NO. 18-_____

In the Supreme Court of the United States

IAN S. GOLDENBERG, ET AL.,

Petitioners,

v.

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRITE OF CERTIORARI

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QUESTION PRESENTED

The Court has long emphasized the strict construction of condemnation statutes, especially as against corporate delegatees of this sovereign power. By the plain, undisputed terms of the Natural Gas Act, 15 U.S.C. § 717f(h), a pipeline company obtains title and any incident rights of possession in property it seeks to condemn only upon entry of judgment and payment of compensation in such an action. A growing number of Circuits have nevertheless upheld grants of full possession to pipeline companies at the outset of these actions through mandatory preliminary injunctions—the Seventh Circuit has demurred. In this case, the Eleventh Circuit further expanded the reach of these injunctions in holding that a pipeline company need not even pay estimated just compensation, by posting a cash bond, before obtaining possession. As a result, Petitioners have now been deprived of their property without any compensation for over two years, even as Respondent profits from its use—pumping as much as 44.8 million cubic feet of natural gas through it every day. This case thus raises an important and frequently recurring issue never addressed by the Court as to the constitutional limits of equitable procedures in eminent domain actions at law.

THE SPECIFIC QUESTION PRESENTED IS:

Whether a judicially-conferred right of possession to a pipeline company before judgment and without compensation in a Natural Gas Act taking improperly invades the exclusive authority of Congress to legislate how eminent domain is exercised and violates the just compensation clause.

PARTIES TO THE PETITION

PETITIONERS

- Ian S. Goldenberg.
- Handy Land and Timber L.P.
- Christine Marie Cali
- Gene A. Terrell
- Joyce Bailey Terrell
- Thomas W. Smrcina
- Jeannie F. Smrcina
- Donald Morris

RESPONDENT

- Transcontinental Gas Pipe Line Company, LLC

RULE 29.6 STATEMENT

None of the petitioners has a parent corporation or shares held by a publicly traded company.

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JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit entered on December 6, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND JUDICIAL RULES

The following provisions are presented in the appendix:

- **U.S. Const. Amend. V** (App.119a)
- **15 U.S.C. § 717f**—Construction, Extension, or Abandonment of Facilities (App.119a)
- **Fed. R. Civ. P. 65**—Injunctions and Restraining Orders (App.125a)

- **Fed. R. Civ. P. 71.1**—Condemning Real or Personal Property (App.128a)

STATEMENT OF THE CASE

A. Natural Gas Act Takings

The method of taking prescribed by Congress through Section 717f(h) of the Natural Gas Act ("NGA") has never been in dispute. NGA takings are "straight take" condemnation actions. *Transwestern Pipeline v. 17.19 Acres of Property*, 550 F.3d 770, 774 (9th Cir. 2008) ("All courts examining the issue have agreed that the NGA does not authorize quick take power, nor can it be implied, because eminent domain statutes are strictly construed to exclude those rights not expressly granted.").

As this Court has explained, Congress delegates two statutory methods of condemnation: (1) "straight take" authority, which is the ordinary statutory method of condemnation, and (2) "quick take" authority. *Kirby Forest Indus. v. United States*, 467 U.S. 1, 3-4, 104 S.Ct. 2187, 2190-91 (1984).

Where Congress has delegated straight take authority, the condemnor can take possession of the subject property only after just compensation is judicially determined and paid to the owner. *Id.* In a straight take action, the "practical effect of final judgment on the issue of just compensation is to give the [condemnor] an option to buy the property at the adjudicated price." *Id.*

Importantly, if the condemnor "wishes to exercise that option, it tenders payment to the private owner, whereupon title and right to possession vest in the [condemnor]." *Id.* (emphasis added). If the condemnor "decides not to exercise its option, it can move for dismissal of the condemnation action." *Id.*

In other words, a condemnor with straight take authority cannot take possession from the property owner before (1) obtaining this option after a judicial determination of just compensation and (2) exercising this option by tendering payment in the amount determined as just compensation.

The quick take authority confers an "additional . . . right." *Transwestern Pipeline Co.*, 550 F.3d at 774-75; *see also* 40 U.S.C. § 3118 ("Declaration of Taking Act"). In a quick take action, the condemnor has the right to take possession of the subject property before just compensation is judicially determined but only if at the time of filing the action the condemnor deposits, for the use of the condemnee, "an amount of money equal to the estimated value of the land. *Kirby Forest*, 467 U.S. at 4-5, 104 S.Ct. at 2191. Upon doing so, "[t]itle and right to possession thereupon vest immediately in the [condemnor]." *Id.*

Despite the consensus that the NGA confers no quick take authority and the fact that Congress has not modified the language of Section 717f(h) since its adoption three-quarters of a century ago, the procedures applied to takings actions under the NGA have transformed in the intervening years to the point they now bear little resemblance to those Congress originally had conceived.

Section 717f(h) provides that applicable state eminent domain practices and procedures govern even NGA condemnation actions brought in a United States district court. In spite of this clear mandate, the clause was read out of the NGA with the adoption of Fed. R. Civ. P. 71.1 in 1951. The courts have reasoned that "a more recent statute prevails over an older conflicting statute" and so Congress must have intended to replace the state practice and procedure clause in the NGA with Rule 71.1. *S. Natural Gas v. 2.0 Acres Cullman County*, 197 F.3d 1368, 1374 (11th Cir. 1999).[1] Among other things, the absolute right many property owners would previously have had to jury trials in NGA condemnations disappeared with the advent of Rule 71.1. *Id.*

But that was just the beginning of the procedural transformation. Despite that Congress delegated no quick take authority to pipeline companies through the NGA, a district court in 1981 conferred this right anyway. *N. Border Pipeline Co. v. 127.79 Acres of Land*, 520 F. Supp. 170, 173 (D.N.D., 1981). In granting immediate possession, the district court justified the relief solely on the basis of its inherent equitable authority. *Id.* at 172.

Almost two decades later, a unanimous panel of the Seventh Circuit that included Judges Frank H. Easterbrook, Joel M. Flaum, and Kenneth F. Ripple

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[1] Interestingly, Congress has amended other provisions in the NGA numerous times since the promulgation of Rule 71.1, while leaving the state practice and procedure clause untouched. *See, e.g.*, Pub. L. 95–617, title VI, § 608, Nov. 9, 1978, 92 Stat. 3173; Pub. L. 100–474, § 2, Oct. 6, 1988, 102 Stat. 2302. Yet no court has ever suggested this logic might apply in reverse.

seemed to squelch the notion of judicially-conferred injunctive possession in NGA takings. *N. Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469, 471 (7th Cir. 1998). In a well-reasoned defense of the need for "a substantive entitlement" to equitable relief, the court noted that for a pipeline company to obtain immediate possession it would have to "claim[ ] an ownership interest in the property that, if it existed at all, was fully vested even before initiation of the lawsuit" because it was asking the court to "predict[] what future proceedings would reveal about the *ex ante* state of affairs between the parties, *i.e.*, that the [pipeline company], not the [landowner], had the right to possess the property." *Id.* at 472.

Despite the sound reasoning in *N. Border Pipeline Co.*, the idea of mandatory injunctive possession in favor of pipeline companies gained new traction in 2004. The Fourth Circuit held that a pipeline company can establish a pre-judgment, substantive right in property sought to be condemned under the NGA. *E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004). The pipeline company can do so, the argument goes, by obtaining partial summary judgment as to its right to condemn. *Id.* at 823. Then, the company has "an interest in the landowners' property that could be protected in equity if the conditions for granting equitable (in this case, injunctive) relief were satisfied," which according to that court, they easily were. *Id.* at 823, 829-830. Five Circuits have adopted *Sage*'s reasoning, including now the Eleventh Circuit. (App.40a-41a).

Thus completed the transformation of the statutory straight take authority delegated by Congress under

the NGA into a judicially-conferred quick take procedure. Now, according to the Eleventh Circuit in this case, a pipeline company exercising this equitable quick authority need not even pay the condemnee estimated just compensation before taking possession—as would be required of a condemnor exercising the statutory quick take authority—since Federal Rule of Civil Procedure 65(a) leaves the issue of surety to the discretion of the district court. (App.84a).

B. District Court Proceedings

Petitioners are all homeowners and residents ("Landowner-Petitioners") of a rural area in western Coweta County, Georgia, which is bisected by Respondent Transcontinental Gas Pipe Line Company, LLC's ("Transco") 115-mile natural gas pipeline, known as the Dalton Expansion Project.

After a four-year regulatory review process, which Transco unilaterally delayed at least once for eleven months, the Federal Energy Regulatory Commission ("FERC") issued a certificate of public need ("FERC Certificate") for the project on August 3, 2016. (App. 18a-19a, 21a, 76a) Transco immediately began filing the condemnation actions at issue in this appeal later that same month. (App.23a) On the same day Transco initiated these actions, Transco filed motions for partial summary judgment and a mandatory preliminary injunction that would convey immediate possession of the subject properties. (App.24a).

Transco filed three declarations in support of these motions. (*Id.*). A land agent stated that offers had been made to acquire by contract the easement areas now sought to be condemned. (App.25a). An

engineer stated that the easement areas were approved by FERC. (*Id.*). And the project manager stated that Transco would lose millions of dollars if construction did not proceed immediately. (App.25a-26a).

Over Landowner-Petitioners' objections, the district court consolidated all of the cases in the Atlanta Division, despite that all of their rural properties are within ten miles of another federal courthouse in that same district. Also over Landowner-Petitioners' objection, the district court refused to allow expedited written or deposition discovery prior to a hearing on Transco's motions. (App.28a-29a). The district court further denied Landowner-Petitioners' request to take and present evidence at the hearing, even though Landowner-Petitioners' had already subpoenaed several of Transco's declarants. (App.28a, 138a).

These limitations notwithstanding, Landowner-Petitioners did submit the declaration of a Georgia-licensed real-estate appraiser. (App.27a). He testified that the easements sought by Transco were not fixed to a particular location on the ground, as required by FERC. (*Id.*). He concluded that the easements as proposed could not be appraised without making extraordinary assumptions. (App.27a).

At the hearing, Landowner-Petitioners also called into question Transco's averred in-service deadline of May 1, 2017. (App.25a). Landowner-Petitioners submitted a letter from Transco that had previously stated the in-service date as August 2016. (App.28a). Without producing any contracts, Transco had also declared that it would owe irrecoverable contractual penalties to purchasers of its gas if the in-service deadline were not met. (App.25a-26a). Landowner-

Petitioners obtained and produced at the hearing a certified copy of a contract from one of the alleged contractual purchasers that contained no provision for such penalties due to a construction delay. (App.137a-139a).

Finally, landowners showed that the offers made by Transco to acquire the subject properties by contract would have required landowners to convey rights far in excess of those Transco is permitted to condemn. (App.30a).

Two weeks after the hearing, the district court granted Transco's motions. (App.31a-35a). The district court granted partial summary judgment as to Transco's right to condemn because (1) it held a valid FERC Certificate; (2) the property to be condemned was necessary for the project; and (3) it could not acquire the necessary easements by contract, all of which are necessary pre-requisites to bringing any condemnation action under Section 717f(h) of the NGA. (App.31a).

The district court also issued a mandatory preliminary injunction to convey immediate possession of the subject properties to Transco to the full extent authorized by FERC but declined to make a determination as to specific easement terms. (App.33a). The district court, and later the Eleventh Circuit, concluded that Transco had shown "actual success" on the "merits of its condemnation claim." (*Id.*). The district court found that the potential for largely monetary irreparable harm Transco could suffer outweighed any risk of harm to landowners from giving up their property immediately. (App.34a). Finally, the district court found the mandatory injunction in the public

interest, largely based on FERC's findings in issuing the FERC Certificate in the first place. (*Id.*).

Transco proposed bond amounts based on its own appraisals of the easement rights to be taken. 35. Transco's proposed bond amount for one of the Landowner-Petitioners was based on a valuation of $198.00 for the easement rights to be taken. Landowner-Petitioners proposed their own bond amounts and requested clarification that Transco would be made to file cash bonds that could be drawn upon during the litigation, much like a deposit of estimated just compensation in a quick take case. (App.36a). The district court rejected this request, requiring only a surety bond, and adopted Transco's proposed bond amounts as to Landowner-Petitioners. (App.36a-37a).

This appeal followed on December 12, 2016. (App. 38a). Although Transco did not make the critical May 1, 2017 in-service deadline, the pipeline has now been fully operational for over a year. (App.39a). Landowner-Petitioners have been out of possession and without compensation since February 2, 2017. (*Id.*).

C. Appellate Court Proceedings

In a 90-page opinion, the Eleventh Circuit adopted the reasoning of *Sage*, allotting just six paragraphs to its discussion of the availability of injunctive possession in NGA takings, and affirming the district court in all respects. (App.17a, 40a-44a).

Jurisdiction in the Eleventh Circuit was grounded in 28 U.S.C. § 1292(a)(1), which permits an immediate appeal from an order granting or denying an injunction. Pendent jurisdiction was exercised to review the district

court's partial summary judgment ruling since it provided the basis for its finding that Transco had satisfied the first prong of the preliminary injunction analysis. (App.44a). The Eleventh Circuit further exercised jurisdiction over the district court's decision not to require a cash bond under *Callaway v. Block*, 763 F.2d 1283, 1287 n.6 (11th Cir. 1985), since that order involved matters "closely related" to the interlocutory order being appealed. (App.81a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW AND RECENT DECISIONS IN THREE OTHER CIRCUITS, CONFLICT WITH THIS COURT'S PRECEDENT ON FUNDAMENTAL ISSUES OF EMINENT DOMAIN, EQUITY, AND SEPARATION OF POWERS JURISPRUDENCE

A. Eminent Domain Is an Exclusively Legislative Function

Congress—not any court—has exclusive control over how and when eminent domain authority is delegated and exercised. "As a general and fundamental principle, the exercise of the sovereign right of eminent domain is within the legislative power and mere questions of its range and extent in particular cases are ordinarily not subject to judicial correction and control." *O'Brien v. United States*, 392 F.2d 949 (5th Cir. 1968). Accordingly, and as this Court has held, Congress is the only branch of the federal government with authority to delegate the power, or authorize the use of, eminent domain. *See Youngstown Sheet*

& Tube Co. v. Sawyer, 343 U.S. 579 (1952) (prohibiting President from seizing possession of private property even in wartime absent Congressional authorization); *Berman v. Parker*, 348 U.S. 26, 33, 36 (1954) ("not for the courts to determine whether [exercise of eminent domain] is necessary" for a particular public purpose as this is for "Congress and Congress alone to determine"). This includes the manner in which eminent domain authority is exercised. *Secombe v. R.R. Co.*, 90 U.S. 108, 117-18 (1874) ("It is no longer an open question in this country that the mode of exercising the right of eminent domain . . . is within the discretion of the legislature.") (emphasis added).

As a result, when Congress delegated only straight take authority to pipeline companies under the NGA, no other branch of government can alter that statutorily prescribed method of taking. The courts certainly cannot permit quick takes in equity through novel applications of the Federal Rules of Civil Procedure.

The district court's actions in this case did just that and effected a quick take in favor of Transco. Since this result intrudes on the exclusive authority of Congress to prescribe the method of taking, contrary to this Court's precedent, it is due to be reversed. Likewise, the Eleventh Circuit's review should not have proceeded beyond this point.

If Congress had felt quick take authority was warranted under the NGA, then it certainly could have delegated this authority to pipeline companies. As a 2008 Congressional Research Service report noted, however, "we find [no] instances where Congress has authorized purely private delegatees to use the 'quick take' mechanism available to federal condemnors, by

which the condemnor may obtain title and possession of land expeditiously, without awaiting the conclusion of the condemnation trial." Robert Meltz, Cong. Research Serv., RS2288, DELEGATION OF THE FEDERAL POWER OF EMINENT DOMAIN TO NONFEDERAL ENTITIES, 2 (May 20, 2008). The historical reticence of Congress to delegate quick take authority to private entities makes the courts' willingness to confer a judicially-created quick take procedure on natural gas companies all the more extraordinary. For that reason alone, the issue merits review by this Court.

B. Eminent Domain Statutes Are Strictly Construed

This Court has also consistently held that statutory delegations of eminent domain authority must be construed strictly. *City of Cincinnati v. Vester*, 281 U.S. 439, 448 (1930); *W. Union Tel. Co. v. Penn. R. Co.*, 195 U.S. 540, 569 (1904) (holding eminent domain authority must "be given in express terms or by necessary implication"). This is especially so where Congress has delegated eminent domain authority to a private entity, such as a utility. *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946) (explaining grants of eminent domain to public utilities and private corporations "are, in their very nature, grants of limited power" and "do not include sovereign powers greater than those expressed or necessarily implied"). Where an eminent domain statute is silent, therefore, a court cannot infer legislative acquiescence in a remedy simply on the basis it was not prohibited. *Green v. Biddle*, 21 U.S. 1, 41 (1823) ("The doctrine of acquiescence cannot apply to the exercise of such a sovereign power.").

In this case, the Eleventh Circuit disregarded these rules of construction for eminent domain statutes: "There is nothing in § 717f(h), or anywhere else in the Natural Gas Act, indicating that Congress intended to foreclose the district court from issuing a preliminary injunction granting a pipeline company immediate access to property for which it has established a right to condemn under the Act." (App.42a). This construction of the NGA runs directly contrary to this Court's guidance regarding the interpretation of eminent domain statutes. Accordingly, the Eleventh Circuit erred in reading a right to mandatory injunctive possession into the NGA.

The Eleventh Circuit doubled-down on the doctrine of acquiescence by also noting that "nothing in Rule 71.1 indicates that Congress intended to limit a district court's authority to issue a preliminary injunction in condemnation proceedings under the Natural Gas Act." (App.43a). This statement ignores the language of Rule 71.1 itself, which, of course, was approved by Congress. Subpart (f) provides that "[w]ithout leave of court, the plaintiff may—as often as it wants—amend the complaint at any time before the trial on compensation." It is hard to reconcile this free amendment provision with the sweeping injunctive rights of possession sanctioned by the Eleventh Circuit under Rule 65(a). The ability of a condemning authority to amend rights it has already taken—but not paid for—is inconceivable under traditional notions of eminent domain practice. Incidentally, Transco has already filed a unilateral amendment to the easement terms in these cases since the Eleventh Circuit handed down its opinion. The Court should grant review to provide

guidance and restore proper rules of construction in eminent domain cases.

C. Equity Cannot Supply Substantive Right to Immediate Possession in Straight Take Condemnations

1. No Substantive Right to Condemn

As shown by the foregoing, the well-established principle that equity must follow the law as a remedy of last resort, which this Court has repeatedly reaffirmed, is even more critical in the eminent domain context. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 385 (1996) (Thomas, J. concurring) ("Principles of federalism and separation of powers impose stringent limitations on the equitable power of federal courts."); *N.Y. Times Co. v. United States*, 403 U.S. 713, 742-43 (1971) (Marshall, J. concurring) ("[T]he Constitution . . . did not provide for government by injunction in which the courts . . . can make law without regard to the action of Congress. . . . "). Accordingly, equity cannot intervene without a legal right to protect. *See Chapman v. Coal Co.*, 338 U.S. 621, 70 S.Ct. 392, 94 L.Ed. 393 (1950) (denying injunctions where action presented no breach of contract right, invasion of property right, or violation of law); *Rees v. City of Watertown*, 19 Wall. 107, 22 L.Ed. 72, 86 U.S. 107 (1873) ("The very ground of the jurisdiction of equity is that there is a legal right and no legal remedy . . . .").

As outlined in *Kirby Forest*, the condemnor's right of possession arises, if at all, in a straight take action only after just compensation is judicially determined and paid, where the "practical effect of final judgment on the issue of just compensation is to give the

[condemnor] an option to buy the property at the adjudicated price." 467 U.S. at 3-4, 104 S.Ct. at 2190-91. Only upon the exercise of that option and tender of payment to the private owner do "title and right to possession vest in the [condemnor]." *Id.* (emphasis added).

Thus, establishing a substantive right to condemn in the straight take context is entirely beside the point. Looked at another way, once a pipeline company demonstrates the right to condemn and obtains an order confirming same, typically by way of partial summary judgment on this issue, all that means is the company does, in fact, have standing to proceed through the compensation process and, ultimately, to obtain an option to purchase the condemnee's property at the adjudicated price. But since there is typically no potential threat to a condemning pipeline company's right to condemn that foreseeably could arise during this process, it is difficult to see an appropriate manner for equity to protect this right.

The Eleventh Circuit's reliance on the right to condemn (as opposed to the right to possess) as the basis for allowing Transco's preliminary injunctive possession of Landowner-Petitioners' properties is the fundamental flaw in their analysis. (App.40a, 43a). As already discussed, the right to condemn only permitted Transco to pursue and obtain an option to possess the subject properties upon payment of just compensation. The Eleventh Circuit's failure to make this distinction is fatal to their analysis, because without any substantive right to possession there can be no equitable right to injunctive access.

In sum, even if equity were a potential remedy in this context, there was no substantive right to protect as to possession, and there was no potential harm to prevent as to any right to condemn.

2. Contrasting the Seventh Circuit's Reasoning in *N. Border Pipeline Co.* Further Illuminates the Flaws in the Eleventh Circuit's Approach

In *N. Border Pipeline Co.*, the Seventh Circuit correctly identified the substantive right required before preliminary injunctive access could issue as "a substantive entitlement to the [condemnees'] land right now," or in other words an "ownership interest in the property that, if it existed at all, was fully vested even before initiation of the lawsuit" 144 F.3d at 471. The panel further found any entitlement as to the pipeline company would arise only "at the conclusion of the normal eminent domain process" and that meant the company was "not eligible for [injunctive] relief." *Id.* The panel explained that in considering such a request for injunctive relief, a court is being asked to "predict[ ] what future proceedings would reveal about the *ex ante* state of affairs between the parties." *Id.* at 472.

The Eleventh Circuit stopped after the first part of the analysis—predicting what future proceedings may reveal about Transco's rights to possess Landowner-Petitioners' properties. Whether or not such predictions may prove accurate, they do not demonstrate that Transco has a pre-existing entitlement, present right, or vested interest in Landowner-Petitioners' properties worthy of protection through mandatory injunctive relief.

3. Transco Is No Different than Any Other Option Holder

To refine an analogy used at oral argument before the Eleventh Circuit, suppose Transco has an option to purchase several residential tracts at a future date in order to construct a manufacturing facility. Through a successful lobbying effort, Transco unexpectedly obtains the necessary zoning and permitting approvals ahead of schedule. Transco estimates that if the plant can open before the original option date, an additional $450,000,000.00 in tax revenues and other economic activity will be generated for the local economy. Neither party to the option contract disputes that it is binding and enforceable.

Even still, no court could issue a mandatory injunction on these facts to oust the homeowners and allow construction to proceed in advance of the contracted closing date—all without requiring Transco to tender payment. Yet that is precisely the nature of the relief the Eleventh Circuit has afforded Transco in this case. As in the example above, however, Transco has no present right of possession to Landowner-Petitioners' properties. This Court made clear in *Kirby Forest* that Transco, as a mere delagatee of the federal straight take authority, obtains "an option to buy the [condemned] property at the adjudicated price" upon entry of "final judgment on the issue of just compensation" that can be exercised by "tender[ing] payment to the private owner, whereupon title and right to possession vest in the [condemnor]." 467 U.S. at 4. Review is necessary to correct the lower courts' departure from this distinction.

II. REVIEW IS WARRANTED BECAUSE GRANT OF INJUNCTIVE ACCESS WITHOUT PAYMENT OF CASH BOND WORKS A JUDICIAL TAKING IN VIOLATION OF JUST COMPENSATION CLAUSE

The district court's refusal to require a cash bond in this case was, at best, an abuse of discretion and, at worst, a separate, unconstitutional taking without just compensation. The Eleventh Circuit's approval of this action represents a departure even from *Sage*, whose panel observed that potential harm to landowners from granting injunctive possession "is blunted by [the landowners'] right to draw down the money [the pipeline company] has deposited with the Court." *Sage*, at 361 F.3d at 829. This expansion of judicially-conferred immediate possession untethers it from the traditional eminent domain framework altogether and leaves landowners in an even more tenuous position. In short, it is a judicial quick take but without the cash deposit requirement of a statutory quick take.

As this Court has long held, the Fifth Amendment does not "require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision [for such payment] before his occupancy is disturbed." *Sweet v. Rechel*, 159 U.S. 380, 403 (1895). This means "it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner." *Id.* at 399.

The Court also held in *Kirby Forest* that the Fifth Amendment does not require compensation for the time between the filing of the action and the date title

ultimately transfers in a straight take proceeding. *See* 467 U.S. at 10-16. This is because the date title transfers is the date for which just compensation is determined and on which it is paid, even though it occurs at the end of a straight take proceeding. *Id.*

As has been established, this case is a straight take proceeding. According to *Kirby Forest*, Landowner-Petitioners cannot obtain compensation for the time period before transfer of title in such a proceeding. Since transfer of title will not occur until the end of this proceeding, a separate taking has occurred for the period beginning when Transco took possession and will continue until the date title ultimately transfers. This taking, moreover, violates the Fifth Amendment either because it will go entirely uncompensated under *Kirby Forest*, or because there is no "reasonable, certain, and adequate provision" for compensating Landowner-Petitioners. *Sweet*, 159 U.S. at 403. The district court could have, but did not, make provision for this taking by requiring a cash bond or otherwise. And Congress certainly did not make provision for this sort of compensation since no quick take authority was delegated in the NGA. In any event, since "it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner," *id.* at 403 (emphasis added), Landowner-Petitioners urge the Court to grant this petition in order to address this unconstitutional taking.

III. THIS CASE IS AN IDEAL VEHICLE FOR REVIEW OF AN IMPORTANT AND RECURRING PROPERTY RIGHTS ISSUE

This case is an ideal vehicle for resolving the question presented. The Court is unlikely to benefit from further development of this issue in the lower courts. As the Anti-Federalist feared, so too do Landowner-Petitioners, that without immediate review "[o]ne adjudication will form a precedent to the next, and this to a following one. . . . so that a series of determinations will probably take place before even the people will be informed of them." THE ANTI-FEDERALIST NO. 82 (Brutus). This procedural trespass has bedeviled property owners and confounded eminent domain practitioners far too long already.

Review is also timely because of the significant increase in the number of FERC-authorized pipeline projects in recent years. Review now will provide much needed guidance to the lower courts, pipeline companies, and property owners at a time when the number of NGA takings is on a steep rise.

Finally, as of the due date for this petition, appellant-property owners in appeals pending in the Third, Fourth, and Sixth Circuits still have time remaining to petition this Court for writs of certiorari seeking review of the respective decisions in their cases, all of which permitted immediate possession under the NGA on identical grounds to this one. Landowner-Petitioners anticipate that additional petitions will be filed by at least some of these appellant-property owners. Accordingly, Landowner-Petitioners respectfully urge the Court to defer any determination as to this peti-

tion until all related petitions out of the other circuits are ripe for consideration.

CONCLUSION

For all these reasons, this Court should grant the petition.

Respectfully submitted,

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