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Supreme Court Forces Divorce for a Happily Married Couple: The Trail and Its Land, 55 UIC L. Rev. 176 (2022)

Jesse Carbonaro

SUPREME COURT FORCES DIVORCE FOR A HAPPILY MARRIED COUPLE: THE TRAIL AND ITS LAND

JESSE CARBONARO*

I. INTRODUCTION

While divorce feels increasingly common, there was one "couple" that never wanted, nor expected, to separate—the Appalachian National Scenic Trail [hereinafter "Appalachian Trail" or "Trail"] and its land. On June 15, 2020, the Supreme Court forced a separation, a divorce of sorts, between the Trail and the land that forms it in *U.S. Forest Service v. Cowpasture River Preservation Association*.[1] Any hiker who walks the Trail understands the

obvious connection between the Trail and the land, a relationship that seems to have escaped some on the Court. Justice Kagan explained in oral argument that "when you walk on the trail . . . [you are] walking on land" and that "the trail is a piece of land."[2] Much like a marriage, a trail and "the land upon which it exists"[3] are a union that, once made, is never meant to be separated.

The Supreme Court in *Cowpasture* made the critical mistake of separating the Trail from its land[4] and wrongly reversed and remanded the Fourth Circuit's holding.[5] The Court incorrectly severed the Trail from "the land upon which it exists,"[6] through an analysis which neglected to conclude that (1) the Trail and its land are both legally paired through a plain reading of the statutes and (2) the Trail and its land are practically paired, as the environmental impacts equally implicate both the Trail and its land.[7]

Part I will explore the factual and procedural history of *Cowpasture*, including the Atlantic Coast Pipeline's [hereinafter "ACP"] construction and route through the Appalachian Trail. Part II will study the Court's reasoning behind separating the Trail from its land and the dissent's logic in concluding the opposite. Part III will argue the Court ignored the rational conclusion that the Trail is legally and practically indivisible from its land, and the dissent correctly interpreted the intertwining statutes. The Court's majority opinion ignored the environmental impacts of a pipeline through the National Park System and Congress's goal of conserving the Trail. The environmental impacts—only touched upon in the dissent—warranted more attention, particularly given their implications for the close relationship between the Appalachian Trail and the land that was at issue in the case.

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* Jesse Carbonaro, Juris Doctor Candidate 2022, UIC School of Law. Thank you to my parents, Joe and Jane, and sister, Danielle who have supported and loved me throughout my entire life. Additionally, thank you to Brian, who encouraged me to apply my passion for the environment to the law.

1. U.S. Forest Serv. v. Cowpasture River Pres. Ass'n., 140 S. Ct. 1837, 1850 (2020).

2. Transcript of Oral Argument at 12, *Cowpasture*, 140 S. Ct. 1837 (2020) (Nos. 18-1584, 18-1587), 2020 WL 883393 at *12.

3. Gillian Giannetti, *SCOTUS Debrief: The Atlantic Coast Pipeline Cowpasture Case*, NRDC (Feb. 25, 2020), www.nrdc.org/experts/gillian-giannetti/oral-argument-debrief-cowpasture-case [perma.cc/8D4E-NES9].

4. *Cowpasture*, 140 S. Ct. at 1844. The Court initiated the split between the Trail and its land by "focus[ing] on the distinction between the *lands* that the Trail traverses and the Trail itself." *Id.* This divorced relationship incorrectly placed "the lands (not the Trail) are the object of the relevant statutes." *Id.*

5. *Id.* at 1850.

6. Giannetti, *supra* note 3.

7. *See generally Cowpasture*, 140 S. Ct. at 1841-50 (demonstrating that Justice Thomas found there was no statutory authority to support the notion that the Appalachian Trail was unified with the land and that environmental considerations were not included as a significant factor in his analysis).

II. BACKGROUND

A. History of the Appalachian National Scenic Trail's Ecological Resources

The National Trails System Act ("Trails Act") established national scenic and historic trails, including the Appalachian Trail.[8] Visited by approximately two million hikers annually, the Trail is a 2,190 mile public trail traversing the spine of the Appalachian Mountains.[9] The Trail passes through significant and rare ecosystems in fourteen states, six national parks, eight national forests, and two national refuges.[10] The Trail's ecosystem serves "as an indicator of the health of the natural resources of the entire Eastern Seaboard"[11] because it holds a substantial amount of fragile and protected habitat, vegetation, and wildlife, called biodiversity hotspots.[12]

The integrity and resources of the Appalachian Trail are vulnerable to "incompatible developments," like pipelines.[13] Pipelines that penetrate the Trail, or its adjacent land, cause the depletion and eradication of the Trail's precious biological and cultural resources.[14] The ACP, undoubtedly one of these incompatible developments, created concern over how this pipeline would burden the Trail and its nearby land[15] due to the

8. 16 U.S.C § 1244(a) (2022). The Appalachian Trail was the second trail created under the Trails Act. § 1244(a)(1).

9. *Appalachian National Scenic Trail*, NAT'L PARKS CONSERVATION ASS'N, 1 (Mar. 2010), www.nps.gov/appa/learn/management/upload/AT-report-web.pdf [perma.cc/F93K-2Y2H].

10. *Id.*

11. *Id.* at 7 (explaining that a 2010 Special Report of the National Parks Conservation Association qualified the Trail as an indicator of health).

12. John Charles Kunich, *The Uncertainty of Life and Death: The Precautionary Principle, gödel, and the Hotspots Wager*, 17 MICH. ST. J. INT'L L. 1, 13 (2008). Biodiversity Hotspots are "[c]omparatively limited geographical areas with a disproportionately large number of endemic species." *Id.* Biodiversity refers to the variability among habitat, vegetation, and wildlife. Bradley M. Bernau, *Help for Hotspots: Ngo Participation in the Preservation of Worldwide Biodiversity*, 13 IND. J. GLOBAL LEGAL STUD. 617, 620 (2006) (citing Convention on Biological Diversity art. 2, June 5, 1992, 1760 U.N.T.S. 142, 146 (1992)).

13. *Appalachian National Scenic Trail*, *supra* note 9, at 2. ("The narrow, linear nature of the trail corridor, coupled with its prime location along the crest of the Appalachian Mountains, leaves it susceptible to an array of development threats, such as pipeline").

14. *Id.* at 19; 9-11.

15. Brief of Amicus Curiae the Appalachian Trail Conservancy in Support of None of the Parties at 32, *Cowpasture*, 140 S. Ct. 1837 (2020) (Nos. 18-1584, 18-1587).

imperativeness of preserving the Trail in its entirety.[16]

Since the Appalachian Trail was minted as a National Trail, Congress has never authorized a right-of-way for a pipeline which would cross the Trail on federally owned land.[17] Rather, the pipelines that do infiltrate the Appalachian Trail, do so under the authority of the Mineral Leasing Act ("MLA").[18] These rights-of-way are permitted to cross the Trail because they either rely on an easement created prior to federal ownership or cross on land to which the MLA does not apply.[19]

B. Atlantic Coast Pipeline Project Mired in Litigation from its Inception

In 2015, Atlantic was formed as a LLC to develop and own the

16. *Id*. It is critical to preserve the Trail "in its full richness, the experience of nature and of the nation's history and culture that hiking the Trail affords." Id.

17. Brief for Respondents at 8, *Cowpasture*, 140 S. Ct. 1837 (2020) (Nos. 18-1584, 18-1587) (citing a 2013 decision by the Forest Service authorized a pipeline to proceed alongside a preexisting pipeline right-of-way over the Appalachian Trail on federal land.); *see also* Forest Serv., Decision Notice, Columbia Gas, Giles County, Virginia (Nov. 22, 2013), www.fs.usda.gov/nfs/11558/www/nepa/93590_FSPLT3_1462661.pdf [perma.cc/G52Z-GN2P] (verifying that the Trail was rerouted before new pipeline construction began; no new crossing occurred on federal land).

18. WildEarth Guardians v. Jewell, 1:15-CV-2026-WJM, 2016 WL 8577508, 1 (D. Colo. June 17, 2016). The MLA "governs the leasing of public lands for developing deposits of federally owned coal, petroleum, natural gas, and other minerals." *Id*. The MLA was intended "to promote the orderly development of oil and gas deposits in publicly owned lands of the United States through private enterprise." Geosearch, Inc. v. Andrus, 508 F. Supp. 839, 842 (D. Wyo. 1981) (citing Harvey v. Udall, 384 F.2d 883, 885 (10th Cir. 1967)). The Act mandates that before "any action on a leasehold which might cause a significant disturbance of the environment, the lessee shall submit for the Secretary's approval an operation and reclamation plan." 30 U.S.C. § 207(c) (2022). Then, the Secretary must "approve or disapprove the plan or require that it be modified." *Id*.

19. The MLA is applicable to federal land, not state or private land. 30 U.S.C. § 185 (2022). "Respondents acknowledge that if the pipeline had passed through an area that was not public land, their argument(s) would not apply." Lindsay Williams, *Unhappy Trails: Leasing Authority and the Trails Act, U.S. Forest Service v. Cowpasture River Preservation Association (2020)*, 45 HARV. ENVTL. L. REV. 521, 537, n. 35 (2021) (citing Brief for Respondents, *supra* note 17 at 8). Pipeline developers contend a ruling that the Forest Service does not have authority under the MLA to grant rights-of-way through lands within national forests would act as a 2,000-mile barrier to development. Ellen Gilmer, *Dominion Pipeline Clashes With Appalachian Trail at High Court*, BLOOMBERG LAW (Feb. 10, 2020), www.news.bloomberglaw.com/environment-and-energy/natural-gas-pipeline-iconic-trail-at-odds-in-supreme-court-case [perma.cc/J62A-SPL9].

Atlantic Coast Pipeline.[20] Atlantic filed an application with the Federal Energy Regulatory Commission, the agency tasked with the regulation of interstate transmission of natural gas,[21] to construct and operate the ACP.[22] The ACP was a proposed "604.5 mile, 42-inch diameter natural gas pipeline, that would stretch from West Virginia to North Carolina."[23] Atlantic asserted that the purpose of the ACP was to provide an energy supply to communities across North Carolina and Virginia.[24] The Fourth Circuit did not find this to be a sufficient reason to justify the construction of the pipeline.[25]

The ACP has been mired in litigation since the beginning.[26]

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20. Joint Appendix at 32, *Cowpasture*, 140 S. Ct. 1837 (2020) (Nos. 18-1584, 18-1587). Dominion Energy and Duke Energy are Atlantic's majority ownership holders. *Id*. Dominion and Duke have a combined annual eighty billion dollars in sales and primarily engage in the distribution of natural gas. *Dominion Energy (D)*, FORBES, www.forbes.com/companies/dominion-energy/#1acf1b823392 [perma.cc/UNZ4-3QYG] (last visited Jan. 10, 2022); *Duke Energy (Duk)*, FORBES, www.forbes.com/companies/duke-energy/#7623ae946f9b [perma.cc/E5GP-9EC9] (last visited Jan. 10, 2022).

21. *What FERC Does*, FED. ENERGY REG. COMM'N, www.ferc.gov/about/what-ferc/what-ferc-does [perma.cc/4TAM-84JN] (last visited Oct. 6, 2020); *Natural Gas Pipelines: 2019 In Review*, Practical Law Article w-023-4881.

22. *Cowpasture*, 140 S. Ct. at 1841.

23. Cowpasture River Pres. Ass'n v. Forest Serv., 911 F.3d 150, 155 (4th Cir. 2018), *cert. granted*, No.18-1584, WL 4889926 (Oct. 4, 2019), *cert. granted*, *Atl. Coast Pipeline, L.L.C. v. Cowpasture River Pres. Ass'n*, No.18-1587, WL 4889930 (Oct. 4, 2019).

24. *Dominion Energy and Duke Energy cancel the Atlantic Coast Pipeline*, DUKE ENERGY (July 5, 2020), www.news.dominionenergy.com/2020-07-05-Dominion-Energy-and-Duke-Energy-Cancel-the-Atlantic-Coast-Pipeline [perma.cc/7GBW-C8KN] [hereinafter DUKE ENERGY].

25. Joint Appendix, *supra* note 20, at 37. The Fourth Circuit was "not persuaded by [the] contention that there is insufficient supply in the Appalachian Basin to support the pipeline." *Id*. Dick Brooks of the Cowpasture River Preservation shared this sentiment, stating "[i]t's been six years since this pipeline was proposed, we didn't need it then and we certainly don't need it now." Becky Sullivan & Laurel Wamsley, *Supreme Court Says Pipeline May Cross Underneath Appalachian Trail*, NPR (Jun. 15, 2020), www.npr.org/2020/06/15/877643195/supreme-court-says-pipeline-may-cross-underneath-appalachian-trail [perma.cc/9SEB-CVR7]. President Biden demonstrated the importance of being cautious in analyzing the need for a pipeline before construction when he revoked a permit for the Keystone XL Pipeline. Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021). The President reasoned that a natural gas pipeline would not serve the best interests of the United States given the severity of climate change, and it was in the country's best interest to "prioritize the development of a clean energy economy, which will in turn create good jobs." *Id*.

26. Noah Sachs, *Argument analysis: The trail, the pipeline and a journey to the center of the earth*, SCOTUSBLOG (Feb. 25, 2020), www.scotusblog.com/2020/02/argument-analysis-cowpasture/ [perma.cc/MK6N-BS5H] [hereinafter Sachs I]. The ACP has faced significant litigation outside of the *Cowpasture* case. *Id*. While the ACP is now canceled, at

Several courts, mostly the Fourth Circuit,[27] have issued rulings that have impeded the construction of the ACP.[28] The litigation at the center of this Note began after two years of conflict over Atlantic's applications for a Special Use Permit[29] to construct and operate the ACP across the Appalachian Trail. The Forest Service issued the permit and granted a right-of-way in 2017.[30] Subsequently, the Fourth Circuit vacated the Special Use Permit, reasoning that the Forest Service lacked the authority pursuant to the MLA to grant a pipeline right-of-way across the Trail.[31]

The Supreme Court granted certiorari on October 4, 2019 and held the Forest Service had statutory authority to grant a right-of-way under the Appalachian Trail.[32] While Atlantic won the battle

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the time of the *Cowpasture* case, a ruling would "neither stop nor guarantee the development of the 600-mile pipeline" because there were several key permits that had sent back to the agencies by the courts. Amelia Burnette, *Court Weighs in on Pipeline Crossing Appalachian Trail*, REGULATORY REVIEW (Aug. 3, 2020), www.theregreview.org/2020/08/03/burnette-court-weighs-pipeline-crossing-appalachian-trail/ [perma.cc/V5FU-KUV7]. The aforementioned challenges to ACP permits include:

> Endangered Species Act permit (Biological Opinion) from the U.S. Fish and Wildlife Service, Special Use Permit and right-of-way grant from the U.S. Forest Service, Right-of-way permit from the National Park Service, Virginia air pollution permit for the Union Hill compressor station, [and] Four Clean Water Act authorizations from the Corps of Engineers for Pennsylvania, West Virginia, Virginia, and North Carolina.

Atlantic Coast Pipeline problems persist despite Supreme Court decision, S. ENV'T L. CTR. (Jun. 15, 2020), www.southernenvironment.org/news-and-press/press-releases/atlantic-coast-pipeline-problems-persist-despite-supreme-court-decision [perma.cc/3PNR-K7FT].

27. Sachs I, *supra* note 26 (The Fourth Circuit has been most involved as they have vacated seven other ACP permits).

28. DUKE ENERGY, *supra* note 24. The United States District Court for the District of Montana has vacated "long-standing federal permit authority for waterbody and wetland crossings." *Id*. On December 17, 2021, the U.S. Court of Appeals for the District of Columbia Circuit decided on a challenge to the Federal Energy Regulatory Commission's decision to provide a "more limited disclosure—the property owners' initials and street names" along the now discontinued ACP. Niskanen Ctr. v. FERC, No. 20-5028, 2021 WL 5979261, at *1 (D.C. Cir. Dec. 17, 2021).

29. *Special-use Permit Application*, U.S. FOREST SERV. www.fs.usda.gov/working-with-us/contracts-commercial-permits/special-use-permit-application [perma.cc/9QLN-HRQE] (last visited Nov. 17, 2020). A special-use permit "allows occupancy, use, rights, or privileges of agency land. *Id.* The authorization is granted for a specific use of the land for a specific period of time." *Id.*

30. *Cowpasture,* 911 F.3d at 155-60.

31. *Id.* at 155.

32. *Cowpasture*, 140 S. Ct. at 1841. The Supreme Court granted certiorari in the consolidated cases *Atlantic Coast Pipeline, LLC v. Cowpasture River Preservation Association* and *United States Forest Service v. Cowpasture River Preservation Association. Id.* It was an unusual case for the Court to consider because "[t]here was no circuit split—only one circuit court had ruled on this

in *Cowpasture*, they ultimately lost the war to build the ACP.[33] After six years and billions of dollars invested, on July 5, 2020, Atlantic announced the cancellation of the ACP construction.[34] Atlantic blamed the termination on construction delays and legal developments, which created uncertainties on the cost to complete the project.[35] Nonetheless, the implications of the Supreme Court's ruling will reverberate throughout National Park Service lands.[36]

C. Atlantic Coast Pipeline's Invasive Construction Through the Appalachian Trail

The ACP would have required extensive construction to cross under the Appalachian Trail, causing devastating impacts on the environment.[37] Atlantic planned to "blast and flatten Forest mountain ridgelines" and dig an eight-foot trench to lay its pipe.[38] Atlantic intended to clear a 125-foot-wide stretch of trees and other vegetation and diminish the land to only seventy-five feet in wetlands.[39] Deforestation of this magnitude would negatively alter the well-known and well-loved visual experience of hiking the Trail and degrade the ecosystem of the surrounding area.[40] Construction would have converted the previously forested ecosystem to a

issue—and there was no constitutional question." Burnette, *supra* note 26.

33. *Message to Our Communities*, ATLANTIC COAST PIPELINE, www.atlanticcoastpipeline.com/default.aspx [perma.cc/56CF-CHDQ] (last visited Oct. 7, 2020).

34. *Id.*

35. DUKE ENERGY, *supra* note 24.

36. Transcript of Oral Argument, *supra* note 2, at 19. The consequences of a ruling that the Trail is not *lands* in the National Park System would mean "thousands and thousands of acres of park land gets transferred to the Forest Service and these thousand-mile trails get converted into barriers to pipeline development." *Id.* Environmental groups and the impacted communities, which would have been negatively impacted if the construction of the pipeline came to fruition, shared this "concern about the ruling's implication for the integrity of the National Forest System," and the vulnerability for the "already-complex regulatory scheme governing National Forests" to be dismembered. Lawson Fite, C*owpasture Decision Upholds Integrity of the National Forest System*, 52 NO. 1 ABA TRENDS 4, 6 (Sept./Oct. 2020) [hereinafter Fite I]. Environmental groups and the impacted communities include the "Cowpasture River Preservation Association, Highlanders for Responsible Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee, and Wild Virginia". *Cowpasture*, 140 S. Ct. at 1842.

37. Brief for Respondents, *supra* note 17, at 9.

38. *Id.*

39. *Id.*

40. Joint Appendix, *supra* note 20, at 107. Permanent visual impacts would where permanent structures of the ACP like "compressor stations, houses, buildings, guardrails" would exist. *Id.* These structures are "inconsistent with the existing visual character of the area" and would impact views on the Trail. *Id.*

drastically different plant schema that is entirely inconsistent with the area's natural ecosystem.[41] The ACP would have demanded a fifty-foot right of way[42] that would run for most of the Trail's length through the George Washington National Forest for the lifetime of the pipeline, prompting frequent disruptive maintenance procedures.[43]

Atlantic would construct the ACP using the Horizontal Directional Drilling method ("HDD"),[44] which would drill a one-mile-long and three-and-a-half feet wide borehole where the pipeline crosses the Trail.[45] Atlantic acknowledged the inherent risk for the failure of HDD to leak hazardous substances.[46] This method requires invasive heavy machinery for the entirety of the construction process.[47] The HDD method would persist for over a year, generating twenty-four-hour noise in sensitive areas.[48] Its incessant use of construction night lights would diminish visibility to engage in astronomical viewing and research.[49] There would be extreme soil disruption and loss around the ecosystem.[50]

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41. *See id*. at 107 (explaining that the ecosystem would be converted "to scrub-shrub or herbaceous vegetation types").

42. *Cowpasture,* 911 F.3d at 155.

43. *Id*.

44. Drilling—Horizontal directional drilling, ENV. SCI. DESKBOOK § 5:48 (2020). HDD is a method used for installing "environmental remediation wells" in Pipeline projects. Id. If HDD turned out to be incompatible with the project, Atlantic's contingency plan was the direct pipe crossing option, which is an even more invasive process. Brief for Respondents, supra note 17, at 72. "This alternative "would result in an additional 3,996 feet . . . of cleared pipeline right-of-way" and would "result in an additional [two] acres of forest impact." *Id*. "Implementing this contingency option would increase the duration of project activities and the resulting air, noise, and traffic impacts from these activities near the [AT.]" *Id*. The success of HDD "is not at all certain," and "Atlantic's contingency plan . . . 'is expected to intensify the disruptive effects of the pipeline.'" *Id*. at 10 (citing Sierra Club v. United States Dep't of Interior, 899 F.3d 260, 294 (4th Cir. 2018)).

45. Brief for Respondents, *supra* note 17, at 10; Gilmer, *supra* note 19 (this method would "drill sideways through the mountain's bedrock and basalt").

46. Joint Appendix, *supra* note 20, at 69 ("[T]here is some inherent risk with the HDD method and unknown factors can cause a HDD to fail, and alluvium at the entry and exit locations could complicate the drilling process.").

47. Brief for Respondents, *supra* note 17, at 10 (machinery required included "drilling rigs, mud pumps, cranes, backhoes, and engine-driven light plants").

48. *See* Joint Appendix, *supra* note 20, at 79 (explaining that construction would have created a significant "increase above the ambient sound level at two noise sensitive areas ("NSAs") located 600 feet and 1,300 feet from the HDD entry site would be about 0.1 to 0.2 decibels.").

49. *Id*. at 80.

50. A State Supreme Court held that a construction project's erosion would negatively result in "a reduction in the capacity of the land to hold water." *In re Wildlife Wonderland, Inc.*, 346 A.2d 645, 653 (Vt. 1975). Erosion makes the surrounding environment more prone to flooding. *Soil Erosion and Degradation*, WWF, www.worldwildlife.org/threats/soil-erosion-and-degradation [perma.cc/SY8E-9UDF] (last visited Jan. 13, 2022). In this case,

Broad deforestation and interference with the land would impact the historically significant visual experience hiking on the Appalachian Trail provides by introducing foreign permanent structures to the landscape and degrading the health and beauty of the Trail's nature.[51] Any hiker would agree that the value of a trail extends beyond the trail to the land that encompasses it, and that the infrastructure of a pipeline is unnatural to the Trail's inherent environment.

Construction would significantly degrade the ecological value of the Trail. The ACP's proposed route would have traversed twenty-one miles of national forest land, including sixteen miles of land within the George Washington National Forest and five miles through the Monongahela National Forest.[52] The ACP's route raised ecological concerns as the path would transect fifty-seven rivers, streams, and lakes, and numerous other ecologically vital areas.[53] By infiltrating these lands, the ACP route would displace critical wildlife habitat, which could take over fifty years to recover.[54] This habitat is home to some of the world's richest populations of temperate zone species[55] such as bears, foxes, woodpeckers, owls, salamanders, and butterflies.[56] This habitat also includes threatened and endangered species, such as the Little Brown Bat, which are critical for pest control, pollination, and seed spreading.[57] The pipeline would ultimately "increase soil erosion and sedimentation, risk landslides and contamination of groundwater and soil, and displace wildlife habitat, some which could take '50 years or longer' to recover."[58] Construction on the

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"[s]edimentation modeling indicates annual soil loss will be 200 to 800 percent above baseline erosion during the first year of construction," and *if* restoration takes place, it will take years to return to pre-construction soil levels. *Cowpasture*, 911 F.3d at 166 (citing Corrected Deferred Joint Appendix, at 25).

51. Joint Appendix, *supra* note 20, at 102 ("[A] construction zone would introduce contrasts of color, texture, line, and pattern, and possibly of form where the pipeline would crest ridges and knobs.").

52. *Cowpasture*, 911 F.3d at 155.

53. Brief for Respondents, *supra* note 17, at 9-10 (citing Fourth Circuit Appendix, 1659).

54. Brief for Respondents, *supra* note 17, at 11 (citing Fourth Circuit Appendix, 1468-70, 1604, 1611, 1630, 1682-83).

55. *The Appalachian Trail in five minutes*, ESA (Mar. 9, 2011), www.esa.org/esablog/research/the-appalachian-trail-in-five-minutes/ [perma.cc/ZP4X-W8CS].

56. Emma Rosenfield, *Wildlife along the Appalachian Trail*, TREK (Apr. 10, 2019), www.thetrek.co/appalachian-trail/wildlife-along-appalachian-trail/ [perma.cc/L39B-QM2F].

57. *Cowpasture*, 911 F.3d at 155; 158; Matt Trott, *Beneficial Bats: Little Brown Bat Keeps Us Safe*, U.S. FISH & WILDLIFE SERVS. (Oct. 26, 2015), www.fws.gov/news/blog/index.cfm/2015/10/26/beneficial-bats-little-brown-bat-keeps-us-safe [perma.cc/Q83M-X4SC].

58. Brief for Respondents, *supra* note 17, at 11 (citing Fourth Circuit Appendix, 1468-70, 1604, 1611, 1630, 1682-83*);* Mike Tony, *Atlantic Coast*

Appalachian Trail would be immense and cascade far beyond the physical trail.

D. Forest Service and the Federal Energy Regulatory Commission Ruling to Approve the ACP After the Forest Service's Initial Denial

In April 2016, the Forest Service initially denied Atlantic's plan and proposal for the Atlantic Coast Pipeline because of serious environmental concerns, including the aforementioned detrimental impacts of construction.[59] However, in May 2017, the Forest Service curiously withdrew these concerns and approved the pipeline and right-of-way.[60] The Forest Service determined the alternative routes presented did not propose "a significant environmental advantage when compared to the proposed route and would not be economically practical."[61] Buried in the Forest Service's ruling was the project's exemption from thirteen Forest Service planning standards concerning "soil, water, riparian, threatened and endangered species, and recreational and visual resources."[62] The Fourth Circuit noted that "[d]espite the Forest Service's clearly stated concerns regarding the adverse impacts of the ACP project, as Atlantic's deadlines for the agency's decisions drew closer, its

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Pipeline restoration planned to start later in WV than other states, CHARLESTON GAZETTE-MAIL (Jan. 6, 2021), www.wvgazettemail.com/news/energy_and_environment/atlantic-coast-pipeline-restoration-planned-to-start-later-in-wv-than-other-states/article_232fde2b-0f9e-57f9-9919-b4453d8dce58.html [perma.cc/3DWQ-AMNR]. West Virginia has implemented a restoration plan to address the issues construction has already inflicted on the West Virginia; including an increased risk for landslides. *Id*. For example, "[it's] not just a runoff effect but a whole side of a mountain running down into a stream. Stabilization and revegetation, it's really important that it's done and done quickly." *Id*. The plan will also require cut-and-fill grading and temporary sediment barriers. *Id*.

59. *See Cowpasture*, 911 F.3d at 174 (stating

> Specifically, the record reflects that the Forest Service voiced concerns about (1) authorizing the SUP without ten site-specific stabilization designs to demonstrate the effectiveness of Atlantic's [Best in Class] program; (2) the overly high efficiency rate of erosion control devices used in the sedimentation analysis (96 percent); (3) relying on the use of water bars as a mitigation technique, when Atlantic had not analyzed whether water bars would mitigate or exacerbate erosion effects during construction; and (4) Atlantic's use of averaged versus episodic sediment calculations to analyze the water resource impacts from increases in sedimentation due to the ACP project.).

60. Andrew Graham, *West Virginia*, 5 OIL & GAS, NAT. RES. & ENERGY J. 319, 327 (2019) (quoting *Cowpasture*, 911 F.3d 158).

61. *Cowpasture,* 911 F.3d at 159 (citing U.S. Forest Service draft Record of Decision).

62. Graham, *supra* note 60, at 327 (citing *Cowpasture*, 911 F.3d 162).

tenor began to change."[63] This "mysterious"[64] shift in level of concern was made without acknowledging or explaining the Forest Service's change in position.[65] In October 2017, the Federal Energy Regulatory Commission approved Atlantic's application to construct the ACP[66] "with marginal analysis of actual need for the natural gas."[67]

E. The Fourth Circuit Ruling to Vacate Atlantic's Special Use Permit Due to Several Environmental Violations

In January 2018, environmental organizations, concerned about the Forest Service's stark change in position over whether to issue the Special Use Permit, brought an action in the Fourth Circuit to review the agency's decision to issue a Permit for the construction of the ACP.[68] A unanimous panel of the Fourth Circuit vacated the Forest Service's decision and remanded on four independent bases.[69] The Fourth Circuit held (1) the Forest Service acted "arbitrarily and capriciously"[70] in its issuance of the Special

63. *Cowpasture*, 911 F.3d at 158.

64. *Id.* at 183 ("A thorough review of the record leads to the necessary conclusion that the Forest Service abdicated its responsibility to preserve national forest resources. This conclusion is particularly informed by the Forest, assuaged in time to meet a private pipeline company's deadlines.").

65. *Id*. at 175.

66. *Atl. Coast Pipeline, LLC Dominion Transmission, Inc. Piedmont Nat. Gas Co., Inc*., 161 F.E.R.C. ¶ 61042, 2017 WL 4925429, at *3 (2017).

67. Sam Kalen, *A Bridge to Nowhere*? *Our Energy Transition and the Natural Gas Pipeline Wars*, 9 MICH. J. ENV'T. & ADMIN. L. 319, 366 (2020) (citing USDA Forest Service, Record of Decision on the Atlantic Coast Pipeline Project Special Use Permit/Land and Resource Management Plan Amendments, 23 (2017)). The agency took into consideration President Trump's energy infrastructure executive orders and the pressure for timely approvals in their review process. *Id*.

68. *Cowpasture*, 140 S. Ct. at 1842. "Respondents, including the Cowpasture River Preservation Association and environmental organizations, brought an action under the Administrative Procedure Act. *Id.* They alleged "the issuance of the special use permit for the right-of-way under the Trail, as well as numerous other aspects of the Forest Service's regulatory process," violated MLA, National Environmental Policy Act, the National Forest Management Act of 1976, and the Administrative Procedure Act. *Id.*

69. Brief for Respondents, *supra* note 17, at 11.

70. *Cowpasture*, 911 F.3d 160 (citing Sierra Club, Inc. v. U.S. Forest Serv., 897 F.3d 582, 590 (4th Cir. 2018) (quoting Defs. Of Wildlife v. N.C. Dep't of Transp., 762 F.3d 374, 396 (4th Cir. 2014))) (explaining that

> An agency's decision is arbitrary and capricious if: the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the

Use Permit;[71] (2) violated National Environmental Policy Act by failing to consider other feasible route alternatives;[72] and (3) provided an inadequate Final Environmental Impact Statement.[73]

The fourth holding, which was the issue appealed to the Supreme Court, held that "'the Forest Service does not have statutory authority to grant pipeline rights of way across the [Appalachian Trail] pursuant [to] the [MLA].'"[74] The Fourth Circuit held the Appalachian Trail became part of the National Park System because the Secretary of the Interior delegated its duty to administer the Appalachian Trail to the National Park Service.[75] In other words, when the Trail became part of the National Park System, the Trail became "married" to its land.

Consequently, the Fourth Circuit vacated the Forest Service's Special Use Permit.[76] The termination of the Permit hinged on the MLA lacking the authority to vest the Forest Service's ability "to grant the pipeline right-of-way beneath the Trail."[77] Because the Trail is a "unit"—a fact to which both parties agreed—the Trail is a unit of the National Park System, "and thus is outside the scope of the [MLA]."[78] The practical effect of the vacated permit was a halt

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product of agency expertise.).

71. *Cowpasture*, 911 F.3d at 160-67. The Forest Service acted arbitrarily and capriciously because Atlantic's proposal violated the National Forest Management Act by not complying with required environmental standards. *Id*.

72. *Id*. at 168. The Fourth Circuit held that "Forest Service violated its obligations under the [National Forest Management Act] and its own Forest Plans because it failed to demonstrate that the ACP project's needs could not be reasonably met on non-national forest lands." *Id*.

73. *Cowpasture*, 911 F.3d at 155. "Environmental impact statement ("EIS") describ[es] the likely environmental effects, 'adverse environmental effects which cannot be avoided,' and potential alternatives to the proposal." Id. (citing 42 U.S.C. § 4332(C) (2022)). "The Fourth Circuit found FERC's EIS failed to meet the Forest Service's needs." Christine Tezak, *A Policy Analyst's View on Litigation Risk Facing Natural Gas Pipelines*, 40 ENERGY L.J. 209, 237 (2019) (citing *Cowpasture*, 911 F.3d at 173). The Fourth Circuit held the Forest Service violated NEPA by failing to take a hard look at the environmental consequences of the ACP project." *Cowpasture*, 911 F.3d at 173–74 (emphasis added). The Forest Service was apprehensive that the draft EIC "lacked necessary information to evaluate landslide risks, erosion impacts, and degradation of water quality, and it further lacked information about the effectiveness of mitigation techniques to reduce those risks." *Id*. at 174. Furthermore, Fourth Circuit noted the Forest Service violated the National Forest Management Act when they "raised concerns that were never addressed in the final [Environmental Impact Statement] or its own [decision], and ultimately "relied on the very mitigation measures it previously found unreliable." Tezak, *supra* note 73, at 237 (citing *Cowpasture*, 911 F.3d at 174).

74. Brief for Respondents, *supra* note 17, at 13-14.

75. *Cowpasture*, 140 S. Ct. at 1842 (citing 16 U.S.C. § 1244(a)(1) (2022); 34 Fed. Reg. 14337 (1969); 54 U.S.C. § 100501 (2022)).

76. *Cowpasture*, 140 S. Ct. at 1842 (citing 30 U.S.C. § 185(a) (2022)).

77. *Cowpasture*, 140 S. Ct. at 1842.

78. Brief for Respondents, *supra* note 17, at 13.

to pipeline construction. As such, "the Forest Service and Atlantic both petitioned for certiorari, which the Court granted in October 2019."[79]

F. Supreme Court's Ruling to Reverse and Remand the Fourth Circuit

The Supreme Court granted certiorari to decide if the Forest Service has authority under the MLA "to grant rights-of-way through lands within national forests traversed by the Appalachian Trail."[80] In June 2020, the Court reversed and remanded the Fourth Circuit decision in a 7-2 opinion by Justice Thomas.[81] Justice Sotomayor filed a dissenting opinion, to which Justice Kagan joined.[82] The majority held that the "Department of the Interior's decision to assign responsibility over the Appalachian National Scenic Trail to the National Park Service did not transform the land over which the Trail passes into land within the National Park System."[83] Consequently, the Forest Service retained the authority under the MLA "to grant rights-of-way within national forests traversed by the Appalachian Trail."[84]

III. COURT'S ANALYSIS

Section III, Part A of the *Cowpasture* analysis will explore the discourse between how the issue was framed by the majority and dissent, and their subsequent conclusions. Section III, Part B will discuss the majority opinion's patchwork analysis of the statutes and their conclusion that there is no legal pairing between the Appalachian Trail and its land.[85] Each subsection will explore the Court's interpretation of the Organic Act, canons of property law, the Trails Act, and the MLA. Section III, Part C will study the dissent's plain reading of the statutes, which led to the conclusion that there is a legal pairing between the Trail and its land.[86] Each subsection will analyze at the dissent's interpretation of property law, the Organic Act, the Trails Act, the MLA and congressional

79. Fite I, *supra* note 36, at 6.

80. *Cowpasture*, 140 S. Ct. at 1841.

81. *Id.* (Justice Ginsburg joined the majority opinion as to all but Part III-B-2).

82. *Id.* at 1850.

83. 53 A.L.R. Fed. 3d Art. 7 (originally published in 2020).

84. *Cowpasture*, 140 S. Ct. at 1841.

85. *See generally id.* at 1841-50 (showing that the majority used language from several statutes in order to conclude the MLA applied to the Trail separate from its land, thereby separating the two entities).

86. *See generally id.* at 1850-61 (Sotomayor, J., dissenting) (demonstrating that the dissent focused on statutory definition).

intent. Section III, Part D will investigate the dissent's conclusion that there is a practical pairing between the Trail and its land based on the environmental consequences on the pairing.[87]

A. The Court Created a Patchwork Analysis of Statutes to Conclude There is No Legal Pairing Between the Trail and Its Land

The Justices' fundamental disagreement over what the issue was surrounding the right-of-way under the Appalachian Trail established two stark approaches to the statutory interpretation.[88] Justice Thomas's majority opinion framed the issue as to whether the MLA vests the Forest Service the authority to grant a right-of-way through lands in a national forest crossed by the Appalachian Trail.[89] He constructed a blunt distinction "between the *lands* that the Trail traverses and the Trail itself."[90] Under this assumption, the Court established that the *land* was the object of the interlocking federal statutes, not the Trail,[91] and analyzed the conglomerate of statutes to divorce the Appalachian Trail from its land.[92]

The Court patched together the Organic Act, National Trails Act, and MLA to reach their conclusion. Despite joining the majority, Justice Breyer, at oral argument, likened the three statutes to "ping pong . . . they have this, you have that."[93] Despite acknowledging that in order to reach their decision the statutes would have to "fit together" in a patchwork analysis, Justice Thomas's opinion for the majority proceeded to include more statutes, the Wild and Scenic Rivers Act ("Rivers Act") and the Blue Ridge Parkway, to support the Court's analysis.[94]

In contrast, Justice Sotomayor, writing in dissent, asked whether the Appalachian Trail is considered land within the National Park System.[95] She concluded the Trail cannot be separated from the underlying land[96] and branded the majority's analysis as "inconsistent with the language of three statutes,

87. *See generally id.* (corroborating that the dissent included the environmental consequences of construction in their analysis).

88. *See generally id.* at 1841-61 (illuminating that the majority and dissent did not come to a conscious on what the subject of the statutory analysis was).

89. *Id.* at 1844.

90. *Id.*

91. *Id.* at 1843-44.

92. *Id.* at 1841.

93. Transcript of Oral Argument, *supra* note 2, at 43-4.

94. *Cowpasture*, 140 S. Ct. at 1847 (Justice Thomas include the Rivers Act and the Blue Ridge Parkway to exemplify that Congress did not use comparable language in the Trails Act.).

95. *Id.* at 1851 (Sotomayor, J., dissenting).

96. *Id.* at 1848.

longstanding agency practice, and common sense."[97] Justice Sotomayor positioned the Trail, *not the land*, as the object of the intertwining statutes.[98] She reasoned the National Park Service administers the Trail[99] and any area administered "by the Park Service is a unit of and thus land in the National Park System."[100] The MLA "does not permit natural-gas pipelines across such federally owned lands,"[101] and only Congress can change that mandate.[102] The majority incorrectly detached the Trail from its land through an analysis that mischaracterized the issue at hand.[103]

1. The Court Used the Organic Act to Define Area of Land to be Land Administered by the Secretary of the Interior Acting Through the Director of the National Park Service

The Court and dissenters had an initial consensus as to the utility of the Organic Act:[104] the Act established the National Park System and minted conservation as its sole mission.[105] The

97. *Id*. at 1861 (Sotomayor, J., dissenting).

98. *Id.* at 1851 (Justice Sotomayor positioned the issue as "whether parts of the Appalachian Trail are 'lands' within the meaning of those statutes," referring to the interlocking statutes).

99. *See id.* at 1861 (Sotomayor, J., dissenting) (citing §§ 3(b), 5(a)(1), 82 Stat. 919–920; 34 Fed. Reg. 14337) (explaining that "[t]he Park Service administers acres of land constituting the Appalachian Trail for scenic, historic, cultural, and recreational purposes").

100. *See Cowpasture*, 140 S. Ct. at 1861 (Sotomayor, J., dissenting) (citing 54 U.S.C. §§ 100102(6), 100501 (2022)) (relying on the logic that "any area of land" that is "administered" by the Park Service is a part of the National Park System as its "unit").

101. *Cowpasture*, 140 S. Ct. at 1861 (Sotomayor, J., dissenting) (citing 30 U.S.C. § 185(b) (2022)).

102. *Cowpasture*, 140 S. Ct. at 1861 (Sotomayor, J., dissenting); 54 U.S.C. § 100101(b)(2) (2022); *see* Brief for Respondents, *supra* note 17, at 6 (stating the Park Service's authorities "shall be construed . . . in light of" and not "exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress").

103. *Cowpasture*, 140 S. Ct. at 1848.

104. *See id*. at 1843, 1851 (citing 54 U.S.C. § 100501 (2022)) (indicating that Justice Thomas and Sotomayor relied on the Organic Act to reach consensus of its utility).

105. 54 U.S.C. § 100101 (2022). The National Park System's mission is conservation. *Id*. "Congress created national parks in order to 'conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.'" *United States v. Stephenson*, 29 F.3d 162, 165 (4th Cir. 1994) (construing predecessor to 54 U.S.C. § 100101 (2022)). The distinction between a National Forests and National Parks is significant because "unlike national forests, Congress did not regard the National Park System to be compatible with consumptive uses." *Sierra Club*, 899 F.3d at 292 (citing Mich. United Conservation Clubs v. Lujan, 949 F.2d 202, 207 (6th Cir. 1991).

differences begin with how the Justices defined and used the definition of "area of land" under the Organic Act. The Organic Act states that the National Park System includes "any area of land . . . administered by the [Park Service] for park, monument, historic, parkway, recreational, or other purposes."[106]

The majority stretched the Organic Act's definition of "area of land" to inform the definition "lands" in the Trails Act.[107] The majority argued the Department of the Interior has jurisdiction over the lands at issue they delegated the administration of the lands to the National Park Service.[108] The Court urged that the delegation of administration duties to the National Park Service did not convert the Trail into "*lands* in the National Park System"[109] and reinforced a marital dissolution "between the *lands* that the Trail traverses and the Trail itself."[110]

2. The Court Relied on Property Law Principles to Distinguish the Trail from Its Land, An Argument the Dissent Found Unconvincing

In order to conclude "[a] trail is a trail, and land is land,"[111] Justice Thomas read the complicated assortment of statutes in light of property law principles.[112] The majority established a right-of-

106. 54 U.S.C. § 100501 (2022). Congress carefully chose the definition of "area of land" in an effort to replace a history of "complex patchwork of responsibility for various lands." Brief for Respondents, *supra* note 17, at 5-6 (citing H.R. Rep. No. 91-1265, at 3 (1970)). "Congress created 'one National Park System' that unambiguously includes every area the Park Service administers." Brief for Respondents, *supra* note 17, at 6 (citing 54 U.S.C. § 100101(b)(1)(B); (D) (2022)) ("stating legislative "purpose . . . to include all these areas in the System and to clarify the authorities applicable to the System.")

107. *Cowpasture*, 140 S. Ct. at 1841-43.

108. *Id.* at 1848 (citing 54 U.S.C. § 100501 (2022)).

109. *Cowpasture*, 140 S. Ct. at 1848 (citing 30 U.S.C. § 185(b)(1) (2022)).

110. *Cowpasture*, 140 S. Ct. at 1844.

111. *Id.* at 1846.

112. Noah Sachs, *Opinion analysis: Appalachian Trail no barrier for major gas pipeline*, SCOTUSBLOG (Jun. 17, 2020), www.scotusblog.com/2020/06/opinion-analysis-appalachian-trail-no-barrier-for-major-gas-pipeline/ [perma.cc/98MM-GTYS] Justice Thomas's opinion has been described as "a treatise on the law of easements" that is "[l]oaded with citations to state law and scholarly authorities." *Id*. Justice Thomas explains "[a] right-of-way is a type of easement" which grants the limited right to use another's land by passing through it. *Cowpasture*, 140 S. Ct. at 1844 (citing Kelly v. Rainelle Coal Co., 64 S.E.2d 606, 613 (1951); Builders Supplies Co. of Goldsboro, N. C., Inc. v. Gainey, 282 N.C. 261, 266 (1972); R. Powell & P. Rohan, Real Property § 405 (1968); Restatement (First) of Property § 450 (1944); BLACK'S LAW DICTIONARY 1489 (4th ed. 1968)). "And because an easement does not dispossess the original owner, [] 'a possessor and an easement holder can simultaneously utilize the same parcel of land.'" *Cowpasture*, 140 S. Ct. at 1844 (citing Barnard v. Gaumer, 361 P.2d 778, 780 (Colo 1961)) (quoting J. Bruce & J. Ely, Law of Easements and Licenses in Land § 1:1, p. 1–5 (2015)). Therefore,

way is a type of easement that creates a path that can be used by a nonowner.[113] The majority imported property law[114] to conclude easements are distinct from the land they burden because easements solely burden land owned by another.[115] The Court reasoned the right-of-way under the Appalachian Trail only granted non-possessory rights of use of the underlying land[116] because the burden on the land is something separate from the land itself.[117] When Atlantic obtained a Special Use Permit right-of-way for the Atlantic Coast Pipeline under the Appalachian Trail, the authority to do so remained with the Secretary.[118] Justice Thomas reasoned the issuance of a right-of-way did not strip the Forest Service of jurisdiction over the land underneath the Trail land[119] because the

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Justice Thomas concluded that "easements are not *land*" because they only "burden land that continues to be owned by another." *Cowpasture*, 140 S. Ct. at 1845 (citing Bruce, *supra*, at 1–2) (emphasis added)).

113. *Cowpasture*, 140 S. Ct. at 1844 (citing *Kelly*, 64 S.E.2d at 613; *Builders Supplies Co. of Goldsboro*, 192 S.E.2d at 453) (the majority established a right of way is a type of easement that grants a nonowner a limited privilege to pass through the estate of another); R. Powell & P. Rohan, *supra* note 112, at § 405; Restatement (First) of Property, *supra* note 112, at § 450; BLACK'S LAW DICTIONARY *supra* note 112, at 1489.

114. *Cowpasture*, 140 S. Ct. at 1844-45 (citing Bunn v. Offutt, 222 S.E.2d 522, 525 (1976); Barnard v. Gaumer, 361 P.2d 778, 780 (1961); Minneapolis Athletic Club v. Cohler, 177 N.W.2d 786, 789 (1970)).

115. J. Bruce & J. Ely, *supra* note 112, at 1-2.

116. *Cowpasture*, 140 S. Ct. at 1844.

117. *Id.* at 1845. To elicit this point, Justice Thomas used the following hypothetical:

> If analyzed as a right-of-way between two private landowners, determining whether any land had been transferred would be simple. If a rancher granted a neighbor an easement across his land for a horse trail, no one would think that the rancher had conveyed ownership over that land. Nor would anyone think that the rancher had ceded his own right to use his land in other ways, including by running a water line underneath the trail that connects to his house. He could, however, make the easement grantee responsible for administering the easement apart from the land. Likewise, when a company obtains a right-of-way to lay a segment of pipeline through a private owner's land, no one would think that the company had obtained ownership over the land through which the pipeline passes.

Id.

118. *Id.*

119. *Id*. at 1846 (reaching this conclusion by reading it in light of basic property law principles, explaining

> [T]he plain language of the Trails Act and the agreement between the two agencies did not divest the Forest Service of jurisdiction over the lands that the Trail crosses. It gave the Department of the Interior (and by delegation the National Park Service) an easement for the specified and limited purpose of establishing and administering a Trail, but the land itself remained under the jurisdiction of the Forest Service.).

Trails Act does not suggest a right-of-way transfers jurisdiction as well as the land.[120] Justice Sotomayor pointed out that the language of the Trails Act actually extends authority, it does not usurp the original agency authority.[121]

3. The Court Argued Under the Trails Act, the National Park Service Has a Limited Role of Administering the Trail as an Easement, but the Land Remained Within the Forest Service

The Justices agreed Congress vested the Secretary of the Interior with the administration of the Appalachian Trail, regardless of the ownership of the land.[122] Then, the Secretary "designated the Park Service as the Trail's 'land administering bureau.'"[123] The Trail Act commanded for the Secretary, or by delegation the National Park Service, to administer the Appalachian Trail as a footpath.[124] The Act mandated that the Park Service administer the Appalachian Trail to ensure outdoor recreation and to conserve "nationally significant scenic, historic, natural, or cultural qualities.'"[125] However, Justice Thomas diverged from the consensus when he interpreted the Trail Act's command to be evidence that the National Park Service has only "a limited role of administering a trail easement, but that the underlying land remains within the jurisdiction of the Forest Service."[126]

Justice Thomas dismissed the Trail and Organic Acts' reference to the physicality of the Trail as evidence that the Trail and its land are one in the same because easements burden an area of land bound particular metes and bounds.[127] With this

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120. *Id*. at 1845; Azar v. Allina Health Servs., 139 S. Ct. 1804, 1812 (2019) (The Supreme Court cannot "lightly assume that Congress silently attaches different meanings to the same term in the same . . . statute.").

121. *Cowpasture*, 140 S. Ct. at 1845, n. 3 (citing 16 U.S.C. § 1248(a) (2022)); Bruce, *supra* note 112, at 1–5 ("A possessor and an easement holder can simultaneously utilize the same parcel of land").

122. Brief for Respondents, *supra* note 17, at 5 ("administ[ration] of the entire Trail, no matter who owns the land").

123. Brief for Respondents, *supra* note 17, at 5 (citing 34 Fed. Reg. 14,337, 14,337 (Sept. 12, 1969)).

124. *Cowpasture*, 140 S. Ct. at 1847 (citing 16 U.S.C. § 1244(a)(1) (2022)).

125. *Cowpasture*, 140 S. Ct. at 1851 (citing 16 U.S.C. § 1242 (2022)) (Sotomayor, J., dissenting); Brief for Petitioner Atlantic Coast Pipeline, LLC at 6, 8–9, *Cowpasture*, 140 S. Ct. 1837 (Nos. 18-1584, 18-1587); Brief for Petitioners, at 9, 26, *Cowpasture*, 140 S. Ct. 1837 (Nos. 18-1584, 18-1587); Brief for Respondents, *supra* note 17, at 5.

126. *Cowpasture*, 140 S. Ct. at 1846.

127. *Cowpasture*, 140 S. Ct. at 1845-46. Justice Thomas interpreted "the Trails Act refer[al] to the granted interests as 'rights-of-way,' both when

understanding of property law, he concluded that when the Forest Service granted a right-of-way under the Appalachian Trail within the National Park land they granted "only an easement across the land, not jurisdiction over the land itself."[128]

The majority construed the Trails Act's mandate for the Appalachian Trail to be 'administered' by the Park Service to ensure recreation and conserve the Appalachian Trail's qualities to mean that the Forest Service is charged with designating the Trail's uses.[129] Justice Thomas argued the Forest Service's more significant role of managing the necessary physical work duties of the Trail is evidence of their retention of the land's jurisdiction.[130] Whereas, the National Park Service holds a more limited role of administering the maintenance duties of the Trail.[131] He reasoned that the distinguishment of these roles is evidence that the Trail is distinct from its land because there is a difference of how and who

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describing agreements with the Federal Government and with private and state property owners." *Cowpasture*, 140 S. Ct. at 1845 (16 U.S.C. §§ 1246(a)(2), (e) (2022). He then applied the aforementioned cannons of property law that a right-of-way, "[w]hen applied to a private or state property owner . . . would carry its ordinary meaning of a limited right to enjoy another's land." *Cowpasture*, 140 S. Ct. at 1845; *see supra* note 112 (explaining how Justice Thomas incorporated property law into his analysis). The Justice dismisses that the Organic Acts reference to the Trail as an "area" because "[l]ike other right-of-way easements, the Trail burdens 'a particular parcel of land.'" *Cowpasture*, 140 S. Ct. at 1845 (citing 54 U.S.C. §§ 100102(6), 100501 (2022)) (quoting Bruce, *supra* note 112, at 1–6). The Justice continues to brush off the Trails Acts' reference to "land" to be consistent with the conclusion that the Trail is a typical easement with metes and bounds. *Cowpasture*, 140 S. Ct. at 1846 (citing Carnemella v. Sadowy, 147 App.Div.2d 874, 876 (N.Y. 1989); Sorrell v. Tennessee Gas Transmission Co., 314 S.W.2d 193, 195–96 (Ky. 1958))

128. *Cowpasture*, 140 S. Ct. at 1845. Justice Thomas follows this conclusion with another statute and definition, the MLA's definition of "Federal Lands." *Id*. (citing 30 U.S.C. § 185(b) (2022)). Under the MLA, "federal lands" include "all lands owned by the United States, except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf." 30 U.S.C. § 185(b) (2022). He concludes that

> the Forest Service may grant a pipeline right-of-way through [Federal lands]—just as it granted a right-of-way for the Trail. Sometimes a complicated regulatory scheme may cause us to miss the forest for the trees, but at bottom, these cases boil down to a simple proposition: A trail is a trail, and land is land.

Cowpasture, 140 S. Ct. at 1846 (citing 30 U.S.C. § 185(b) (2022)).

129. *Cowpasture*, 140 S. Ct. at 1846 (citing 16 U.S.C. § 1244(a)(1) (2022)) These uses include providing Trail markers, presenting information to the public about the Appalachian Trail, and passing regulations for the "protection, management, development, and administration" of the Appalachian Trail. *Cowpasture*, 140 S. Ct. at 1847 (citing 16 U.S.C. §§ 1246(c), (i) (2022)).

130. *Cowpasture*, 140 S. Ct. at 1846-47 (citing 16 U.S.C. §§ 1246(h)(1), (i) (2022)).

131. *Cowpasture*, 140 S. Ct. at 1846-7 (citing 16 U.S.C. § 1246(h)(1) (2022)).

accomplishes the duties set out in the Trail Act.[132] Still, Justice Thomas failed to explain "how the Park Service could administer the Trail without administering the land that forms it."[133]

4. The Court Reasoned that the Lands that the Trail Crosses Remain Under the Forest Service's Jurisdiction and Continue to be "Federal Lands" Under the Mineral Leasing Act

The MLA enables the permitting of rights-of-way for natural-gas pipelines "through any Federal lands."[134] The term "federal lands" is defined as "all lands owned by the United States except lands in the National Park System."[135] The MLA mandates efforts must be made to "minimize adverse environmental impacts" in a right-of-way across Federal lands.[136]

After establishing the Forest Service's jurisdiction over the ""Federal lands" within the George Washington National Forest,"' Justice Thomas over-extended this conclusion to mean the Appalachian Trail is "Federal Land" under the MLA.[137] He reasoned the MLA, in conjunction with the aforementioned canons of property law, supports the notion that because the Forest Service' retained jurisdiction over the land under the Trail, those lands were Federal lands.[138]

In sum, the majority argued Congress did not use "unequivocal and direct language" to indicate that Congress did not intend for the Trail to be land in the Park System.[139] *Cowpasture* reaffirmed a clear-statement rule for transfers of jurisdiction between federal agencies—it is not the courts' place to infer a transfer of jurisdiction

132. *Cowpasture*, 140 S. Ct. at 1857-58 (Sotomayor, J., dissenting).

133. *Id.* at 1856.

134. *Id.* at 1852 (citing 30 U.S.C. § 185(a) (2022); *Cowpasture*, 140 S. Ct. at 1843 (citing 30 U.S.C. § 185(b) (2022) Under the MLA, "the 'Secretary of the Interior or appropriate agency head' may grant pipeline rights-of-way across 'Federal *lands*.'" *Cowpasture*, 140 S. Ct. at 1844 (citing 30 U.S.C. § 185(a) (2022) (emphasis added). "The Forest Service is an 'appropriate agency head' for 'Federal lands' over 'which [it] has jurisdiction.' *Cowpasture*, 140 S. Ct. at 1844 (citing 30 U.S.C. § 185(a); (b)(3) (2022)).

135. 30 U.S.C. § 185(b)(1) (2022).

136. Sierra Club, Inc. v. U.S. Forest Serv., 897 F.3d 582, 604 (4th Cir. 2018) (citing 30 U.S.C. § 185(p) (2021)).

137. *Cowpasture*, 140 S. Ct. at 1844.

138. *Id.* at 1843, 1846; *see supra* note 112 (explaining how Justice Thomas incorporated property law into his analysis). The majority's final theory argued the language of the Leasing Act mirrors the MLA because "the lands that the Trail crosses are still "Federal lands." *Id.*; 30 U.S.C. § 185(a) (2022). The majority also argued that the Forest Service may grant a pipeline right-of-way through them—just as it granted a right-of-way for the Trail. *Cowpasture*, 140 S. Ct. at 1843, 1846.

139. *Cowpasture*, 140 S. Ct. at 1847.

without a clear statement.[140] Interestingly, shortly after ruling on *Cowpasture*, the Court adopted a similar clear-statement rule in *McGirt v. Oklahoma* where "only three members of the *Cowpasture* majority – Justices Ginsburg, Breyer, and Gorsuch — joined the *McGirt* majority."[141]

B. The Dissent Read the Statutes Plainly to Conclude There is a Legal Pairing Between the Trail and Its Land

1. The Dissent Branded the Court's Use of Property Law as Unconvincing

At the outset of the dissenting opinion, Justice Sotomayor observed the majority deployed a complicated discussion of property law principles as a tool to mask the issue of the case.[142] Arguing that classifying the Appalachian Trail as an easement, rather than land, is incorrect because it relied "on anything except the provisions that actually answer the question presented."[143] The majority's reasoning is self-defeating because if the Forest Service granted the Park Service an easement for the Appalachian Trail[144] and an easement is not land, then nothing "divest[ed] the Forest Service of jurisdiction over the lands that the Trail crosses."[145] She reasoned the discussion of private law easements was "unconvincing" because the Federal Government owns all lands at issue here, an uncontested fact in this case.[146] It illogical to incorporate private

140. *Id.*

141. Lawson Fite, *Cowpasture Decision Upholds Integrity of the National Forest System*, 52 TRENDS: ABA SECTION OF ENV'T, ENERGY, & RES. NEWSL. (ABA, Chicago, Ill.), Sept./Oct. 2020, at 4, 7 (citing McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) (holding "[i]f Congress wishes to break the promise of a reservation, it must say so")).

142. *Id.* at 1850 (Sotomayor, J., dissenting) (arguing "[t]he majority's complicated discussion of private-law easements, footpath maintenance, differently worded statutes, and policy masks the simple (and only) dispute here").

143. *Id.* at 1851.

144. *Id.* at 1856.

145. *Id.*

146. *Id.* (breaking down the court misuse of property law by explaining

> [i]n the Court's words, a private-law easement is 'a limited privilege' granted to 'a nonowner' of land . . . But as the Court recognizes, 'the Federal Government owns all lands involved here,' [] so private law is inapposite. Precisely because the Government owns all the lands at issue, it makes little sense to ask whether the Government granted itself an easement over its own land under state-law principles. Between agencies of the Federal Government, federal statutory commands, not private-law analogies, govern).

property law principles because the matter here did not involve privately owned land, but it was a dispute over public federal land.[147]

2. The Dissent Used the Organic Act's Definition of "Area of Land" to be Units of the Park System

Justice Sotomayor deployed the Organic Act's definition of "area of land" in a "common sense"[148] analysis to conclude the Act states the National Park System includes "any area of land" administered by the Park Service.[149] The Federal Government has an extensive fifty-year history of referencing the Appalachian Trail as a "'unit' of the National Park System."[150] In the Park System, a "unit" is either land or water.[151] As a "unit" of the National Park System, the Trail and its "land" are conjoined.[152] "Land" under the Organic Act does not distinguish between units of the park system; therefore, the Trail is a unit, or land, in the Park System, and "'no federal agency' has 'authority under the [MLA] to grant a pipeline right-of-way across such lands.'"[153]

In response to the majority opinion's handling of the definition of "area of land" under the Organic Act,[154] Justice Sotomayor argued

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147. *Id*. at 1856, n. 10 ("A right-of-way may include not just a right of passage, but also the land itself."); 16 U.S.C. § 521(e)(3) (2022) (providing that certain 'rights-of-way' are 'lands'); BLACK'S LAW DICTIONARY 1587 (11th ed. 2019) ('right-of-way' can refer to '[t]he strip of land')).

148. *Cowpasture*, 140 S. Ct. at 1851 (Sotomayor, J., dissenting) ("Those laws, a half century of agency understanding, and common sense confirm that the Trail is land, land on which generations of people have walked.").

149. Brief for Respondents, *supra* note 20, at 5-6 (citing H.R. Rep. No. 91-1265, at 3 (1970) ("describing existing statutory authorities as "almost devoid of uniformity.) Brief for Respondents, *supra* note 20, at 6 (citing 54 U.S.C. § 100101(b)(1)(B); § 100101(b)(1)(D) (2022) (stating legislative "purpose . . . to include all these areas in the System and to clarify the authorities applicable to the System. Congress created "one National Park System" that unambiguously includes every area the Park Service administers")).

150. *Cowpasture*, 140 S. Ct. at 1851 (citing 54 U.S.C. §§ 100102(6), 100501 (2022)).

151. *Id.*

152. *Cowpasture*, 140 S. Ct. at 1851.

153. *Id.* (quoting Brief for Petitioners, *supra* note 148, at 3.).

154. *Cowpasture*, 140 S. Ct. at 1848 (citing 30 U.S.C. § 185(b)(1) (2022)); *Cowpasture*, 140 S. Ct. at 1854, n. 15 (Sotomayor, J., dissenting) (clarifying the definition of "area of land" by writing:

> The Court acknowledges that 'the Government might refer to the Trail' as 'area of land,' but concludes that those references must pertain only to easements as defined by state law . . . .That view strays far from the federal statutes at issue. The simpler conclusion is that when the Government uses terms that define land in the Park System, the

the majority's line of reasoning neglected to explain "how the Trail could be a unit of the Park System if it is not land."[155] The majority opinion incorrectly concluded that the Appalachian Trail's standing as a "System unit" does not designate that the Trail and its land are the same[156] because there is no statutory authority to support that conclusion. The majority's logic, she explained, conflicts with the Organic Act's declaration that a "'System unit' is by definition 'land' or 'water.'"[157] Justice Sotomayor writes that unless Justice Thomas intended to imply the Appalachian Trail is water, the Trail is land in the Park System.[158]

3. The Dissent Argued So Long as the National Park Service Administers the Trail, the Trail is Land Within the National Park System

While there was consensus that the Trails Act grants "authority to the agency responsible for the Trail,"[159] Justice Sotomayor argued that this "only scratches the surface" of the Park Service authority over the Appalachian Trail.[160] The Park Service has the authority to control "what happens under the Trail consistent with 'units of the national park system . . .'"[161] and advocate for the Appalachian Trail's "protection, management, development, and administration."[162] The Park Service has the authority to determine what "uses along the trail" to permit.[163]

The dissent disagreed with Justice Thomas's conclusion that the Forest Service has the authority to grant a right-of-way under the Appalachian Trail, but cannot "determin[e] whether a pipeline bores across the Trail."[164] She alternatively argued Justice Thomas' argument leads to the illogical conclusion that the MLA "would not

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Government refers to land in the Park System.).

155. *Cowpasture*, 140 S. Ct. at 1856 (Sotomayor, J., dissenting).

156. *Id.*

157. *Id.* (Sotomayor, J., dissenting) (citing 54 U.S.C. §§ 100102(6), 100501 (2022)) (arguing "[f]ederal law does not distinguish 'land' from the Trail any more than it distinguishes 'land' from the many monuments, historic buildings, parkways, and recreational areas that are also units of the Park System." Following this reasoning to its logical conclusion, "the Trail is land in the Park System" and "'no federal agency' has 'authority under the Mineral Leasing Act to grant a pipeline right-of-way across such lands.'").

158. *Cowpasture*, 140 S. Ct. at 1856 (Sotomayor, J., dissenting).

159. *Id.* at 1857.

160. *Id.*

161. *Id.* (citing § 1246(i)).

162. *Cowpasture*, 140 S. Ct. at 1857 (Sotomayor, J., dissenting).

163. *Id.* (citing § 1246(c)).

164. *Cowpasture*, 140 S. Ct. at 1857 (Sotomayor, J., dissenting). "It is undisputed that 16 U.S.C. § 1248 does not authorize rights-of-way for natural-gas pipelines. Atlantic therefore does not rely on this provision." *Id.* at 1857, n. 5.

even stop Atlantic from building a pipeline on top of an undisputed unit of the Park System."[165] She branded the Court's reasoning as "atextual" and that it "cannot be right."[166] Rather, a plain reading of the statutes leads to the logical conclusion that the Appalachian Trail and its land are an inseparable couple.[167]

In response to the majority's use of "two terms of art: 'administering' land and 'managing' it,"[168] the dissent argued that a plain reading of the Trails Act defeats the majority's logic.[169] In its own words, the Trails Act differentiates between the terms "because it uses both, but disclaims only the transfer of 'management,' not 'administration.'"[170] The Park Service uses "administration" to reference "the agency broadly 'responsible for Federal funding and staffing necessary to operate the trail and exercising trail-wide authorities from the [Trails Act] and [the administering agency's] own organic legislation.'"[171] "'Management,' by contrast, refers to localized matters like 'local visitor services,' 'law enforcement,' 'site-specific compliance,' 'site interpretation,' 'trail maintenance' and 'marking,' 'resource preservation and protection,' and 'viewshed protection.'"[172] When Congress contains terms in one section of a statute but omits them in another, the Supreme Court "generally presumes" that "Congress 'intended a difference in meaning.'"[173] Justice Sotomayor reasoned so long as the National Park Service "administers" the Trail, the Trail is land within the National Park System.[174]

The Trails Act stipulates that the right-of-way "for the Appalachian Trail 'shall include lands protected for it' where 'practicable.'"[175] Therefore, even for an "easement" through a federal

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165. *Id*. at 1857.

166. *Id*. at 1856-57.

167. *See generally id.* at 1841-61 (focusing on statutory definitions as the basis for the analysis).

168. *Id*. at 1858.

169. *Id*. at 1857 (citing § 1246(a)(1)(A)).

170. *Cowpasture*, 140 S. Ct. at 1858.

171. *Id.* at 1858-59, n. 11 (citing National Park Service, *National Trails System: Reference Manual 45*, 8 (Jan. 2019), www.nps.gov/subjects/nationaltrailssystem/upload/Reference-Manual-45-National-Trails-System-Final-Draft-2019.pdf [perma.cc/KG7A-BY4Q] [hereinafter *NPS, Reference Manual*]).

172. *Cowpasture*, 140 S. Ct. at 1858 (Sotomayor, J., dissenting).

173. *Id*. at 1857 (citing Maine Community Health Options v. United States, 140 S.Ct. 1308, 1323 (2020)).

174. *Cowpasture*, 140 S. Ct. at 1859, n. 12 (Sotomayor, J., dissenting) ("Mere months after Congress had enacted § 1246(a)(1)(A) to clarify that it had not transferred "management responsibilities," the Park Service issued a final rule for "General Regulations for Areas Administered by the National Park Service," reaffirming that the Appalachian Trail was land in the Park System.").

175. C*owpasture*, 140 S. Ct. at 1856 (Sotomayor, J., dissenting) (citing 16 U.S.C. § 1244(a)(1) (2022); *cf.* § 1246(d) (listing the "areas . . . included" in a right-of-way); § 1246(e) (providing that the Government may "acquire such

forest, "the Park Service still administers land "acquire[d]" and "protected" for the Trail."[176] In reality, the Trails Act "undercuts the Court's distinction between a trail and land."[177] She explained, the statute likens "components of the National Trails System" like the Appalachian Trail to "lands.'"[178] The language of the statutes inextricably marries the Trail to its land.[179]

4. The Dissent Argued the Appalachian Trail is Land in the National Park System, and the MLA does Not Permit Pipeline Right-of-Way Across Those Lands

Justice Sotomayor argued that the plain statutory definition indicates the Appalachian Trail is "land in the National Park System," and the MLA does not permit pipeline right-of-way across those lands.[180] The plain text of the MLA specifies "'Federal lands' exclude[s] 'lands in the National Park System."[181] Under the statutory definition of "Federal lands," no agency could rely on the MLA for authority to grant a pipeline right-of-way that would cross land in the National Park System.[182]

Under the MLA, it is feasible that the Appalachian Trail may fall under the authority of multiple agencies.[183] Justice Sotomayor argued while the majority acknowledges this possibility,[184] they "[do] not follow it to its logical conclusion: that land may be in both the Park Service and the Forest Service and thus excluded from the

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lands or interests therein to be utilized as segments of" a trail and that "lands involved in such rights-of-way should be acquired in fee")).

176. *Cowpasture*, 140 S. Ct. at 1857 (Sotomayor, J., dissenting) ("That is why the Park Service refers to the Trail as a 'swath of land,' . . . why the Forest Service admits that the Park Service administers those 'acres,' . . . and why the Secretary of the Interior has authority to grant rights-of-way 'under' the Trail's surface").

177. *Id.* at 1858.

178. *Id.* (citing § 1241(b) (Appalachian Trail is a "componen[t]" of the National Trails System); § 1246(a)(1)(A); *Cowpasture*, 140 S. Ct. 1846 – 1847, 1850 ("Court elides two terms of art: "administering" land and "managing" it); *NPS, Reference Manual*, *supra* note 172, at 21 ("Trail administration is distinguished from on-the-ground trail management.").

179. *Cowpasture*, 140 S. Ct. at 1858.

180. *Id.* at 1853.

181. *Id.* at 1852 (citing § 185(b)).

182. *Cowpasture*, 140 S. Ct. at 1852 (Sotomayor, J., dissenting) (citing Brief for Petitioners, *supra* note 148, at 3; Brief for Petitioner Atlantic Coast Pipeline LLC, *supra* note 148, at 10; Brief for Respondents, *supra* note 20, at 1).

183. *Cowpasture*, 140 S. Ct. at 1857-58 (Sotomayor, J., dissenting) (citing 30 U.S.C. § 185(c) (2022)); *Cowpasture*, 140 S. Ct. at 1860, n. 13 (citing *NPS Reference Manual*, *supra* note 172, at 8) ("Park Service's 'Trail administration provides trail wide coordination and consistency' among 'government agencies, landowners, interest groups, and individuals'").

184. *Cowpasture*, 140 S. Ct. at 1858 (Sotomayor, J., dissenting).

MLA's right-of-way authority."[185] The Trails Act also supports this shared authority scheme.[186]

The plain language of the MLA explains the difference between administration and management of the Appalachian Trail land by comparing land "under the jurisdiction of [a] Federal agency" to land "administered" by that agency.[187] While the majority argued the use of the two different terms, administering and managing, to be evidence that the Trail is distinct from its land,[188] the dissent clarified that the terms are not mutually exclusive, "the Park Service administers the Appalachian Trail, even if the Forest Service manages it."[189] Under this logic, the Trail and land are an inseparable couple under the Trails Act[190] and Organic Act[191] as well.[192]

5. The Dissent Relied on Congressional Intent to Argue the Trail is a Part of the Park System

Justice Sotomayor introduced Congressional intent in her analysis as further evidence the Appalachian Trail cannot be divorced from its land.[193] When Congress amended the MLA, in response to a previously too broad definition of lands in the Park System, it did so to further protect the public lands from being penetrated by rights-of-way.[194] The MLA, before its amendment,

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185. *Id.* (citing § 185(b)) (The MLA "asks whether the federally owned land is in the Park System at all. . . . If it is, then (as the parties recognize) the Mineral Leasing Act does not permit pipelines to cross that park land.").

186. *Cowpasture*, 140 S. Ct. at 1857 (Sotomayor, J., dissenting) (citing 16 U.S.C. § 1244(a)(1); § 1246(a)(2) (2022)) (giving the Secretary of the Interior administrative authority "in consultation with the Secretary of Agriculture . . . Development and management of each segment of the National Trails System shall be designed to harmonize with and complement any established multiple-use plans for that specific area.").

187. *Cowpasture*, 140 S. Ct. at 1858 (Sotomayor, J., dissenting) (citing 30 U.S.C. §§ 185(c)(1), (2) (2022)).

188. *Cowpasture*, 140 S. Ct. at 1857-58 (Sotomayor, J., dissenting).

189. *Id.* at 1859.

190. *Cowpasture*, 140 S. Ct. at 1858 (citing Reference Manual, *supra* note 206, at 21) (The Trails Act, § 1246(a)(1)(A), differentiates the terms of 'administering' land and 'managing' it "because it uses both, but disclaims only the transfer of 'management,' not 'administration.'").

191. *Cowpasture*, 140 S. Ct. at 1858 (Sotomayor, J., dissenting) ("The Organic Act defines the Park System as land "administered" by the Park Service); 54 U.S.C. § 100501 (2022); *see also* § 100502 (reflecting difference between administration and management).

192. *Cowpasture*, 140 S. Ct. at 1858 (Sotomayor, J., dissenting) (citing § 5(a)(1), 82 Stat. 920) ("Similarly, the rest of the Trails Act differentiates the two terms by giving the Secretary of the Interior (and by extension the Park Service) power to 'administe[r]' the lands making up the Appalachian Trail, [] in consultation with other parties about proper Trail 'management.'").

193. *Cowpasture*, 140 S. Ct. at 1861 (Sotomayor, J., dissenting).

194. *Id.* at 1853.

provided only restricted opportunity to grant a right-of-way through public lands.[195] "Public lands" is a "term of art referring to certain federally owned land that had never been owned by a State or private individual."[196] Currently, lands under the MLA are further protected "by eliminating authority to grant [rights-of-way] across those lands."[197]

According to Justice Sotomayor, under the amended MLA, "'any area of land and water administered by' the Park Service is a unit of the Park System."[198] A Park System unit "must be 'regulate[d]' through 'means and measures' that 'conserve' and 'provide for the enjoyment of the scenery, natural and historic objects, and wild life' in ways 'as will leave them unimpaired for the enjoyment of future generations.'"[199] There is no doubt the Appalachian Trail qualifies as a Park System unit and therefore Atlantic may not rely on the MLA to obtain a Special Use Permit.[200]

Justice Sotomayor argued the majority's reliance on the Rivers Act and the Blue Ridge Parkway statutes was unwarranted.[201] The Rivers Act mandates any section of the Rivers System would "'become a part of' the National Park System"[202] which demonstrated that "Congress has many means to make land a unit of the Park System,"[203] such as the General Authorities Act.[204] Similarly, the dissent argued that Blue Ridge Parkway statutes "did not include language about 'transferring' land from one agency to another," but stated that the parkway "shall be administered and maintained by the Secretary of the Interior through the National Park Service" and be "'subject to' the [Organic Act,] even though the relevant lands included national forests."[205] The Rivers Act and the

195. § 28, 41 Stat. 449.

196. *Cowpasture*, 140 S. Ct. at 1853 (Sotomayor, J., dissenting) (citing Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 65, n. 2 (1966)).

197. *Cowpasture*, 140 S. Ct. at 1853 (Sotomayor, J., dissenting).

198. *Id.* at 1853-54 (citing 54 U.S.C. §§ 100101, 100501 (2022)).

199. *Id.*

200. *Cowpasture*, 140 S. Ct. at 1854 (Sotomayor, J., dissenting).

201. *Id.* at 1859.

202. 16 U.S.C. § 1281 (2022).

203. *Cowpasture*, 140 S. Ct. 1859 (Sotomayor, J., dissenting).

204. *Id.* (Justice Thomas explains the context of and use of the General Authorities Act. He describes it as

"a statute just as explicit as the Rivers Act. Again, it was after the Park Service had become the Trail's "land administering bureau," 34 Fed. Reg. 14337, that Congress provided that "'any area of land . . . now or hereafter administered by the Secretary of the Interior through the National Park Service'" is land in the Park System, § 2(b), 84 Stat. 826; see also 54 U.S.C. §§ 100102(2), (6), 100501 (2022). Resembling the Rivers Act, the General Authorities Act unambiguously provided that a component of the Trails System would become land in the National Park System.").

205. *Cowpasture*, 140 S. Ct. at 1859 (Sotomayor, J., dissenting) (citing 49 Stat. 2041; ch. 277, 54 Stat. 249–250; NPS, Blue Ridge Parkway: Virginia and North Carolina Final General Management Plan 12 (2013)).

Blue Ridge Parkway statutes exemplify that Congress intended to protect and strengthen the coupling of a trail and its land.[206]

C. The Dissent Argued Not Only Is There a Legal Pairing Between the Trail and Its Land, but that There is also a Practical One

Not only do the relevant interlocking statutes confirm that the Appalachian Trail is land, but "a half century of agency understanding, and common sense" demonstrates the Trail's obvious marriage to the land.[207] Justice Sotomayor explained the Appalachian Trail is "land on which generations of people have walked."[208] Ignoring blatant agency practice, the majority opinion argued "[i]f a tree falls on forest lands over the trail, it's the Forest Service that's responsible for it," not the Park Service.[209] This scenario was argued at oral argument,[210] and accordingly the Court found this hypothetical convincing, as Justice Thomas wrote the National Park System "has a limited role of administering a trail easement, but that the underlying land remains within the jurisdiction of the Forest Service."[211]

Instead, the dissent introduced agency practice as evidence that the Park Service acknowledged that the Appalachian Trail is land within the Park System.[212] Justice Sotomayor explained the Secretary of Interior designated the Park Service as the "land administering bureau" for the Trail.[213] The Park Service recognized the Trail as a recreational area that it administered.[214] As administrator of that land, the Park Service issued regulations for the Trail under the umbrella, "Areas of the National Park System;"[215] so the "statutory purposes of units of the National Park System" would be fulfilled.[216] "All those terms—land, area, administer, recreation, unit of the National Park System—trace the

206. *Cowpasture*, 140 S. Ct. at 1859 (Sotomayor, J., dissenting).

207. *Id.* at 1851.

208. *Id.* at 1851, n. 4 (citing BLACK'S LAW DICTIONARY, *supra* note 112, at 1967 ("The legal meaning of 'land' when Congress enacted the relevant statutes was 'any ground, soil, or earth whatsoever.'").

209. *Id.* at 1847.

210. Transcript of Oral Argument, *supra* note 3, at 5.

211. *Cowpasture*, 140 S. Ct. at 1846.

212. *Id.* at 1854.

213. *Cowpasture*, 140 S. Ct. at 1854 (Sotomayor, J., dissenting) (citing 34 Fed. Reg. 14337).

214. *Cowpasture*, 140 S. Ct. at 1854 (Sotomayor, J., dissenting) (citing National Park Service (NPS), National Parks & Landmarks 88).

215. *Cowpasture*, 140 S. Ct. at 1854 (Sotomayor, J., dissenting) (citing 36 C.F.R. pt. 7 (1983) (capitalization deleted); § 7.100; 48 Fed. Reg. 30252 (1983)).

216. *Cowpasture*, 140 S. Ct. at 1854 (Sotomayor, J., dissenting) (citing 36 C.F.R. § 1.1 (2021); 48 Fed. Reg. 30275).

Organic Act's definition of land in the Park System."[217] Congress' implementation of terms indicate the Trail and land are unified.[218]

The dissent offered other evidence of the Park Service's importance to the Trail. The Park Service became responsible for protecting and maintaining the Trail within federally administered areas when the Trail was introduced in the National Park System by the Trails Act.[219] Even so, a Park Service handbook,[220] reference manual,[221] compendium of regulations,[222] budget justification to Congress,[223] and acreage estimations[224] identify the Trail as part of the Park Service. Extensive agency literature is evidence that the Trail and the land that forms it are an inseparable couple.[225]

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217. *Cowpasture*, 140 S. Ct. at 1854 (Sotomayor, J., dissenting) (citing 54 U.S.C. §§ 100102(6), 100501 (2022)).

218. *Cowpasture*, 140 S. Ct. at 1859 (Sotomayor, J., dissenting).

219. *Id.* at 1854 (citing NAT'L PARK SERV., THE NATIONAL PARKS: SHAPING THE SYSTEM 77 (1991), www.npshistory.com/publications/shaping-the-system-1991.pdf [perma.cc/3ZZC-9WK2]).

220. *Cowpasture*, 140 S. Ct. at 1854 (Sotomayor, J., dissenting) (citing NPS, Management Policies 2006, § 9.2.2.7, p. 134) (The Park Service handbook explains that "[s]everal components of the National Trails System which are administered by the [Park] Service," including the Appalachian Trail, "have been designated as units of the national park system" and "are therefore managed as national park areas."); NPS, Management Policies 2006, § 9.2.2.7, p. 134. (A 2016 Park Service index similarly listed the Trail as "a unit of the National Park System.")).

221. *Cowpasture*, 140 S. Ct. at 1855 (Sotomayor, J., dissenting) (citing *NPS, Reference Manual*, *supra* note 172, at 28) ("[T]he Park Service issued a reference manual describing the Appalachian Trail as a 'land protection project' that has 'been formally declared [a] uni[t] of the National Park System.'").

222. *Cowpasture*, 140 S. Ct. at 1855 (Sotomayor, J., dissenting) (citing NPS, Appalachian Trail Superintendent's Compendium 2 (2019)) ("The Park Service's compendium of regulations similarly explains that the General Authorities Act "brought all areas administered by the [Park Service] into one National Park System.")).

223. C*owpasture*, 140 S. Ct. at 1855 (Sotomayor, J., dissenting) (citing Dept. of Interior, Budget Justifications and Performance Information—Fiscal Year 2020: National Park Service, at Overview–16, ONPS–89, –105 (Budget Justifications) (capitalization deleted)) ("Even the Park Service's recent budget justification to Congress identified the Appalachian Trail as a 'Park Base Uni[t],' a 'Park Uni[t],' and a national 'par[k].'").

224. C*owpasture*, 140 S. Ct. at 1855 (Sotomayor, J., dissenting) (citing NPS, Land Resources Div., Acreage Reports, Listing of Acreage, p. 1 (Dec. 31, 2019) (NPS, 2019 Acreage Report) ("The Park Service's Land Resources Division estimates that the Appalachian Trail corridor constitutes nearly 240,000 acres."); Dept. of Agriculture, Revised Land and Resource Mgmt. Plan–George Washington Nat. Forest 4–42 (2014) (Forest Service Land Plan) ("In its own management plan, the Forest Service explained that the Secretary of the Interior "administer[s]" in the George Washington National Forest "about 9,000 acres." *Ibid.* Acres of land, that is.")).

225. *Cowpasture*, 140 S. Ct. at 1854-55 (Sotomayor, J., dissenting).

IV. ANALYSIS

The *Cowpasture* Court incorrectly severed the Appalachian Trail from "the land upon which it exists,"[226] through an analysis that avoided a logical conclusion. The Trail and its land are both legally paired under a plain reading of the statutes and practically paired, as the environmental impacts implicate both the trail and its land equally.

First, this note will argue there is a legal pairing between the Trail and the land that forms it. Its subsections will examine how a plain reading of the Organic Act, the Trails Act, and the MLA shows that this pairing is inseparable. Next, this note will contend that there is a practical pairing between the Trail and its land because (1) the Forest Service's implementation of the term "Trail" indicates the Appalachian Trail and land are an inseparable pair; (2) the discussion at the *Cowpasture* oral argument encompasses the practical paring; and (3) the construction of the Trail will have lasting impacts on the Trail and its land and the majority ignored peer-reviewed science that demonstrates construction has lasting implications on the land. While the dissent touched on the environmental consequences of construction, the seriousness of the impacts demanded more attention.

A. The Dissent Correctly Read the Statutes Plainly to Conclude There is a Legal Pairing Between the Trail and Its Land

1. The Majority's Attempt to Dilute the Clear Definitions Provided in the Organic Act and Trails Act with a Complicated Discussion of Property Law was Unsubstantiated

Justice Sotomayor plainly read the statutes to derive definitions and apply them in a common-sense manner in contrast to the majority's propensity to stretch each definition to shift their meanings.[227] The dissent correctly branded the majority's opinion reasoning as wrong and atextual because the Court should not have construed these statutes in a way that defeats the underlying purpose of protecting the land.[228]

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226. Giannetti, *supra* note 4.

227. *Cowpasture*, 140 S. Ct. at 1861 (Sotomayor, J., dissenting).

228. *Id*. at 1857; 82 C.J.S. *Ordinary meaning extended or restricted by court* § 416 (2021) (citations omitted) ("Although a court must give words their plain and ordinary meanings in interpreting a statute, in so doing the court must not construe the statute in a way that would defeat the underlying purpose of the enactment").

The Organic Act clearly defines "area of land" to mean land within the National Park System administered by the Park Service.[229] Analyzing how that definition was applied in Park history enabled the dissent's conclusion that "land" under the Organic Act does not distinguish between "units" of the park system.[230] The Trail is a "unit," and its land are under the purview of the Park System, meaning that "'no federal agency' has 'authority under the [MLA] to grant a pipeline right-of-way across such lands.'"[231]

The majority ignored the plain language of the Organic Act by reading property law into the statute.[232] Property law principles acted as the glue to patch the three relevant statutes—Organic Act, Trails Act, and MLA—together in a manner that divorced the legal and practical pairing of the Appalachian Trail from its land.[233] However, the federal government's steadfast history of referring to the Trail as a unit belied this interpretation and leads to the logical conclusion that the government is referring to lands in the Park System.[234]

Justice Thomas attempted to dilute a plain language of the Trails Act through a messy discussion of property law.[235] The majority dismisses the Trail Acts' language that "'rights-of-way' for the Appalachian Trail 'shall include lands protected for it' where 'practicable.'"[236] The Trails Act describes the Trail as a right-of-way "that traces a specified route."[237] The term "right-of-way" is not bound to just the limited right of someone to pass through another's land.[238] In actuality, a right-of-way is for "public purpose" to

229. *Cowpasture*, 140 S. Ct. at 1851 (Sotomayor, J., dissenting) (quoting Brief for Petitioners, *supra* note 148, at 154); *see* Brief for Respondents, *supra* note 20, at 5-6 (citing H.R. Rep. No. 91-1265, at 3 (1970) (describing the Organics Acts' lack of uniformity). Congress created "one National Park System" that unambiguously includes every area the Park Service administers." Brief for Respondents, *supra* note 20, at 6 (citing 54 U.S.C. § 100101(b)(1)(B) (2022)); *see* § 100101(b)(1)(D) (stating legislative "purpose . . . to include all these areas in the System and to clarify the authorities applicable to the System".

230. *Cowpasture*, 140 S. Ct. at 1851 (Sotomayor, J., dissenting) (quoting Brief for Petitioners, *supra* note 148, at 3).

231. *Id.*

232. *Cowpasture*, 140 S. Ct. at 1856 (Sotomayor, J., dissenting).

233. *See generally id.* at 1841-61 (Justice Thomas used elements from different statutes to inform his analysis).

234. *Id.* at 1856 (Sotomayor, J., dissenting); 1854 n. 8.

235. *See supra* Section III.B.2 (providing a summary of how Justice Thomas incorporated property law).

236. *Cowpasture*, 140 S. Ct. at 1856 (Sotomayor, J., dissenting) (citing 16 U.S.C. § 1244(a)(1); § 1246(d), (e) (2022)).

237. Brief for Amici Curiae Natural Resources Defense Council, et al. in Support of Respondents at 8, *Cowpasture*, 140 S. Ct. at 1837 (Nos. 18-1584, 18-1587) (citing 16 U.S.C. § 1244(a)(1) (2022)).

238. New Mexico v. U.S. Tr. Co., 172 U.S. 171, 181-182

construct a trail.[239] Rather than adopting the clear history of the term right-of-way in the context of a public use like the Appalachian Trail—a right-of-way is "[t]he *strip of land* subject to a nonowner's right to pass through"[240]—the majority opinion opted for a more complicated discussion of easements and transfer of jurisdiction between agencies.[241]

As the Natural Resources Defense Council argued in its brief, the Trails Act functions only by recognizing the "designated 'trails' as the strip of land on which they exist."[242] Trails only permit specific types of uses on the land on which they exist;[243] for example, only certain portions of the trail allow for the use of vehicles. Justice Sotomayor recognized the uses laid out in the Trails Act apply to "the *land* that makes up a trail, not only the route a trail takes."[244] Moreover, the Trails Act's appropriation of funds — "for the acquisition of lands or interests in lands [for the] Trail"[245] supports the dissents' logical conclusion that the Appalachian Trail and the land are not severable.[246] The plain language of the Trails Act — the permitted uses and appropriation of funds — reinforces the "Trail cannot be separated from the land that constitutes it."[247]

2. The Mineral Leasing Act Demonstrates that the Park Service Administers the Appalachian Trail, and the Trail is Within the National Park System

Not only did Justice Sotomayor's review of the plain text support her conclusion, but also a review of the MLA proves just as convincing. Again, since the MLA excludes Federal lands from the National Park System, thus making the Appalachian Trail part of

(1898) (quoting Keener v. Union Pac. Ry., 31 F. 126, 128 (D. Colo. 1887)).

239. Brief for Amici Curiae Natural Resources Defense Council, *supra* note 307, at 9 (citing *Keener*, 31 F. at 128)); BLACK'S LAW DICTIONARY 1522 (10th ed. 2014) (defining "right-of-way," as, *inter alia*, "[t]he *strip of land* subject to a nonowner's right to pass through") (emphasis added)).

240. *Amici Curiae Natural Resources Defense Council*, *supra* note 238, at 8 (citing 16 U.S.C. § 1244(a)(1) (2022)) (citing BLACK'S LAW DICTIONARY*, supra* note 276, at 1522).

241. *Cowpasture*, 140 S. Ct. at 1844.

242. Brief for Amici Curiae Natural Resources Defense Council, *supra* note 307, at 9.

243. *Id.* (citing 16 U.S.C. § 1246(j) (2022)) ("The Act, for example, specifies the types of 'trail uses allowed on designated components of the national trails system,' including 'bicycling, cross-country skiing, day hiking, [and] equestrian activities,' and the types of '[v]ehicles which may be permitted on certain trails,' including 'motorcycles' and 'four-wheel drive or all-terrain off-road vehicles.'").

244. Brief for Amici Curiae Natural Resources Defense Council, *supra* note 307, at 9.

245. *Id.* at 9-10 (citing § 1249(a)(1)).

246. *Id.*

247. Brief for Respondents, *supra* note 20, at 3.

the National Park System,[248] it prohibits the Forest Service from issuing a pipeline right-of-way under the Appalachian Trail.[249] In fact, under the MLA's expressed definition of "Federal lands," no agency could rely on the MLA for authority to grant a pipeline right-of-way that would cross the Appalachian Trail.[250]

The plain language of the MLA gives a clear direction "that the Park Service administers the Appalachian Trail, even if the Forest Service manages it."[251] In contrast to the majority's attempt to patch the statutes in a way to argue against that conclusion, the dissent was able to demonstrate each statute on its own—the MLA, the Trails Act,[252] and Organic Act[253]—lead to the conclusion the trail and land are indivisible.

B. The Dissent Correctly Read the Statutes Plainly to Conclude There is a Practical Pairing Between the Trail and Its Land

1. The Forest Service's Implementation of the Term "Trail" Means the Trail and Its Land are an Inseparable Pair

Not only is it evident from the clear text of the relevant statutes that the Appalachian Trail and its land are legally paired, but it is also apparent from the Forest Service's implementation of the word "trail." The agency used the term "trail" in a manner consistent with both the layman definitions of "land" as the land beneath ones feet and in a legal context as ground "regarded as the subject of ownership . . . and everything annexed to it, whether by nature . . . or by man.'"[254] As evident from the majority's analysis,

248. *Cowpasture*, 140 S. Ct. at 1852 (Sotomayor, J., dissenting) (citing § 185(b)).

249. *Cowpasture*, 140 S. Ct. at 1853.

250. *Id.* at 1852 (citing Brief for Petitioners, *supra* note 148, at 3; Brief for Petitioner Atlantic Coast Pipeline LLC, *supra* note 148, at 10; Brief for Respondents, *supra* note 20, at 1).

251. *Cowpasture*, 140 S. Ct. at 1859 (Sotomayor, J., dissenting).

252. *Id.* at 1858. "For another, in relying on this provision, the Court elides two terms of art: 'administering' land and 'managing' it." *See id.* (citing *id.* at 1846-47, 1850). The Trail Act's use of administration "is distinguished from on-the-ground trail management" because "it uses both [terms], but disclaims only the transfer of 'management,' not 'administration.'" *Cowpasture*, 140 S. Ct. at 1859 (Sotomayor, J., dissenting) (citing Reference Manual, *supra* note 210, at 21; § 1246(a)(1)(A) (2022)).

253. *Cowpasture*, 140 S. Ct. at 1858 (Sotomayor, J., dissenting) ("The Organic Act defines the Park System as land "administered" by the Park Service); 54 U.S.C. § 100501 (2022); *see also* § 100502 (reflecting difference between administration and management).

254. Brief for Respondents, *supra* note 20, at 23 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1388 (2d ed. 1950); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1268 (2002)); BLACKS LAW DICTIONARY 1019 (4th

they used creative definitions, such as conflating definitions of public lands with private lands law, to detour from the plain definitions and common sense—"The Appalachian Trail is 'land': a part of the earth's surface defined by a worn, marked path."[255]

The majority turned a blind eye to not only the ordinary English usage of "Trail" and "Land,"[256] but also to the profound history of the federal government's use of "land" in this ordinary sense to reference the Appalachian Trail as land.[257] The Forest Service's records use the Trail and land synonymously,[258] and the Appalachian Trail's 1981 Comprehensive Plan ("Plan") treats the pairing as inseparable as well.[259] The Plan's purpose is to present Congress with the necessary information to meet its oversight responsibility for the Appalachian Trail and states that "[t]he body of the Trail is provided by the lands it traverses.'"[260] Throughout the federal government, therefore, there has been a historical and widespread view of the Trail and Land as an inseparable pair, even to the extent that the individual terms can be used interchangeably.

2. The Oral Argument Explained Why There is a Practical Pairing Between the Trail and Its Land

The oral argument elucidated further fault lines and flaws in the majority's argument. The Court's metaphysical perspective on the relationship between the Trail and its land was evident during oral argument. In contrast, in her dissent Justices Sotomayor took a practical analysis.

Anthony Yang and Paul Clement, counsel for the petitioners, argued a right-of-way that crosses 600 feet under the Appalachian

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rev. ed. 1968)).

255. Brief for Respondents, *supra* note 20, at 23-4.

256. Brief for Respondent, *supra* note 20, at 24 (citing *NPS Reference Manual*, *supra* note 172, at 221) ("Those examples show that the government's strained trail-land distinction has nothing to do with ordinary English.").

257. *See* Brief for Respondents, *supra* note 20, at 23-24 (recounting the (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1388 (2d ed. 1950)). *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1268 (2002) (similar); *see also* BLACK'S LAW DICTIONARY 1019 (4th rev. ed. 1968) ("any ground, soil, or earth whatsoever" and "also things of a permanent nature affixed thereto or found therein").

258. *See* Brief for Respondents, *supra* note 20, at 24 (providing a history of the Forest Services' interchangeable use of Trail and Land). For example, the Forest Service issued a Reference Manual describing '[t]he Appalachian Trail' as 'a unique land protection project.'" *Id.* (citing *NPS Reference Manual*, *supra* note 172, at 221).

259. *Comprehensive Plan for the Protection, Management, Development and Use of the Appalachian National Scenic Trail*, NAT'L PARK SERV., Addendum 3; 1 (1981), www.americantrails.org/files/pdf/ATCompPlan.pdf [perma.cc/6F53-RZW9].

260. *Id.*

Trail distinguished the Trail from the land.[261] Justice Alito, who joined the majority, found this argument compelling, stating "when I think of a pipeline that is 600 feet below the surface, that doesn't seem like a trail . . . can't we just say that the trail is on the surface and something that happens 600 feet below the surface is not the trail?"[262] The Court's affinity to divorce the trail and "the land upon which it exists"[263] was based on the legal fiction of an abstract distance that was apparent in the oral argument and the Court's opinion.[264]

Justices Sotomayor and Kagan noted during oral argument that this conjectural attempt to separate the Trail from its land was weak and ill-founded. Justice Kagan provided a quick retort to Yang's 600 feet argument, stating that "[i]t's a . . . difficult distinction to wrap one's head around, Mr. Yang. You're saying the trail is distinct from . . . the land that is the trail. I don't really quite know how to say it except that nobody makes this distinction in real life."[265] She also commented that the petitioner's briefs were "strange to read because you can't ever just say what you mean, which is that the trail is a piece of land."'[266] Justice Kagan correctly identified how the petitioners were attempting to wedge something between the trail and "the land upon which it exists"[267] because in reality, the trail is as much land as the land is the trail. Justice Sotomayor translated the practical understanding to her dissent. The majority opinion was mistakenly distracted by the distance of the pipe to the Appalachian Trail.[268]

Moreover, in this case, distance is irrelevant in deciding the relationship between the Appalachian Trail and its land because even at 600 feet, the pipeline would impact both the surface of the Appalachian Trail's land. Ruptures of pipeline are common[269] and have disastrous environmental consequences.[270] When crude oil or petroleum products leak from a pipeline into the environment, they

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261. Transcript of Oral Argument, *supra* note 3, at 7-8; 20; Sullivan & Wamsley, *supra* note 30 ("Anthony Yang . . . sought to disentangle the trail from the land beneath it, so that the pipeline could proceed under the permit granted by the Forest Service.").

262. Transcript of Oral Argument, *supra* note 3, at 21-22.

263. Giannetti, *supra* note 4.

264. *Cowpasture*, 140 S. Ct. at 1842; 1844; n. 7.

265. Transcript of Oral Argument, *supra* note 3, at 10-11.

266. *Id.* at 12.

267. *Id.*; Giannetti, *supra* note 4.

268. *Cowpasture*, 140 S. Ct at 1844.

269. G. Kousiopoulos et al., *Pipeline Leak Detection in Noisy Environment*, 8TH INT'L CONF. ON MODERN CIRCUITS & SYSTEMS TECH. 1-5, (2019) (for example, "according to Canada's National Energy Board, over thirty federally regulated pipelines ruptured between 1992 and 2011, three of which released over 3,000 m^3 of oil.").

270. *Id.*

are highly combustible and toxic.[271] Justice Kagan's view of the land and Trail as indivisible makes sense, both from her practical example and from the perspective of the more specific implications of the proposed pipeline.

C. Construction of the Trail Will Have Lasting Impacts on the Trail, and Therefore Environmental Impacts Should Have Had More Consideration

1. The Court Ignored Peer-Reviewed Science that Construction has Lasting Implications on the Land

The Appalachian Trail is practically paired with the land on which it traverses, as the environmental impacts effect both the trail and its land equally. The federal government, petitioners, put forth the strained argument that even the Atlantic Coast Pipeline would "do much for the environment" and preventing its construction would "not even promote environmental protection."[272] These claims ignore the peer-reviewed science proving that pipelines contribute to climate change, and there is a genuine "need to offset energy services provided by natural gas infrastructure with zero-carbon renewable energy alternatives and investments in energy efficiency."[273] The United Nations' Intergovernmental Panel on Climate Change deemed it essential that reliance on natural gas be reduced by thirteen to sixty-two percent by 2050.[274] The ACP is a commitment to the use of natural gas for the foreseeable future, which is clearly at odds with the United Nation's guidance.[275]

The ACP would cause significant deforestation of the Appalachian Trail by clear cutting a 125-foot path of trees and vegetation through a National Forest.[276] This deforestation is

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271. *Gasoline explained: Gasoline and the environment*, U.S. ENERGY INFO. ADMIN. (Nov. 19, 2020), www.eia.gov/energyexplained/gasoline/gasoline-and-the-environment.php [perma.cc/HWG5-NBGZ].

272. Brief for Petitioner Atlantic Coast Pipeline LLC, *supra* note 148, at 47.

273. Brief of the City of Staunton, Virginia et al. as Amici Curiae in Support of Respondents at 11, *Cowpasture*, 140 S. Ct. 1837 (Nos. 18-1584, 18-1587); Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021) (President Biden proclaimed "We must listen to science—and act. . . . We must hold polluters accountable for their actions. We must deliver environmental justice in communities all across America.").

274. Brief of the City of Staunton, *supra* note 343, at 11 (citing ROGEL, J., ET AL., MITIGATION PATHWAYS COMPATIBLE WITH 1.5°C IN THE CONTEXT OF SUSTAINABLE DEVELOPMENT 97 (2018) (Masson-Delmotte et al. eds.)); Exec. Order No. 14008, *supra* note 310 (President Biden rejoined the Paris Climate Agreement and pledged the "United States will exercise its leadership to promote a significant increase in global climate ambition to meet the climate challenge").

275. Brief for City of Staunton, *supra* note 346, at 11.

276. Emily Brown, *Dominion touts Atlantic Coast Pipeline progress,*

devastating to the critical habitat of threatened and endangered species.[277] For example, the Little Brown Bat will face an increase in predation and a loss of roosting habitat.[278] Additionally, deforestation in this ecologically important area could have disastrous consequences as the ecosystem has steep, mountainous slopes[279] that are "vulnerable to catastrophic mudslides, landslides and Hurricanes."[280] Nelson County, which the ACP bisects, has expressed a long-founded concern that the ACP would traverse its "most scenic, rugged, and undeveloped terrain," and would be destructive to the cornerstone of the County's economy, tourism.[281]

Furthermore, the ACP would impact water supply in Virginia by cutting through the critical aquifer recharge area of Gardner Spring,[282] which produces 4.5 million gallons of waters per day.[283] In addition, the construction of the ACP will negatively impact air quality by emitting "particulate matter, inorganic dust and abrasive dust."[284]

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mountain construction concerns opponents, NELSON CNTY. TIMES (Apr. 27, 2017), www.atlanticcoastpipeline.com/news/2017/4/27/dominion-touts-atlantic-coast-pipeline-progress-mountain-construction-concerns-opponents.aspx [perma.cc/8DLP-QAW4].

277. *Threats, Deforestation and Forest Degradation*, WORLD WILDLIFE FOUND., www.worldwildlife.org/threats/deforestation-and-forest-degradation [perma.cc/8S3V-3KKM] (last visited Dec 30, 2020).

278. *Cowpasture,* 911 F.3d at 158.

279. Brief of the City of Staunton, *supra* note 343, at 13 (citing Federal Energy Regulatory Commission, *Final Impact Statement*, ATLANTIC COAST PIPELINE & SUPPLY HEADER PROJ., Vol. I, Docket Nos. CP15-554-000, CP15-554-001, CP15-555-000, and CP15-556-000 FERC/EIS-0274F, at 4-30 (July 2017).

280. Jeffrey Halverson, *Unprecedented rain: Hurricane Camille's Deadly Flood in the Blue Ridge Mountains,* WASH. POST (Aug. 19, 2013), www.washingtonpost.com/news/capital-weather-gang/wp/2013/08/19/unprecedented-rain-hurricane-camilles-deadly-dlood-in-the-blue-ridge-mountains/ [perma.cc/TN78-BG3E]; *Final Environmental Impact Statement*, *supra* note 326.

281. Nelson County Board of Supervisors, *Resolution in Opposition of the Atlantic Coast Pipeline* (Sept. 9, 2014).

282. Brief of the City of Staunton, *supra* note 343, at 12.

283. Brief of the City of Staunton, *supra* note 343, at 12 (citing City of Staunton Comprehensive Plan 2018-2040, at 8-22; Letter from the Hon. Carolyn W. Dull, Mayor, City of Staunton, to Ms. Julia Wellman, Va. Dep't. Envtl. Quality (Feb. 21, 2017), www.abralliance.org/wp-content/uploads/2017/03/Staunton-City-Council-letter-of-opposition-to-ACP.pdf.) The City of Staunton concern of the ACP's negative implications on their water supply is long founded. *Id*. The City claimed that owners of the ACP and the Federal Energy Regulation Commission "have utterly failed to account yet for the potentially catastrophic consequences of the project as to the route of the line that would be unacceptably within the ambit of our water source known as Gardner Spring." *Id*. Their concern is rooted in the vitality of the recharge area, "because the bulk of the water that feeds Gardner Spring comes from an extensive underground aquifer system." *Id*.

284. Tomareva et al., *IOP Conf. Series: Materials Science and Engineering*,

The Forest Service commented that Construction of the ACP will cause "irreversible [negative] impacts to the soil and vegetation resources" on National Forest System lands.[285] They concluded that, no matter the method used to construct the pipeline, "there will still be an unavoidable irreversible dedication of the soil resource as defined by [National Environmental Policy Act.]"[286] These consequences would ripple beyond the construction area permeating through the soil and vegetation.[287] Construction would ultimately "eliminate the stable, resident plant community"[288] and cause significant soil loss, which will take years to recover.[289]

Executive Order 12898 requires all federal agencies, including the Forest Service, to take steps to avoid inequitable environmental outcomes.[290] Here, it is obvious that the flora, fauna, and the hikers will experience inequitable environmental outcomes as a direct consequence of construction of the ACP. The Trail and its land will be equally affected from such a disturbing construction project because they are a married pair: both will be equally affected as they are one and the same.

2. While the Dissent Touched on the Implications of Constructions, the Seriousness of Impacts Warranted More Attention

To Justice Sotomayor's credit, the dissent briefly touched on

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IOP SCIENCE 5 (2017), www.iopscience.iop.org/article/10.1088/1757-899X/262/1/012168/pdf [perma.cc/Y3RN-VKRQ].

285. *Cowpasture*, 911 F.3d at 157 (citing Corrected Deferred Joint Appendix, *supra* note 25, at 2445); Tony, *supra* note 53 (Virginia, West Virginia, and North Carolina all required extensive cleanup and restoration plans to remedy the construction that had occurred before the ACP was canceled).

286. *Cowpasture*, 911 F.3d at 157 (citing Corrected Deferred Joint Appendix, *supra* note 25, at 2445.

287. Jun Xiao et al., *Potential effects of large linear pipeline construction on soil and vegetation in ecologically fragile region*s, 186 ENV'T MONITORING & ASSESSMENT 8037, 8037 (2014).

288. *Id.*

289. *Cowpasture*, 911 F.3d at 166 (citing Corrected Deferred Joint Appendix, *supra* note 25, at 2445).

290. Sierra Club v. FERC, 867 F.3d 1357, 1368 (D.C. Cir. 2017) ("The principle of environmental justice encourages agencies to consider whether the projects they sanction will have a 'disproportionately high and adverse' impact on low-income and predominantly minority communities."); Heather Hansman, *The Supreme Court Approved More Drilling Under the AT*, OUTSIDE MAG. (Jun. 25, 2020) www.outsideonline.com/2415115/dominion-energy-appalachian-trail-drilling-supreme-court-decision [perma.cc/99L2-TKA6] ("The whole point of the federal regulatory and permitting system is to calmly analyze projects, to make sure they're necessary and do the least harm. There's a reason why we make infrastructure go through so many steps—to keep the public (and public lands) as protected as possible.").

how the construction would negatively impact the land.[291] She noted "[c]onstruction noise will affect Appalachian Trail use 24 hours a day" and "Atlantic's machinery (including the artificial lights required to work all night) will dim the stars visible from the Trail."[292] Concluding construction would "unavoidably" lead to "to ecological disturbance since there are clearing of vegetation, excavation, [and] soil compaction."[293] Though Justice Sotomayor gave consideration of the ecological impacts in her analysis, the lasting damage on the land warranted more attention.

The ACP is an invasive construction project that will fundamentally change the character and health of the Appalachian Trail. The Trail would endure blasting, burrowing, drilling, and deforestation during construction for which the consequences of eradication of species and resources would long outlast the final bulldozer.[294] The nearby eco-environment would continue to degrade long after the construction stops.[295]

V. CONCLUSION

The majority's opinion disregarded the conservation goals for the Appalachian Trail when it forced separation of the Trail from the land that forms it. Justice Thomas excused the Forest Service's failure to promote conservation over recreation on the Appalachian Trail despite an express directive from Congress.[296] The lasting environmental consequences on the Appalachian Trail are unavoidable if a massive natural gas construction project is implemented. This environmental degradation of America's longest scenic trail is a clear violation of the Organic Act's prohibition on incompatible consumption uses,[297] such as a natural gas pipeline, and impairs the land's resources and values.[298] Similarly, the

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291. *Cowpasture*, 140 S. Ct. at 1851 (Sotomayor, J., dissenting).

292. *Id*.

293. Tomareva, *supra* note 317, at 1.

294. *Cowpasture*, 911 F.3d at 155.

295. Xiao et al., *supra* note 320, at 8037.

296. *See generally Cowpasture*, 140 S. Ct. at 1841-51 (Justice Thomas does not meaningfully discuss the failure to promote conversation); Nat'l Parks Conservation Ass'n v. U.S. Dep't of the Interior, 835 F.3d 1377, 1386 (11th Cir. 2016).

297. Mich. United Conservation Clubs v. Lujan, 949 F.2d 202, 207 (6th Cir. 1991).

298. Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183, 190 (D.D.C. 2008). The "fundamental purpose" of the Park Service "is to conserve the scenery, natural and historic objects, and wildlife in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." *Id*. Uses of a "unit" of a National Park System must "be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for

Court's majority opinion ignored the Trails Act's mandate to promote "the conservation and enjoyment of the . . . areas through which [national scenic] trails may pass."[299] To use the Forest Service's own words: "Miles of line do not necessarily equate to severity of the environmental impact. The nature of the resources to be impacted needs to be considered."[300] The majority snubbed the environmental impacts of construction and consequently ignored the will of Congress.

The majority's opinion also ignored the practical pairing of the Trail to its land. The majority opinion was distracted by the distance of the pipe from the surface of the Trail;[301] distance does not eliminate the impact on the land that is the Trail. If there was a leak in the pipe, the land and the Appalachian Trail would both be similarly affected. It would have been undeniable that the Trail and its land are one if the majority had given more weight to the proven environmental implications of the pipeline. While the dissent briefly acknowledged the environmental impacts of an invasive pipeline through the National Park System,[302] the majority's opinion disregarded the environmental impacts of the ACP altogether, and consequently the Appalachian Trail's long-term conservation goals that Congress intended were also ignored.[303]

The *Cowpasture* Court incorrectly reversed and remanded the Fourth Circuit holding. The Fourth Circuit correctly concluded that they "trust[ed] the United States Forest Service to 'speak for the trees, for the trees have no tongues.'"[304] Here the voice of a public

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which the System units have been established, except as directly and specifically provided by Congress." 54 U.S.C. § 100101(a); (b)(2) (2022). Amendments to The Park Service's governing statutes, demonstrated that Congress has

> 'eliminate[d] the distinctions' between national park units and mandated that the Park Service 'treat all units as it had been treating those parks that had been expressly within the ambit of the Organic Act, the natural and historic units, with resource protection the overarching concern. This mandate applies to the of the Organic Act apply with equal force to the Appalachian Trail as they do to any other national park unit.).'

Brief for Pamela Underhill et. al. as Amici Curiae Supporting Respondents at *29, n. 10, *Cowpasture*, 140 S. Ct. 1837 (citing Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1453 (9th Cir. 1996))

299. 16 U.S.C. § 1242(a)(2) (2022).

300. *Cowpasture*, 911 F.3d at 171-72 (A statement made "in response to the DEIS's assertion that in general, as the length of a pipeline route increases, the environmental impacts also increase.").

301. *Cowpasture*, 140 S. Ct. at 1844.

302. *Id.*

303. *Id.* at 1841-50.

304. Tezak, *supra* note 99, at 237 (citing *Cowpasture*, 911 F.3d 183 (quoting DR. SEUSS, THE LORAX (1971)).

trail that holds the Eastern Seaboard's most precious resources[305] was ignored in favor of the louder voice: the estimated $5.0 billion natural gas pipeline construction project.[306] While the Court ultimately sided with the gas industry in deploying a patchwork analysis to separate the Trail from its land, the project ultimately was canceled as litigation raged on in other courts.[307] Nevertheless, this decision will long loom as an example of how destructive uses can manipulate public land and the interpretation of laws governing that land.

305. A Special Report, *supra* note 12, at 7.

306. *Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline*, DOMINION ENERGY (July 5, 2020), www.news.dominionenergy.com/2020-07-05-Dominion-Energy-and-Duke-Energy-Cancel-the-Atlantic-Coast-Pipeline [perma.cc/8S56-K285].

307. *Id.*