningful review by an administrative agency for constitutional challenges to Congressional delegations of power. Congress did not—and could not—divest the district court of jurisdiction

[2] Brief of Appellee Mountain Valley Pipeline, Doc. 34 at 12 of 42.

[3] Plaintiffs' Memorandum of Law, Doc. 5 at 18-35 of 42, explaining restrictions on Congressional delegations of power and citing delegation case law including but not limited to: *J.W. Hampton. Jr. & Co. v. United States*, 276 U.S. 394 (1928); *Clinton v. City of NYC*, 524 U.S. 417 (1998); *United States v. Chicago. M.. St. P. gt P.R. Co*., 282 U.S. 311, 324 (1931); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *A.L.A. Schechter Poultry Corp. v. United States* 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

over such challenges. The Landowners' claims are therefore "wholly collateral" to the agency's proceedings and, as repeatedly conceded by Defendant FERC on oral argument and again in FERC's Response, neither MVP nor FERC could have the expertise to decide constitutional questions about Congressional acts.[4] MVP's and FERC's arguments about the application of the *Thunder Basin* standard do nothing to undermine or challenge the Landowners' arguments on these points. Accordingly, the Landowners stand on their arguments in their Opening Brief.

In short, the district court has erred, not only in the method of its analysis but in reaching the conclusion that it lacks subject matter jurisdiction. The Landowners' standing does not defeat their constitutional challenge but, rather, qualifies these Landowners as the most appropriate persons to bring such a challenge. The decision must be reversed.

As requested by motion and in their Opening Brief, the Landowners respectfully request expedited oral argument before irreversible harm occurs to their respective properties.

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[4] *See* Brief for Defendants-Appellees FERC Doc. 33-1 at 13 of 35 ("While observing that it is for the courts to determine the constitutionality of the Natural Gas Act's eminent domain provisions . . .). Note that the Landowners did not assert that Defendant FERC did not follow its own procedures but, rather, that the entire framework is fundamentally flawed because the delegation of power by Congress to FERC was overly broad and thus allowed FERC to create the unconstitutional framework in the first place. Such a delegation challenge is first and foremost a challenge to the congressional act that delegated the power to the agency and not simply a challenge to an agency order itself.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellants has been electronically filed by CM/ECF system which will send notification of such filing to all counsel of record on this 6th day of March, 2018.

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