No. _____

In the
Supreme Court of the United States

RICHARD BAATZ, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION, LLC,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Natural Gas Act ("NGA") provides an avenue for producers and transporters of natural gas to acquire the right to use public, natural gas resources secreted within private land.

The Act authorizes the Federal Energy Regulatory Commission ("FERC") to issue certificates as a prerequisite to such use.

In the decision below, a Sixth Circuit panel held that FERC certificate holders are not required to gain permission to enter the subsurface the land of titled landowners, in this case the Medina Landowners. The Sixth Circuit found that Columbia Gas could use the certificated property, a gas storage formation, without first contracting, obtaining an easement from, or bringing court action against the Medina Landowners. The NGA, the Sixth Circuit reasoned, did not identify a property interest worth protecting under federal or Ohio law.

In this case Columbia Gas had used the storage formation that included the Medina Landowners subsurface for nearly sixty years without the knowledge of or permission from the Medina Landowners.

The question presented is:

Whether the Natural Gas Act requires the holder of a Certificate of Public Convenience and Necessity to obtain by easement, contract, or eminent domain the permission to enter certificated land from the title holder, and additionally identifies a property interest protectable by the titled land owner under federal or state law.

PARTIES TO THE PROCEEDING

Ramsey Atlasy, Kimberly Atlasy, Richard Baatz, Laurie Baatz, Brianne Booth, Erik Booth, Yang Zhang, Alfredo Cipro, Tina Cipro, William Cogar, Kathrine Cogar, Nicholas Doran, Michelle Doran, Paul Eierdam, Arliss Eierdam, Dustin Holtz, Peggy Holtz, Donald Kell, Patricia Kell, Bradley Klingbeil, Brooke Klingbeil, Joseph Kostohryz, Lisa Kostohryz, Susan M. Lee, Robert Newman, Anna Newman, John Racco, Laurie Racco, Richard Reuss, George Rogers, Ellen Rogers, Gregory Roten, Stacey Roten, Jesse Saksa, Melissa Saksa, Jeff Sanderson, Rosemary Sanderson, John Schaller, Kelly Schaller, Karen Shrimpton, Matt Smith, April Smith, John Stricker, Kathleen Stricker, Richard Sunderman, Kevin Swantek, Wendy Swantek, Nancy Swartz, Kathryn Zendarski-Bacho, were plaintiffs- appellants below.

Columbia Gas Transmission, LLC is the respondent here and was the defendant-appellee below.

STATEMENT OF RELATED PROCEEDINGS

Baatz v. Columbia Gas Transmission, LLC, 295 F. Supp. 3d 776, 2018 U.S. Dist. LEXIS 24339 (N.D. Ohio, Feb. 14, 2018) - *Lower court opinion*.

Columbia Gas Transmission, LLC v. Brianne Booth, et al., No. 1:16-cv-01418-TMP, Northern District of Ohio, Eastern Division, Memorandum of Opinion and Order on Plaintiff's Motion for Partial Summary Judgment (December 22, 2016), ECF No. 819.

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

The Natural Gas Act regulates our country's vast resources for natural gas storage and transmission, a staple of United States citizens' energy consumption, granting rights to use that resource to private entities that do not own the land in or through which they store and transmit gas.

Some of the resources at issue include gas storage fields; natural formations in porous rock that hold natural gas reserves. The gas fields at issue are massive. So much so that scores of private citizens own the land over gas storage fields – from home owners to industrial and agricultural businesses – even if they do not know the fields exist. The fields generate massive revenue and support the multi-billion dollar industry of natural gas production and transmission.

A panel for the Sixth Circuit Court of Appeals ruled in *Baatz* that permission to enter land was optional, finding that the "NGA does not require the certificate holder to acquire the property it uses for its natural gas storage; the statute merely authorizes acquisition." *Baatz,* p. 3.[1]

By relying on this false premise, the Sixth Circuit panel found that the NGA granted certificate holders the right to use land without seeking permission to do so from titled land holders, either via the NGA or state law. This included gas storage fields spanning

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[1] The lower court made the same finding, holding that nothing in the NGA required certificate holders such as Columbia Gas to obtain permission to use the certificated land. (App. 35)

hundreds of square miles throughout Ohio and affecting thousands of privately owned parcels of land, regardless, apparently, as to whether those land holders might have an interest to use the same land, were they so informed of its importance.

The Sixth Circuit further found that certificated land was a "property interest" to the FERC certificate holders, but not to title owners of the land. Multinational energy companies presumably found the space valuable and useable, maintained a property interest thereon through the NGA, but the title owners were declared to not. Per the Sixth Circuit panel's reasoning, energy companies were granted rights by the United States government to use the certificated properties. But not title owners, per the Sixth Circuit's new rubric.

Rather, the Sixth Circuit has identified NGA governed property as valueless to its title owner until eminent domain proceedings are commenced, despite a federal judicial history that has required certificate holders to gain permission to enter the land granted under the statute, and permission to use the land as intended under the NGA.

The Sixth Circuit mustered a faulty state law interpretation to support its interpretation of the NGA: A title owner must have reasonable and foreseeable use of the NGA-certificated property in order to have a viable cause of action under state law, and otherwise may only obtain relief through eminent domain proceedings.

Two realities cut against this: (1) eminent domain proceedings do not provide compensation for use prior to the lawful taking via eminent domain proceedings, take; and (2) a landowner cannot know that their property has been utilized under the NGA because the existence and use of any gas storage fields are kept secret, as they were here for natural security purposes.

The Sixth Circuit has made clear that it adheres to a principal not supported by circuit precedent – it is an *option* for a certificate holder to get permission to enter land, as long as the landowner does not know about what the gas company is doing, and so there is no inherent property interest for title holders of NGA certificated land.

The Sixth Circuit panel placed knowledge over title, incentivizing natural gas companies to keep secret their operations, make a great deal of money, and then avoid state law and condemnation damages despite their non-compliance with the NGA.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 929 F.3d 767 and reproduced at App. 1-19.

The district court's memorandum of opinion and order is reported at 295 F. Supp. 3d 776 and reproduced at App.25-63.

JURISDICTION

The Sixth Circuit issued its opinion on July 10th, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Natural Gas Act provides, in relevant part: "When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts." Natural Gas Act, 15 U.S. Code § 717f(h).

"No person shall be. . . .deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Fifth Amendment, United States Constitution.

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. Seventh Amendment, United States Constitution.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Fourth Amendment, United States Constitution.

STATEMENT OF THE CASE

1. The NGA § 717f(h) does not give a FERC certificate holder the right to immediate possession of land, and instead requires a certificate holder to commence eminent domain proceedings before taking possession. *Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa County*, 550 F.3d 770, 774-75 (9th Cir. 2008).

2. An objecting land holder has a viable state law claim that come prior to the issuance of an order for condemnation, because condemnation contemplates going-forward damages only. See *Humphries v. Williams Natural Gas Co.*, 48 F.Supp.2d 1276, 1279-82 (D. Kan. 1999). "[T]he great preponderance of cases have, at the very least, recognized that the condemnation award does not necessarily include damages for prior trespasses, and that the award or the pendency of condemnation proceedings, as the case may be, does not bar an action for the prior trespass, unless trespass damages were in fact litigated." *Id.* quoting George H. Genzel, Award of, or Pending Proceedings for, Compensation for Property Condemned, as Precluding Action for Damages Arising From Prior Trespasses Upon it, 33 A.L.R. 3d 1132

(1971) (footnotes and quotations omitted); *5655 Acres of Land and Coal in Indiana County, Pennsylvania v. Texas Eastern Transmission Corp.*, 190 F. Supp. 175 (W.D. Penn. 1960).

3. The District Court for the Northern District of Ohio has previously held that common law claims predating Columbia's compliance with the NGA bring separate forms of relief from eminent domain proceedings. *Columbia Gas Transmission LLC v. Crawford*, 267 F.R.D. 227, 2010 U.S. Dist. LEXIS 42001 (N.D. Ohio 2010) The Southern District of Ohio recently held the same when it rejected a motion to dismiss trespassing claims, also filed by Columbia. *Wilson v. Columbia Gas Transmission*, LLC, No. 2:12-cv-01203-JLG-MRA (EXF No. 256), at 3-4 (S.D. Ohio Sept. 9, 2013). The Southern District noted that "pre-certification and pre-negotiation" trespass allegations were "factually important", and precluded dismissal under a regulatory scheme in which gas companies must "scrupulously abide" by 717f(h) and do not have a right to immediate possession. *Id.* citing *Humphries*, 48 F.Supp.2d at 1279; *Transwestern Pipeline Co.*, 550 F.2 at 774-75.

4. The Sixth Circuit Court of Appeals previously held that pre-condemnation state law claims bring with them different forms of relief; affirming actual and punitive damages for trespass against Columbia for pre-condemnation entry into land. See *Bowman v. Columbia Gas Transmission Corp.*, 1988 U.S. App. LEXIS 9229, 850 F.2d 692 (6th Cir. Ohio 1988) There, Columbia engaged in "willful and outrageous" twenty-year concealment of gas storage under the subject

property, without having even attempted eminent domain proceedings. *Id.* There, "Columbia intentionally concealed the fact that they were using the property for twenty years without any compensation, just or otherwise. Presumably, this willful unauthorized expropriation would have been continued indefinitely had the Bowmans not signed a lease to retrieve gas from their own property, thereby forcing Columbia's hand. Columbia's actions went beyond mere negligence; their willful and outrageous character amply supported an award of punitive damages." *Id.* at *6.

5. In *Beck,* the Seventh Circuit Court of Appeals also affirmed an award of damages for trespass for natural gas storage. *Beck v. N. Natural Gas Co.*, 170 F.3d 1018 (10th Cir.1999) The Seventh Circuit held that natural gas migration and longtime storage amounted to a trespass, and the trespass warranted attorney's fees per Kansas statute. *Id.* citing KS Stat § 55-1210 (allowing recovery for "use of…subsurface"…"as is provided by law" and "including reasonable attorney's fees, if litigation is necessary to enforce any rights"). The Seventh Circuit's examination in *Beck* affirmed a jury finding of liability for direct, common law trespass identical to that found in Ohio. *Id.* at 1024.

6. The Seventh Amendment to the United States Constitution allows the jury to decide whether the landowners had a protectable property interest, and determine its value: "[A] tort action for money damages is entitled to jury trial under the Seventh Amendment." *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 729

(1999) citing *Curtis v. Loether*, 415 U.S. 189, 195, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974).

7. Federal courts reviewing easement breaches allows landowners to pursue both trespass and unjust enrichment claims in the alternative. *Barfield v. Sho-Me Power Elec. Coop.*, 10 F. Supp. 3d 997 (W.D.Mo.2014) citing *Red Ash Coal Co. v. Ball*, 185 Va. 534, 39 S.E.2d 231 (1946). At the very least, unjust enrichment is a consideration where an easement holder acted beyond the permissions granted by the easement. *Drawhorn v. Qwest Commc'ns Int'l, Inc.*, 121 F.Supp.2d 554, 563 (E.D. Tex. 2000); *In re AT&T Fiber Optic Cable Installation Litig.*, 2001 U.S. Dist. LEXIS 24290, 2001 WL 1397295, at *12 (S.D. Ind. 2001); *Melton v. Carolina Power & Light Co.*, 2012 U.S. Dist. LEXIS 87207, 2012 WL 2401635, at *3 (D.S.C. 2012).

8. Mineral rights cases reflect an overwhelming prohibition against direct use of another's land for profit, such that the encroacher who takes minerals from the land is deemed a "trespasser" and owes the beneficial value of the trespass. *Delta Drilling Co. v. Arnett*, 186 F.2d 481 (6th Cir. 1950) (encroacher who took minerals from another's land is a trespasser under state law, and owed the value of benefit of reserved minerals removed); *Mason v. United States*, 260 U.S. 545, 43 S. Ct. 200, 67 L.Ed. 396 (1923) (encroacher who takes minerals from another land is a trespasser under state law and owes the value gained, even if it was gained by mistake).

9. In *Beck*, the Seventh Circuit held that "there was substantial evidence to support the jury's verdict on unjust enrichment" where the jury found purposeful storage of gas benefitted the gas company. *Beck*, 170 F.3d at 1024. "The benefit that Northern received from the landowners was the use of the Simpson formation without payment of rent, for which the proper measure of damages was, as the district court found, fair rental value." *Id.* While allowing both a trespass and unjust enrichment claim to stand, however, the Beck court disallowed dual recovery for the jury's finding of rental value of the space. *Id.*

10. In *Bayes*, Ohio's Sixth District Court of Appeals ruled that the scope of an easement determines whether a party can be liable for state law claims, including unjust enrichment. *Bayes v. Toledo Edison Co.*, Lucas App. Nos. L-03-1177, L-03-1194, 2004 Ohio 5752, ¶ 2. In *Bayes*, Toledo Edison large utility trucks drove over Bayes' property, causing damage to the ground. *Id.* Toledo Edison's crews also cut down large trees unnecessarily. *Id.* The Sixth District found that although Toledo Edison had an easement, the Trial Court erred in not determining the scope of that easement before dismissing Bayes' claim of unjust enrichment. *Id.* Effectively, a landowner has a claim against encroachers in unjust enrichment, especially where they exceed the scope of their rights to enter. *Id.*

11. "If a property owner proves the elements of trespass, he has a right to nominal damages without proof of actual damages." *CitiMortgage, Inc. v. Robson,* 5th Dist. No. 2011-CA-0017, 2011 Ohio 4617, ¶ 12 citing *Merino v. The Salem Hunting Club*, Columbiana

App. No. 07CO16, 2008 Ohio 6366, ¶ 41; see also *Pearl v. Pic Walsh Freight Co.,* 112 Ohio App. 11, 12, 168 N.E.2d 571, 572 (1960). Nominal damages support an award of punitive damages. *Quillet v. Johnson,* 34 Ohio Op. 308, 71 N.E.2d 488, 489-90 (1947); *Richard v. Hunter*, 151 Ohio St. 185, 187-89, 85 N.E.2d 109, 110 (1949); 88 Ohio Jur.3d Trespass § 19.

12. The Ohio Supreme Court added a caveat to the doctrine of trespass in Ohio, holding that "substantial damage" was necessary for a claim of trespass, where the claim was damage to the res, where trespass occurred indirectly, and the damage to the res interfered with the "reasonable and foreseeable" use of the property. *Chance v. B.P. Chemicals, Inc.*, 77 Ohio St. 3d 17, 670 N.E.2d 985 (Ohio 1996)

13. Staking off odd territory by its opinion, the Sixth Circuit grants companies like Columbia Gas a superior right to use property without notice or recourse to the owner, in contravention to Due Process Clause of the Fifth Amendment, the Fourth Amendment, and Seventh Amendment to the United States Constitution. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 126 L.Ed.2d 490 (1993), syllabus at 1(a), citing, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S. Ct. 2080 40 L. Ed. 2d 452 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

A. Regulatory Background

1. Congress enacted the Natural Gas Act with the "overriding…purpose" to fill the regulatory gap left by judicial decisions prohibiting the state regulation of

interstate commerce. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682, 74 S. Ct. 794, 98 L. Ed. 1035 (1954).

2. A significant part of the regulatory gap was created by cases holding that "the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States." *Interstate Natural Gas Co. v. Federal Power Comm'n*, 331 U.S. 682, 689.

3. The Natural Gas Act does not pre-empt areas of traditional state regulation. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988). This includes States have "common-law and statutory remedies" long provided, including protections against monopolies and unfair business practices." *California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989).

4. The Natural Gas Act "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Oneok, Inc. v. Learjet, Inc.*, ___U.S.___, 135 S. Ct. 1591, 1592, 191 L.Ed.2d 511 (2015) citing *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 517-518, 68 S. Ct. 190, 92 L. Ed. 128 (1947).

B. Procedural History

1. Twenty-nine residents of Medina, Ohio (hereinafter "Petitioners" or "Medina Landowners") brought suit against Columbia Gas Transmission, LLC (hereinafter "Respondents" or "Columbia") after being informed that Columbia used the subsurface of their properties to store and transfer natural gas, without

permission, and without an easement for approximately sixty years.

2. Columbia Gas obtained a certificate of public convenience and necessity in 1958 to operate a natural gas storage field in northern Ohio (the "Medina Storage Field").

3. Columbia Gas concedes that the existence, and its use the storage field, was kept secret from the Medina Landowners until 2013.

4. Third party gas producers paid Columbia Gas to store their natural gas in a large rock formation underground, part of which rested under the Medina Landowners' homes, since the 1950's. Columbia stores and transmits the gas when it is ready to use, charging fees for those services.

5. In 2013, Columbia Gas offered $250 per acre to each Medina Landowner, roughly, for permission to use the subsurface of their property and waive their right to any prior causes of action. Each Medina Landowner declined this offer, whereby each brought an inverse condemnation claim along with claims of trespass and unjust enrichment.

6. The District Court denied Columbia's motion to dismiss the Medina Landowners' state law claims, holding that the Natural Gas Act did not preempt those claims.

7. In *Columbia Gas Transmission v. Booth* (hereinafter "*Booth*"), the eminent domain action related to this case, the parties proceeded to a trial by commission to determine just compensation for the

taking of an underground storage easement beneath the Medina Landowners' properties. The Landowners claimed diminution of value to their properties as damages due to the stigma related to gas storage. Columbia Gas presented prior easement values to argue for a takings award. The commission declined to award the Medina Landowners for diminution of value, and awarded nominal damages to the Landowners on the basis of Columbia's evidence of valuation of the easement alone.

8. Both parties filed cross-motions for summary judgment on the remaining claims of trespass and unjust enrichment. The Landowners, unlike in prior motions and proccedings, included expert valuation of the past storage activities in the subject storage field in requesting a trial, noting that the evidence had yet to be presented. The data included volumetric calculations representing millions of dollars of storage and transmission value to Columbia Gas, all by use of the Landowners' properties without their permission, from the 1950's to the present. The Landowners intended to present that new and unique evidence at the scheduled jury trial and in support of their state law claims.

9. The District Court granted summary judgment to Columbia Gas on the Landowners' trespass claim, but granted summary judgment to the Landowners on their unjust enrichment claim. The District Court awarded as unjust enrichment damages only "prejudgment interest" on the Landowners' award in condemnation under *Booth*. The District Court held that an interpretation of *Chance* precluded the Medina

Landowners from having a protectable property interest in the subsurface of land, the use of which was not "reasonable or foreseeable." The District Court thus precluded a trespass claim.

10. The Sixth Circuit affirmed the District Court's judgment on trespass and interpretation of the NGA and *Chance*. Without Columbia having cross-appealed, the Sixth Circuit modified the District Court's finding on unjust enrichment to deny the Landowners relief, stripping even their modest award, and finding that without a "property interest" in the condemned land, they could not be granted an award for an unjust enrichment claim. The Sixth Circuit panel also concluded that the Medina Landowners' claims failed because they had no property interest, as their use of the underground storage formation was not "reasonable and foreseeable."

REASONS FOR GRANTING THE PETITION

The decision below allows gas companies to cheat titled landowners out of revenue, and incentivizes the same companies to hide their noncompliance with NGA and state law.

Under the NGA, a gas company is now authorized to avoid eminent domain proceedings, and avoid state common law damages. Since every single gas storage field recognized by the NGA is deep underground, few landowners know of them. Since titled landowners don't know of the gas formations, they cannot have a "reasonable or foreseeable" interest to protect it, profit from it, or even demand that an easement be secured before it is used.

This prevents landowners from being compensated for the use of their property, either in the future by way of an easement, or for past, unauthorized use by way of common law trespass and unjust enrichment actions.

The decision of the Sixth Circuit panel ignores the plain language of the NGA, which should be read to mandate a certificate holder to obtain permission to enter land. Through the NGA, gas companies should be encouraged to pay heed to the property rights connected with certificated land, because that land was inevitably titled to another party with superior rights to the land.

The Sixth Circuit renders meaningless state protections by blindly ignoring (1) that Columbia Gas acknowledged a "property interest" in the certificated property when it profited from the property for nearly sixty years, then sued for an easement; and (2) that only by virtue of their secret knowledge of the certificated property did Columbia allegedly gain a "property interest" greater than a title holder. The opinion grants all those who know about the gas storage formation a greater interest than those who actually bought the property.

The Sixth Circuit further deprives the landowner of any right to contest the acquisition of their land through the NGA, leaving them without notice that they have had the subsurface of the land secreted away from them, and then used for profit in which the titled owner could have shared had they known of the existence of the value of the subsurface.

Had the Medina Landowners known that there was money to be made in renting the very same storage formation, for example, and had they not been constrained by the NGA, they would have been entitled to rent their property for a profit – a "reasonable and foreseeable" use of the subsurface – to make money. The Sixth Circuit rubric does not acknowledge this, and in fact dangerously ignores it, to the exclusion of thousands of titled landowners in the United States.

Instead, the Sixth Circuit panel found that the NGA, by fiat, grants property rights to gas companies without the need for permission from the title holder unless that title holder is engaged in a conflicting activity.

This has never been the state of the law in the United States, and the contorted application of Ohio law now stands to affect every state in the union.

I. The Decision Below Encourages Willful Blindness by a Massive and Powerful Energy Industry, Allowing Certificate Holders to Ignore The Rights of Titled Landowners.

By the Sixth Circuit's decision, the NGA has been transformed from an industry regulator to a property overlord, eviscerating the rights of state title owners. Gas companies may now press a strategy of willful blindness, whereby they do not exercise any obligation under the NGA to gain permission before entering, using, and profiting from underground storage formations.

A. The Sixth Circuit Defined Permission to Enter Land as Non-Essential to for Certificate Holders under the NGA.

1. A panel for the Sixth Circuit Court of Appeals ruled in *Baatz* that permission to enter land was optional, finding that the "NGA does not require the certificate holder to acquire the property it uses for its natural gas storage; the statute merely authorizes acquisition." *Baatz,* p. 3.

This astonishing statement of law means that the NGA grants a basket of rights separate and apart from any property regimen in the United States, one not recognized by any court. Put another way – the property a gas company "uses for its natural gas storage" need not be "acquire[d]" – meaning no further property rights need be obtained under the NGA, and operators can start using gas storage fields as soon as the certificate is granted.

This is wrong.

The plain language of the statute presents three options: (1) to obtain by contract; (2) to obtain by easement; or (3) acquire by eminent domain the right to enter land:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-

> way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. NGA, 15 U.S. Code § 717f(h).

Circuit courts have consistently held that the NGA § 717f(h) does not give a certificate holder the right to immediate possession. *Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa County*, 550 F.3d 770, 774-75 (9th Cir. 2008). "[A] plaintiff gas company must secure an order of condemnation before taking possession." *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469, 472 (7th Cir. 1998), citing *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 825 (4th Cir. 2004).

Eminent domain proceedings provide only part of the award to which a landowner is entitled. "[T]he great preponderance of cases have, at the very least, recognized that the condemnation award does not necessarily include damages for prior trespasses, and that the award or the pendency of condemnation proceedings, as the case may be, does not bar an action for the prior trespass, unless trespass damages were in fact litigated." *Humphries v. Williams Natural Gas Co.*, 48 F.Supp.2d 1276, 1279-82 (D. Kan. 1999) quoting George H. Genzel, Award of, or Pending Proceedings for, Compensation for Property Condemned, as Precluding Action for Damages Arising From Prior

Trespasses Upon it, 33 A.L.R. 3d 1132 (1971) (footnotes and quotations omitted); *5655 Acres of Land and Coal in Indiana County, Pennsylvania v. Texas Eastern Transmission Corp.*, 190 F. Supp. 175 (W.D. Penn. 1960).

The Sixth Circuit's premise is thus flawed, that the NGA does not mandate that a FERC holder obtain permission. It presents NGA compliance as a mere option.

B. The Sixth Circuit Contorted State Law to Reach Its Conclusion.

The Sixth Circuit supports its permissive interpretation of the NGA by interpreting state law to exclude economic use of land as a "reasonable or foreseeable" use by title owners.

In so finding, it notes that only Columbia Gas could have an interest in the subsurface, because such use is "reasonably foreseeable" to the gas company, but not the title owners. It likens this case to *Chance v. B.P. Chemicals, Inc.*, 77 Ohio St. 3d 17, 670 N.E.2d 985 (Ohio 1996), where the Ohio Supreme Court found limits to landowners rights to a subsurface. In that case, waste injectate flowed under title owners' property. The owners sued for damage to the res only. It had nothing to do with the collection of rents for economic use.

The Sixth Circuit adopted this finding to not only preclude a trespass claim, but an unjust enrichment claim. In both instances, despite Columbia Gas admittedly profiting from the land beneath the Medina

Landowners' homes for decades, there could be no tort liability against the gas company under state law.

The Sixth Circuit's logic is untenable, as it was not logical for the Medina Landowners to forgo hundreds of thousands of dollars in rental revenues. Had the landowners known that the storage formation existed, they could have demanded rents for its use.

The NGA and Columbia Gas prevented the Median Landowners from having the very knowledge - about their own land - that made its use reasonable and foreseeable.

C. The End Result of the Sixth Circuit's Jurisprudence is to Grant Land Without Due Process, Affecting an Unreasonable Seizure, and Eliminating the Recourse of a Jury Trial.

By not mandating that a certificate holder gain permission to enter certificated land from a title holder, the Sixth Circuit grants a property right without Due Process of law.

A property owner must receive notice and an opportunity to be heard before the Government deprives them of property. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 126 L.Ed.2d 490 (1993), syllabus at 1(a), citing, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

Titled land owners, like the Medina Landowners, are thus left without recourse to correct the trespasses of certificate holders, except through an eminent domain proceeding brought at their whim. The Landowners have asked for its rights to be determined by a jury under the Seventh Amendment. See, e.g. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 729 (1999) citing *Curtis v. Loether*, 415 U.S. 189, 195, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974). The Medina Landowners' request has been ignored.

The Sixth Circuit impacts each of these rights by its decision, further stripping the landowners of any recourse against an actor under the NGA.

II. The Question Presented Is Exceptionally Important.

The Sixth Circuit has laid down the gauntlet for landowners in the United States, that their properties will be used without their permission under the NGA because they don't know any better.

The Sixth Circuit thus places knowledge and an NGA certificate over title. Despite the vast body of law disallowing the extralegal appropriation of the subsurface interests of another from time immemorial, the decision in *Baatz* allows gas companies to use subsurface storage formations with impunity.

When gas companies are caught, the Sixth Circuit concludes that gas companies will have to pay "just compensation" in an eminent domain proceeding – but what of tort damages? The NGA surely didn't mean to destroy those. It surely didn't mean to recognize a new right to gas companies and oil companies that was not

denied title holders prior to its enactment. And surely didn't grant FERC certificate holders carte blanch to every mineral interest in the United States that title owners did not yet claim.

The gross incentive under the *Baatz* rubric is for gas companies to conceal. Conceal, conceal, conceal. By failing to disclose the use of their subsurface interests to landowners, including homeowners with no means necessary to see whether valuable gas storage space exists under their home, gas companies will inevitably adopt the strategy of concealment of their wrongs. If those granted FERC certificates keep quiet, then under *Baatz*, there will be no punishment for them in the form of tort damages or attorney's fees for their gross abuse of law.

This massive advantage bore fruit for Columbia Gas in this instance – they played the waiting game with the courts and the unwitting landowners, and cashed in big time. Making millions of dollars under the noses of the landowners, Columbia Gas moved billions of cubic feet of gas since the 1950's. They waited. They collected revenues in the millions of dollars in rental by use of the Median Landowners' properties alone. They waited. And in the end, when they finally revealed their hand, they were forced to pay a fraction of their gains. By keeping landowners in the dark for approximately sixty years, they proposed – at worst - paying for only six years of revenues under Ohio's statutes of limitations, and ultimately nothing under the Sixth Circuit's interpretation in *Chance*.

The right to benefit from a property should not go to the NGA certificate holder at the expense of the title

owner. It goes to the title owner first. The NGA recognizes the value of the land it governs, so why wouldn't the Sixth Circuit, and why wouldn't all state laws? The Sixth Circuit does not provide a satisfactory answer.

The Sixth Circuit got it backwards, and granted Columbia Gas and its brethren the undue right to profit from land to which they don't have title, contract, or easement.

This Court should review to correct this absurd and dangerous result.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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