No. 19-54

In The
Supreme Court of the United States

KAROLYN GIVENS, *et al.*,
Petitioners,
v.
MOUNTAIN VALLEY PIPELINE, LLC,
Respondent.

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

BRIEF OF AMICI CURIAE OWNERS' COUNSEL OF AMERICA, PENNEAST NEW JERSEY PROPERTY OWNERS, INSTITUTE FOR JUSTICE, AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Through the Natural Gas Act ("NGA"), 15 U.S.C. §717 *et seq*., Congress delegates the federal power of eminent domain to private pipeline companies to build interstate pipelines. Because the Act contains no quick-take provision, courts agree that the Act itself gives a pipeline company only the "straight" power of condemnation. This means the condemnor may take ownership and possession of the land after the trial on just compensation by paying the amount of the final judgment.

The Fourth Circuit and other courts of appeals nevertheless hold that district courts may issue preliminary injunctions granting immediate possession based on the prediction that the pipeline company will ultimately take the land under the NGA. In contrast, the Seventh Circuit holds that preliminary injunctions must be based on the parties' substantive rights at the time the injunction issues. And because neither state law nor federal statute gives a pipeline company any substantive right to pretrial possession, an injunction granting immediate possession exceeds federal judicial power.

The question presented is: whether district courts have power, before the trial on just compensation, to issue a preliminary injunction granting immediate possession of property to a pipeline company in a condemnation proceeding under the Natural Gas Act.

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INTEREST OF AMICI CURIAE[1]

Owners' Counsel of America. Owners' Counsel of America (OCA) is an invitation-only national network of experienced eminent domain and property rights attorneys. They joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a 501(c)(6) organization sustained solely by its members. Only one lawyer is admitted from each state. OCA members and their firms have been counsel for a party or amicus in many of the property cases this Court has considered in the past forty years and participated as amicus in the court below. OCA members have also authored and edited treatises, books, and articles on eminent domain, property law, and property rights, including the authoritative treatise on eminent domain law, *Nichols on Eminent Domain*.

PennEast New Jersey Property Owners. These amici are owners whose properties are being condemned under the Natural Gas Act by the PennEast Pipeline Company, LLC, which is constructing a 36-inch pipeline project to transport natural gas from Pennsylvania's Marcellus Shale field to New Jersey. These owners have been subject to preliminary injunctions that allow PennEast to obtain immediate

1. Pursuant to this Court's Rule 37.2(a), all counsel of record for the parties received timely notice of the intention to file this brief, and all consented in writing. Amici certify that no counsel for any party authored any part of this brief; no person or entity other than amici made a monetary contribution intended to fund its preparation or submission.

possession of their properties, in much the same way as in this case.[2]

Institute for Justice. The Institute for Justice (IJ) is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government, including restoring limits on the power to take property. IJ has represented many property owners in opposing eminent domain for private development in both federal and state courts. *See*, *e.g.*, *Kelo v. City of New London*, 549 U.S. 469 (2005). IJ also regularly files amicus briefs on the proper construction and application of public use under the U.S. Constitution, as well as the construction of similar language under state constitutions.

Cato Institute. The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and

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2. Case No. 3:18-cv-1853, Jacqueline H. Evans (112 Worman Road, Delaware Tp); Case No. 3:18-cv-2508, Foglio & Associates, LLC (155 Lower Creek Rd, Delaware Tp); Case No. 3:18-cv-1722, Joseph and Adele Gugliotta (111 Worman Rd, Stockton Bor); Case No. 3:18-cv-1779, Richard and Elizabeth Kohler (40 Lambertville HQ Rd, Del Tp); Case No. 3:18-cv-2014, Dan and Carla Kelly-Mackey (60 Sanford Rd, Delaware Tp); Case No. 3:18-cv-1811, Virginia James (Block 29 Lot 12, West Amwell Tp); Case No. 3:18-cv-1798, Carl and Valerie Vanderborght (60 Hamp Rd., Lambertville); Case No. 3:18-cv-2028, Frank and Bernice Wahl (815 Milford-Frenchtown Rd, Alexandria Tp); Case No. 3:18-cv-01706, Vincent DiBianca (65 Brookville Hollow Road, Delaware Tp.).

publishes books, studies, and the annual *Cato Supreme Court Review*. Cato also frequently participates as amicus curiae in cases raising important constitutional issues.

Amici are filing this brief because this case presents fundamental questions about the delegated power of eminent domain, separation of powers, and whether the courts can use their equitable powers to grant a substantive right to private condemnors that Congress never delegated.

SUMMARY OF ARGUMENT

Everyone agrees the Natural Gas Act does not delegate to private pipelines the quick-take power to obtain possession before final payment of adjudicated just compensation. Thus, owners whose land is subject to being taken believed that before a private for-profit pipeline could enter and start clearing, grading, and building, it would adhere to the straight-take process: after determination of just compensation by the court, the pipeline could decide whether to exercise its option to pay the adjudicated price, and once it actually paid full compensation, could condemn the land and take possession. But not satisfied with the time this process takes, the pipelines—with the assistance of the courts—took a shortcut, Rule 65 preliminary injunctions.

This is a constitutional problem, not merely one of statute. As this Court recently concluded, "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." *Knick v. Township of Scott*, 139 S. Ct. 2162, 2170 (2019). In a statutory quick-take, the condemnor does not pay full

compensation contemporaneous with the taking, but what saves the process from violating the Fifth Amendment is that it makes an irrevocable promise to pay. Not so with Rule 65 injunction quick-takes.

Yes, these injunctions look like quick-takes. But in substance they are markedly different. And from the pipelines' perspective are even better than statutory quick-takes because they lack the critical protections built into the process, such as the condemnor's irrevocable promise to pay the adjudicated compensation, a transfer of title, the accompanying vesting of a right to compensation in the owner, the owner's right to withdraw the deposit of estimated compensation now, and the right to interest for any difference between the deposit and the final adjudicated compensation. Perhaps most problematical, these injunctions deprive the owner of the right to possess and the right to exclude others without compensation. *Knick*, 139 S. Ct. at 2170. They upturn the balance in the constitutional eminent domain process by allowing pipelines to have both their cake (prejudgment possession of the property), and the ability to eat it (the choice to not buy it if they don't like the adjudicated price).

But according to the Fourth Circuit and four other circuits, those critical differences are of no constitutional moment. The pipelines are likely to eventually condemn the property, so why not give it now? The unstated premise at the heart of the Fourth Circuit's reasoning is that, once initiated, an NGA condemnation is all but inevitable.[3] The reasoning goes that

3. Besides the Fourth Circuit, the Third, Sixth, and Eleventh Circuits have recently considered the same issue. *See Transcontinental Gas Pipe Line Co., LLC v. Permanent Easements for 2.14 Acres*, 907 F.3d 725 (3d Cir. 2018); *Nexus Gas Transmission, LLC*

because it appears the pipeline company will eventually condemn the property after it agrees to pay the adjudicated compensation, what's the harm in transferring possession now? The Fourth Circuit and the other courts following this reasoning conclude that once the pipeline company obtains summary judgment on the three predicates a private condemnor must satisfy to institute an eminent domain action under section 717f(h), the summary judgment order has resolved the substantive issues, and it's all over but the shouting.

There are several fundamental problems with this approach: most critically, a misunderstanding about what the "substantive" rights are in an eminent domain action. The substantive right at stake in all federal takings, these included, is ownership of the property. And in straight takings, ownership and title are transferred to the plaintiff only after final adjudication of the price, and the condemnor exercising its option to buy at that price. Only then—and after the owner either is provided with compensation or has an irrevocably vested right to recover it—may the condemnor obtain possession. The Fourth Circuit, however, concluded the district court's summary judgment order granted MVP a substantive right to Petitioners' properties. But the summary judgment order did no such thing. It merely determined MVP could be a straight taking plaintiff-condemnor and has *standing* to prosecute a federal condemnation lawsuit.

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v. City of Green, 757 F. App'x 489 (6th Cir. 2018); *Transcontinental Gas Pipe Line Co. v. 6.04 Acres*, 910 F.3d 1130 (11th Cir. 2018). They join two other circuits which ruled similarly. *Alliance Pipeline L.P. v. 4.360 Acres*, 746 F.3d 362, 368 (8th Cir. 2014); *Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770, 776-777 (9th Cir. 2008).

ARGUMENT

The process by which private pipeline companies are seizing property nationwide under the power of eminent domain while at the same time avoiding judicial review of public use challenges in FERC was recently described as "a Kafkaesque regime," and "a bureaucratic purgatory that only Dante could love." *Allegheny Defense Project v. Fed. Energy Reg. Comm'n*, ___ F.3d ___, 2019 U.S. App. Lexis 23147 (D.C. Cir. Aug. 2, 2019) (Millett, J., concurring). With judicial acquiescence, pipeline companies are hijacking the constitutional eminent domain process, shortcutting the critical protections by which the Constitution keeps "government's most awesome grant of power" in check.[4] These injunctions cannot be viewed in isolation, but as part of an overall scheme in which pre-condemnation possession in district courts and the start of construction goes hand in glove with routine administrative delays, resulting in land being literally bulldozed before it is condemned, the owners' legal objections rendered pointless, and the pipeline a *fait accompli*. *See id*. at *19 (Millett, J., concurring). Only this Court can resolve the "quagmire . . . that walls homeowners off from timely judicial review of [FERC]'s public-use determination, while allowing

4. *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 155 (Cal. Ct. App. 1985). *See also Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952) ("The power of eminent domain, next to that of conscription of man power for war, is the most awesome grant of power under the law of the land."); *Harrison Redev. Agency v. DeRose*, 942 A.2d 59, 85 (N.J. Super. 2008) ("The power to condemn property 'involves the exercise of one of the most awesome powers of government.'") (quoting *City of Atlantic City v. Cynwyd Invs*., 689 A.2d 712, 712 (N.J. 1997)).

eminent domain and functionally irreversible construction to go forward [that] is in substantial tension with statutory text and runs roughshod over basic principles of fairness." *Id.*

This case and others nationwide only add to the burdens which property owners already suffer.

I. Title Transfer Is the "Substantive" Right in Federal Condemnations

In *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984), this Court described the "straight taking"—or "standard" condemnation—power, noting its key feature: ownership of the property being condemned is the substantive right to which possession is tied:

> The practical effect of final judgment on the issue of just compensation is to give the Government an option to buy the property at the adjudicated price. If the Government wishes to exercise that option, it tenders payment to the private owner, *whereupon title and right to possession vest in the United States.* If the Government decides not to exercise its option, it can move for dismissal of the condemnation action.

Id. at 2 (emphasis added) (citing *Danforth v. United States*, 308 U.S. 271, 284 (1939)).

Similarly, in the two other forms of affirmative federal takings, the right to possession similarly vests only upon title transfer. In a quick-take, "[o]n filing the declaration of taking and depositing in the court, 'title . . . vests in the Government; the land is condemned and taken . . . ; and the right to just compensation for the land vests in the persons entitled to the compensation.'" 40 U.S.C. § 3114(b)(1)–(3); *see also* 40

U.S.C. § 3118 ("the right to take *possession and title* in advance of final judgment" in quick-take eminent domain actions) (emphasis added).

Finally, in a pure statutory taking, a statute itself vests "all right, title, and interest" in the government. *Kirby*, 467 U.S. at 5, n.5; *see also United States v. Dow*, 357 U.S. 17, 21-22 (1958) ("in both classes of 'taking' cases—condemnation and physical seizure—title to the property passes to the Government only when the owner receives compensation, or when the compensation is deposited into court pursuant to the [Declaration of] Taking Act").

II. Summary Judgment Did Not Transfer Title, but Instead Only Recognized MVP's Standing as the Plaintiff

Here, by contrast, the Fourth Circuit concluded that the district court's summary judgment order on the three predicates that a private condemnor must satisfy in order to institute an eminent domain action in federal court under 15 U.S.C. § 717f(h) granted MVP a substantive right, even though the court acknowledged that title would not transfer until the end of the case.[5]

The Fourth Circuit's focus on the summary judgment orders as the substantive actions fundamentally misconstrued the nature and effect of the ruling. Because Congress delegated to MVP only the straight takings power, the district court's order could only determine—at most—that MVP may exercise the

5. Pet. App. 34-35 ("When immediate possession is granted through a preliminary injunction, title itself does not pass until compensation is ascertained and paid, so the landowners could proceed with a trespass action if the company did not promptly make up the difference.").

straight taking power. Thus, the order only determined that MVP may exercise the delegated federal eminent domain power and could prosecute a condemnation lawsuit, and that the takings are for public purposes. Could the order determine the substantive issue in these cases: how much is owed as just compensation? No. Or at least *not yet*. And that is key, because until the properties are actually taken after final adjudication of compensation owed, there is no right of possession.

That is best illustrated by what the district court's order did *not* do. It did not vest title to or an interest in the properties in MVP. It did not establish the amount of just compensation owed the owners. It did not obligate MVP to pay whatever compensation may eventually be adjudicated. It did not obligate MVP to complete the condemnations if it is not willing to pay that amount, leaving MVP free to refuse to exercise its "option" to buy. The order did not vest in the property owners an irrevocable right to compensation.

Preliminary injunctions as a substitute for quick-take also upset the usual rules which govern an eminent domain action. For example, what is the date of valuation? In a straight taking, the date of "taking" is the date of valuation. *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984). Neither federal common law nor the NGA identify a date of taking. Under these circumstances, federal courts look to state law to determine the date of taking. *See*, *e.g.*, *United States v. Peterson Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1356-57 (N.D. Ill. 1992). Under Virginia's eminent domain code, the date of valuation is the date when the petition of condemnation is filed or the date of the lawful taking, whichever occurs first. *See* Va. Code Ann. § 25.1-100 ("'Date of valuation' means the

time of the lawful taking by the petitioner, or the date of the filing of the petition pursuant to § 25.1-205, whichever occurs first."). The date of the lawful taking in an NGA case is after adjudication and payment of compensation.[6] So what is the valuation date when a district court issues an injunction, when the court issues the injunction order, the date on which the pipeline actually enters, the date of the complaint? *Cf.* 40 U.S.C. § 3114(b)(1)–(3) (in Declaration of Taking quick-take, "[o]n filing the declaration of taking and depositing in the court, 'title . . . vests in the Government; the land is condemned and taken . . . ; and the right to just compensation for the land vests in the persons entitled to the compensation.'").

A ruling recognizing the power to institute and maintain an eminent domain action is not the same as a ruling on the ultimate issue: whether MVP may acquire *title* to the properties and the price for the taking. There is a fundamental difference between the "right to exercise eminent domain" and having actually obtained ownership of the properties being condemned by having paid compensation.

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6. The D.C. Circuit concluded recently in *Appalachian Voices v. Fed. Energy Reg. Comm'n*, 2019 U.S. App. Lexis 4803 (D.C. Cir. Feb. 19, 2019), that in the NGA Congress delegated only the "usual" power of eminent domain: "The eminent domain power conferred to Mountain Valley . . . requires the company to go through the 'usual' condemnation process, which calls for 'an order of condemnation and a trial determining just compensation" prior to the taking of private property.'" *Id.* at *18 (citing *Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa County*, 550 F.3d 770, 774 (9th Cir. 2008)).

III. A Court Cannot Use Preliminary Injunctions to Shortcut the Usual, Straight Takings Process and Transfer the Owners' Substantive Rights to MVP

Lacking the transfer of a substantive right to MVP (the owners' titles) and the corresponding vesting of a substantive right in the owners (the condemnor's irrevocable obligation to pay whatever is determined to be just compensation)—which in every other federal condemnation is the predicate to possession—the Rule 65 preliminary injunction process falls woefully short. Although the district courts attempted to structure the injunctions so that they look somewhat like a quick-take, they lack the key protections of a constitutional prejudgment possession: a quick-take condemnor obtains title and possession and in return foregoes the ability to decline to pay whatever compensation the court may eventually determine. *See* 40 U.S.C. § 3115 (a quick-take under § 3114 results in the government's "irrevocable commitment" to pay whatever compensation is eventually determined).

These injunctions have real-world consequences for property owners who, despite the fiction that eminent domain actions are *in rem*, are being subject to *personal* deprivations of their fundamental rights. As this Court held,

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a

> fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (citing John Locke, *Of Civil Government* 82-85 (1924)).

For example, some Pennsylvania property owners who were subject to possession-by-injunction for a pipeline have been threatened with mechanics' liens after a pipeline subcontractor did not get paid. *See*, *e.g.*, *Property owners along pipeline notified of possible liens*, https://www.wgal.com/article/property-owners-along-pipeline-notified-of-possible-liens/26951370 (Mar. 26, 2019). Others have seen a pipeline recording an interest in their land with the local recorder of deeds, even though title to the easement has not yet granted. And early takings will continue to cause landowners significant damages that are likely not compensable as part of the condemnation process. For example, allowing the pipeline company to take possession now rather than after trial has caused lost farm and business income that is likely unrecoverable as part of a just compensation award. *Cf. United States v. Gen. Motors Corp.*, 323 U.S. 373, 379–80 (1945).

By contrast, MVP has obtained prejudgment possession without any corresponding obligation to pay the yet-to-be determined amount. MVP retains the straight-take option of walking away if the compensation eventually determined is too dear. Or if it does not pay any difference between the injunction bond and the adjudicated compensation, the owner could

sue in state court for trespass. Pet. App. 34-35 ("the landowners could proceed with a trespass action if the company did not promptly make up the difference"). This puts MVP in a better position than any federal condemnor. After title transfers, any other federal condemnor who obtains possession cannot decide to *not* obtain title while, here, MVP as a preliminary injunction condemnor can. That this scenario may be unlikely is beside the point. What matters is that MVP is under no legal obligation to exercise its "option."

IV. The Rules of Civil Procedure Cannot Abridge the Landowners Substantive Rights or Enlarge MVP's Power, Which Congress Limited to Straight Takings

A judicial order of possession before title transfer intrudes on Congress's sole power to establish whether—and, most important, how—to take property. Neither the district courts' equitable powers, nor the Rules Enabling Act, nor the rules of civil procedure can recognize in MVP more rights (or powers) than Congress has delegated. *See* 28 U.S.C. § 2072(b) (the rules of civil procedure "shall not abridge, enlarge or modify any substantive right.").

But the panel concluded that although Congress did not delegate the quick-take power in NGA takings, neither did it take away district courts' equitable powers, nor did it expressly *prohibit* the use of preliminary injunctions to give private condemnors prejudgment possession.[7] This is wrong for four reasons, each rooted in the standards for Rule 65 injunctions:

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7. This highlights the pipeline's remedy if it believes the NGA is unworkable in that it does not allow immediate possession: go

1. The key element to any injunction is likelihood of success on "the merits." In reviewing a preliminary injunction, the court looks at the underlying claim. Here, the taking by MVP of the properties upon either the actual payment of just compensation or vesting of the right to obtain whatever amount is finally determined to be just compensation. If it appears as if MVP is likely to prevail at trial on the merits of this underlying claim, the court then evaluates the other preliminary injunction factors. And the issue being evaluated for determining whether the plaintiff is likely to prevail on the merits must be identical to the issue it is asking the court to enjoin (or in this case to affirmatively order).

That is not the case here. MVP sought immediate possession under the three factors in 15 U.S.C. § 717f(h). But the underlying merits question in these condemnation cases is what will be the just compensation owed to the owners, an issue not a part of the § 717f(h) calculus, on which MVP submitted no evidence allowing the district court to reach a conclusion about the amount of final compensation, and which admittedly has yet to be determined.

The panel, however, wrongly concluded the district court's grant of summary judgment was a "merits" determination. Pet. App. 37 ("Success on the merits was not only likely but *guaranteed*, we held, given the district court's determination—uncontested on appeal—that that the gas company had the right to condemn the landowners' property.") (emphasis added). But there is no real "guarantee." As outlined earlier, in straight-takings cases like these, the merits question

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to Congress and change the law. A pipeline might also consider condemning a temporary construction easement.

is whether the condemnor has title, which can only happen here once MVP exercises its option to buy. That, in turn, can only come after the court finally determines the amount of compensation. And that has not yet happened. The Fourth Circuit also agreed with the Ninth Circuit, mischaracterizing the district court's summary judgment order as an "order of condemnation." *Id*. at 199. An "order of condemnation" is the document by which the court transfers title or other property rights to the condemnor after payment of the final adjudicated compensation.[8] Thus, the "right to condemn" is not the same as *actual* condemnation, which hinges on future events: adjudication of

8. *See*, *e.g*., Ariz. Rev. Stat. § 12-1126(A) ("When the final judgment has been satisfied and all unpaid property taxes which were levied as of the date of the order for immediate possession, including penalties and interest, on the property that is the subject of the condemnation action have been paid, the court shall make a final order of condemnation, describing the property condemned and the purposes of the condemnation."); Cal. Code of Civ. P. § 1268.030(a) ("Upon application of any party, the court shall make a final order of condemnation if the full amount of the judgment has been paid as required by Section 1268.010 or satisfied pursuant to Section 1268.020."); Haw. Rev. Stat. § 101-26 ("When all payments required by the final judgment have been made, the court shall make a final order of condemnation, which shall describe the property condemned and the purposes of the condemnation, a certified copy of which shall be filed and recorded in the office of the registrar of conveyances, and thereupon the property described shall vest in the plaintiff."); Mont. Code § 70-30-309(1) ("When payments have been made and the bond, if appropriate, has been given as required by 70-30-307 and 70-30-308, the court shall make a final order of condemnation. The order must describe the property condemned, the purposes of the condemnation, and any appropriate payment for damages to the property actually taken as well as to any remaining parcel of property that may be adversely affected by the taking.").

final compensation and MVPs exercise of its option. In short, a summary judgment ruling under section 717f(h) did not recognize a substantive right.

2. The injunction did not preserve the status quo; it instead radically altered it by affirmatively depriving the property owners of their substantive rights—most importantly the right to exclude—which this Court has repeatedly emphasized is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994).[9] In every other federal taking, owners retain the right to exclude until such time as their right to just compensation irrevocably vests (which has not occurred here). Thus, as detailed earlier, not only did the summary judgment orders *not* grant MVP a substantive right; the injunction actually deprived the owners of one of their most essential substantive rights: the right to exclusive possession of their land and the vested right to compensation when that right is taken. Indeed, some owners are being charged criminally for "trespassing" on their own land. *See* Philip Bump, *Texas grandmother arrested for trespassing on her own land to protest Keystone*, Grist (Oct. 5, 2012) (https://grist.org/climate-energy/texas-grandmother-arrested-for-trespassing-on-her-own-land-to-protest-keystone/ (last visited

9. In *Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa Cnty.*, 550 F.3d 770 (9th Cir. 2008), the court recognized, "preliminary injunctions . . . are primarily issued to preserve the status quo of the parties and as a means for the court to retain jurisdiction over the action"). *Id.* at 776. In denying the injunction, the court noted, "[h]ere, Transwestern [the private NGA pipeline condemnor] seeks not to preserve the status quo, but instead seeks a mandatory injunction, which is 'particularly disfavored' in law." *Id.*

Aug. 4, 2019); *Superior man arrested for trespassing on his own land*, Duluth News Tribune (Dec. 4, 2009) (https://www.duluthnewstribune.com/news/2291397-superior-man-arrested-trespassing-his-own-land) (last visited Aug. 4, 2019).

3. It does not matter that the injunction bond sort of looks like a quick-take deposit because it does not serve the same constitutional function. Pet. App. 30-31 ("The district courts also required Mountain Valley to post a surety bond in an amount double each easement's estimated value, conditioned on its payment of just compensation at the conclusion of proceedings."). A bond, however, does not transfer title, nor does it obligate MVP irrevocably to pay whatever the district court later determines is just compensation. It is thus is an insufficient substitute for a quick-take deposit. *Cf.* 40 U.S.C. § 3115 (government's "irrevocable commitment" to pay whatever compensation is eventually determined). The injunction also did not vest in the owner the corresponding *irrevocable* right to compensation. *See Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587 (1923) ("The owner is protected by the rule that title does not pass until compensation has been ascertained and paid, nor a right to the possession until reasonable, certain, and adequate provision is made for obtaining just compensation.") (citing *Cherokee Nation v. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)). An injunction is not a "reasonable, certain, and adequate" guarantee of compensation; the process established by Congress in the NGA is. *Cf.* Pet. App. 30. If a state supreme court remedy doesn't meet this standard, *see Knick*, 139 S. Ct. at 2175, then a preliminary injunction falls even shorter.

The reason a bond is not a "reasonable, certain, and adequate" guarantee of compensation is because when

the federal government occupies property without having obtained title, the owners have a governmentally-guaranteed and vested ability to obtain whatever compensation the court determines—and the means to obtain it. Because the power to take property is an attribute of sovereignty and the Fifth Amendment's command is self-executing, this obligation cannot be avoided. Congress has provided a vehicle to obtain after-the-fact compensation: a lawsuit under the Tucker Act, either in a district court (for compensation claims up to $10,000) or in the Court of Federal Claims (for all others). The Fourth Circuit, however, viewed a state-law trespass action as the equivalent: "the landowners could proceed with a trespass action if the company did not promptly make up the difference" between the bond and the final compensation. Pet. App. 34 ("the landowners could proceed with a trespass action if the company did not promptly make up the difference"); *id*. at 110-11 ("Further, a gas company that fails to pay any shortfall in the deposit is liable in trespass, and 'if a FERC-regulated gas company was somehow permitted to abandon a pipeline project (and in the midst of a condemnation proceeding, the company would be liable to the landowner for the time it occupied the land and for any 'damages resulting to the [land] and to fixtures and improvements, or for the cost of restoration.'") (citation omitted). But a bond and an inchoate state-law trespass cause of action are not the same as the self-executing right to compensation backed by the federal government and the availability of a federal inverse condemnation judgment to guarantee collection.

The injunctions do not compel MVP to pay whatever the courts determine is just compensation. There are a host of other reasons why a private pipeline

condemnor might not eventually follow through and actually condemn. For example, it might lose a separate challenge on another issue. *See*, *e.g.*, *Defenders of Wildlife v. Dep't of the Interior*, ___ F.3d ___, 2019 U.S. Lexis 22305 (4th Cir. July 26, 2019) (vacating pipeline's incidental take statement). And what if the final adjudicated compensation exceeds MVP current estimate, leaving the bonds and deposits insufficient? *See* Pet. App. 59. Or what if MVP simply abandons the project because it no longer is profitable to continue? Or state regulators stop it. *See* Mike Lee, *Va. officials freeze work on Mountain Valley*, Energy Wire (Aug. 5, 2019) (https://www.eenews.net/energywire/stories/1060851223) (last visited Aug. 5, 2019).

Critically, nothing in the injunction overrules MVP's option under the NGA *not* to take the properties if it does not like the option price, or if it simply decides not to proceed at any stage. And what if MVP becomes insolvent, something that owners whose property is taken by the federal government need not worry about? In that situation, any state-law trespass claims these owners may have against MVP would likely not represent a "reasonable, certain, and adequate" guarantee of receiving the "full and perfect equivalent for the property taken." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893). *Compare* Pet. App. 34 (a state court trespass action is all the protection the property owners need) *with Cobb v. City of Stockton*, 909 F.2d 1256, 1267(9th Cir. 2018) (state-law inverse condemnation claims against a municipality that have not been reduced to final judgment may be "adjusted in bankruptcy").

In sum, the preliminary injunction "deposit" and bond are merely *security* for MVP's future conduct, not its irrevocable and enforceable obligation to pay—

backed by the self-executing Fifth Amendment—whatever final compensation the courts may ultimately determine. Injunctions do not provide the "reasonable, certain, and adequate" vesting of the right to just compensation this Court envisioned over a century ago in *Cherokee Nation*, and recently in *Knick*. *See Knick*, 139 S. Ct. at 2175 ("[s]imply because the property owner was not entitled to injunctive relief at the time of the taking does not mean there was no violation of the Takings Clause at that time").

4. Finally, quick-take injunctions—which grant immediate possession rather than an option to condemn and possess the land after trial—abridge the substantive rights of property owners in violation of the Rules Enabling Act. Landowners lose not only the right to exclude pipeline workers and heavy machinery from their properties during the months or years before the final determination of just compensation at trial, they also lose the right to use their property as they see fit during the pendency of the case. Some of the harms flowing from the abridgement of their property rights—such as lost business, farm, and rental income that could have been earned during the pendency of the case—are often noncompensable in eminent domain proceedings. *See, e.g.*, *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 283 (1943). Premature possession likewise deprives the landowners of the opportunity to prevent or mitigate environmental damage to the springs, streams, hillsides, and other features of their land.

Some courts of appeals have reasoned that the pipeline company will get the property anyway—and that the timing of possession therefore does not matter. But property law—with its life estates, determinable fees, remainders, reversions, rights of entry, leases,

and options—is inextricably linked to the timing of possession.

Landowners facing quick-take injunctions rarely talk about their injuries in the language of substantive rights. They describe instead losing one or two more years of walking through their forests, watching wildlife, caring for a dying relative, earning a living from farming and ranching, seclusion, and enjoying peace and quiet:

> The Homeowners in this case are the Erb and Hoffman families. Their "much beloved properties[.]" That was where the Erbs built their "dream home" and planned for their three sons to settle one day. The Hoffmans' house is tucked among "rolling hills" on their property—a home designed to be so private that it could not be seen from the road. They built their lives there, among "lots of wildlife," including the scores of deer and turkeys they fed each day. Both families cherished the quiet, secluded nature of the places where they chose to live.
>
> That was until the Commission allowed the Transcontinental Gas Pipeline Company ("Transco") to move in. In October 2015, the Commission notified the Erbs and the Hoffmans that a pipeline under consideration might cut right through their land. That would mean "removing topsoil, trees, shrubs, brush, roots, and large rocks, and then removing or blasting additional soil and bedrock to create a trench for the pipeline," and giving Transco a permanent right-of-way

> through their yards. The Erbs were "deathly afraid of the pipeline" and did not "want to be anywhere near it." The Hoffmans found the idea "unacceptable" and "disturbing," because Transco's right-of-way in the middle of their property would "totally take[] [their] privacy away."

Allegheny Defense Project, 2019 U.S. App. Lexis at *14-*15 (Millett, J., concurring) (citations omitted). The consequences of losing the blessings of property are certainly "substantive" to the owners who must endure premature confiscation of their land.

CONCLUSION

A preliminary injunction is a hollow substitute for constitutional safeguards, because MVP unquestionably retains the ability to walk away if it does not like the adjudicated compensation eventually established by the court. There's a right way to accomplish a taking: by adhering to the process Congress established. Deviation for the sake of convenience or expedience is lawlessness.

Respectfully submitted.

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