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* PUBLIC LAW SCHOLARS AND CONCERNED LANDOWNERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court conducting eminent domain proceedings on behalf of a private condemnor pursuant to the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, has power to issue a preliminary injunction ordering immediate possession of the property at issue prior to a trial on just compensation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*

Amici are public law scholars with an interest in both parameters of the government's power of eminent domain and the remedial powers of the federal courts, as well as property owners whose land has been subjected to similar procedures to those at issue in this case.[1]

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Ilya Somin is Professor of Law at George Mason University's Antonin Scalia Law School. He teaches constitutional law and property, and he has written

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[1] This brief has been filed with notice to and written consent of the parties. Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

extensively about property rights and the Takings Clause.

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Jonathan M. Ansell, Jill Averitt, Richard G. Averitt III, Richard Averitt, Dr. Sandra Smith Averitt, Nancy Kassam-Adams, Shahir Kassam-Adams, William Limpert, Libra Max, and Rockfish Valley Investments, LLC are all property owners impacted by the Atlantic Coast Pipeline.

SUMMARY OF ARGUMENT

This case presents a clear circuit split on an issue of considerable public importance. The Natural Gas Act (NGA) delegates the United States' sovereign power of eminent domain to private pipeline companies that have been issued a certificate of public convenience and necessity by the Federal Energy Regulatory Commission (FERC), but it provides *no* authority for such pipelines to take possession of their easements prior to the conclusion of eminent domain proceedings. Nonetheless, the Fourth Circuit, as well as five other circuits, has authorized district courts to effectively create a "quick take" procedure—thereby allowing immediate possession—through their general powers to issue preliminary injunctions under Rule 65(a) of the Federal Rules of Civil Procedure. The Seventh Circuit, by contrast, restricts preliminary injunctive relief to

circumstances in which the plaintiff has a property right that preexists the litigation. As Petitioners ably explain, the practical difference for small landowners subjected to "quick takes" by pipeline companies can be devastating.

The Fourth Circuit's position is indefensible under the NGA. The NGA's eminent domain provision creates a "straight condemnation" procedure by which condemnors become entitled to possession only at the end of the proceeding. This Court's precedent makes clear that, in straight condemnation, the right to possession transfers *only* after the determination and payment of just compensation. *See Kirby Forest Industries, Inc. v. United States*, 461 U.S. 1 (1984). Although some statutes authorize the Government to execute "quick takes," all agree that the NGA includes no such provision. And we are unaware of *any* statute conferring that drastic power on *private* actors.

Nor can Rule 65(a) bear the necessary weight. Nothing in the Federal Rules explicitly authorizes quick takes, and Congress's explicit limitation of such procedures to actions by the United States should foreclose creating such a power by implication. In any event, equitable relief depends on an underlying substantive right, and *Kirby Forest* makes clear that a condemnor acquires such a right *only* after the determination and payment of just compensation.

This case can be decided on statutory grounds, but strong constitutional considerations press in favor of the Seventh Circuit's more restrictive reading of both the NGA and Rule 65(a). This Court's recent decision

in *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), casts considerable doubt on whether even the Government can ever legally take possession before paying compensation. *Knick* held that an unconstitutional taking occurs the moment the Government takes possession of property rights without paying compensation. Certainly, courts should not lightly infer Congress's intent to empower private actors to take such constitutionally dubious action. Likewise, more general constitutional concerns for preserving states' authority over property rights and legislative authority over eminent domain cut strongly against the Fourth Circuit's adventurous extension of judicial authority. So do states' interests in preserving their natural environments.

This Court need not reach these constitutional concerns because Congress has not conferred such a problematic power. "Quick takes" are a particularly drastic extension of judicial equity powers. Congress has not authorized them, and they should not be manufactured by implication. The petition should be granted, the split resolved, and a narrower reading of the NGA and Rule 65(a) adopted as the law of the land.

ARGUMENT

I. A Real and Mature Circuit Conflict Exists Concerning District Courts' Authority to Issue Preliminary Injunctions Granting Immediate Occupancy in Eminent Domain Proceedings under the NGA.

This case meets the essential criterion of a real circuit split: the courts of appeals have reached disparate conclusions concerning whether a federal district court can issue a preliminary injunction granting a pipeline company immediate possession of land subject to condemnation, and those conclusions rest on irreconcilable views about what the NGA and Rule 65(a) require.

Most courts of appeals to have considered the issue have followed the Fourth Circuit's position, which was initially expressed in *East Tennessee Natural Gas Company v. Sage*, 361 F.3d 808 (4th Cir. 2004), and reaffirmed in the instant case. *See Transcontinental Gas Pipe Line Co. v. 6.04 Acres*, 910 F.3d 1130, 1152 (11th Cir. 2018); *Transcontinental Gas Pipe Line Co. v. Permanent Easements*, 907 F.3d 725, 736-37 & n. 70, 739 (3d Cir. 2018); *Nexus Gas Transmission, LLC v. City of Green*, 757 F. App'x 489, 492 n. 2 (6th Cir. 2018); *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, 776-77 (9th Cir. 2008).

In contrast, the Seventh Circuit held in *Northern Border Pipeline Company v. 86.72 Acres of Land*, 144 F.3d 469, 471 (7th Cir. 1998), that a district court lacked the authority to issue a preliminary injunction granting a pipeline company immediate possession of

the land at issue. The Seventh Circuit underscored that Northern Border, the pipeline company, "does not contest the district court's conclusion that its claim to immediate possession has no basis in substantive federal or state law. The company concedes that the Natural Gas Act does not create an entitlement to immediate possession of the land." *Id*. Because of Northern Border's "lack of substantive entitlement," its demand for an order granting immediate possession "misapprehends the relief available in preliminary injunction proceedings":

> A preliminary injunction may issue only when the moving party has a substantive entitlement to the relief sought. Because it disavows any claim that it has a substantive entitlement to the defendants' land *right now*, rather than an entitlement that will arise at the conclusion of the normal eminent domain process, Northern Border is not eligible for the relief it seeks.

Id. (emphasis in original).

In the instant case, the Fourth Circuit devoted only a brief footnote to explaining why there was no circuit split. It reasoned that "the pipeline company in *Northern Border* had not yet obtained a district court order finding that it was entitled to the land; accordingly, it had no equitable right to seek a preliminary injunction granting immediate possession." *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 215 n. 6 (4th Cir. 2019). That is a true statement of the facts of *Northern Border*, but it is neither the distinction upon which the Seventh Circuit relied nor

the difference that matters under the NGA and Rule 65(a).

The Seventh Circuit's analysis plainly turned on the existence of a substantive entitlement to the land, which it said exists only "at the conclusion of the normal eminent domain process." The Seventh Circuit thus followed the teaching of *Kirby Forest Industries, Inc. v. United States*, 461 U.S. 1 (1984), that a district court order finding that a pipeline company is entitled to the land is not a source of substantive rights; it is, rather, a recognition of rights conferred by Congress that will vest at the end of the eminent domain proceeding. Under *Kirby Forest*, an order establishing the condemnor's legal *right* to take property is insufficient to transfer rights. *Kirby Forest* explains that "[t]he 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"; the "right to possession" does not "vest in the United States" until the Government "tenders payment to the private owner." *Id*. at 4. After all, if the cost is too high, the Government may still "decide[] not to exercise its option" and "move for dismissal of the condemnation action." *Id*.

The Seventh Circuit decision in *Northern Border* predates the other circuit decisions we read to be inconsistent; hence, Judge Flaum's opinion had no occasion to discuss whether it was taking a different approach. But we think a hypothetical that Judge Flaum offered to illustrate his reasoning makes the inconsistency clear. He posited two parties who jointly develop a

software program and then later disagree over who owns it. If the plaintiff establishes she is likely to prevail on his claim of ownership, he wrote, a court may issue a preliminary injunction ordering delivery of the software. But, Judge Flaum reasoned:

> The difference between the software hypothetical and Northern Border's case is that the party receiving immediate possession of the software claimed an ownership interest in the property that, if it existed at all, *was fully vested even* before *initiation of the lawsuit*. In awarding the preliminary injunction, the court predicted what future proceedings would reveal *about the* ex ante *state of affairs between the parties*, i.e., that the plaintiff, not the defendant, had the right to possess the property. In contrast, Northern Border puts forth no claim that it has a preexisting entitlement to the defendants' land.

144 F.3d at 472 (emphases added).

The "preexisting entitlement" to which Judge Flaum referred, we submit, is the same right to occupy that *Kirby Forest* held passes only at the conclusion of eminent domain proceedings. Neither the Fourth Circuit nor other courts following *Sage* have required a pipeline company to establish a *preexisting* right to occupy an easement; rather, they settle for an adjudication that the land in question falls within the eminent domain authority authorized by the NGA. Those are not the same things, and—as this case illustrates—the difference is of immense practical significance. That is why we conclude that there exists a real, mature split

of authority between the Seventh Circuit and six other courts of appeals.

II. The Fourth Circuit's Position Is Indefensible as a Construction of the NGA's Eminent Domain Provision.

The Seventh Circuit's position is the correct one, both as a matter of the NGA's eminent domain provision and of the district court's equitable powers under Fed. R. Civ. P. 65(a). The exercise of eminent domain power under federal law generally requires congressional authorization. The leading case on the national government's statutory authority to take is *Kirby Forest*, 461 U.S. 1 (1984), which construed the Government's general eminent domain authority under 40 U.S.C. § 257 (recodified at 40 U.S.C. § 3113). Section 257 authorizes a "straight condemnation" procedure, under which the Attorney General initiates condemnation proceedings and identifies the property that the United States wishes to take. As already noted, trial on the amount of just compensation confers "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." *Id.* at 4.

Kirby Forest contrasted the "straight condemnation" procedure with three other options. The only relevant option here is the "more expeditious procedure," like the quick take method "prescribed by 40 U.S.C. § 258a," which "empowers the Government, 'at any time before judgment' in a condemnation suit, to file 'a

declaration of taking.'" *Id.* When the Government does so, "[t]itle and right to possession thereupon vest immediately in the United States." *Id.* The Government must deposit with the court money equal to the estimated value of the land, but the exact amount of just compensation remains to be determined in subsequent proceedings." *Id.* at 4-5. This "quick take" procedure—recodified at 40 U.S.C. § 3114—is expressly limited to proceedings "brought by and in the name of the United States." To our knowledge, none of the courts that have upheld preliminary injunctions in pipeline cases have disputed the Fourth Circuit's concession that "[t]he Natural Gas Act, like most statutes giving condemnation authority to government officials or private concerns, contains no provision for quick take or immediate possession." *Sage*, 361 F.3d at 822.[2]

Instead, the Fourth Circuit and other courts following its approach have relied on the general remedial authority and equitable powers of federal district courts to reach a result that is, in practical effect, identical to § 258's "quick take" procedure. Eminent

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[2] *Kirby Forest* identified two additional routes by which the federal government takes land. First, "Congress occasionally exercises the power of eminent domain directly" by "enact[ing] a statute appropriating the property immediately . . . and setting up a special procedure for ascertaining, after the appropriation, the compensation due to the owners." 467 U.S. at 5. And "the United States is capable of acquiring privately owned land summarily, by physically entering into possession and ousting the owner," thereby entitling the owner to file an inverse condemnation action to recover the value of the land. *Id.* Those routes are also exclusive to takings by the United States itself—not by private parties to which it has delegated its eminent domain authority.

domain proceedings in the federal courts are governed by FRCP 71A (now relabeled Rule 71.1). As the Fourth Circuit's decision in *Sage* pointed out, "Rule 71A . . . contains no language that prohibits a condemnor from pursuing any available procedures to obtain possession prior to the entry of final judgment. Those procedures could include an application for a preliminary injunction under Rule 65(a) because the regular rules of civil procedure apply when Rule 71A is silent." 361 F.3d at 822-23. But neither Rule 71A nor Rule 65(a) contain any language *authorizing* such quick take procedures, either.

The argument for general judicial authority to issue quick take injunctions fails on its own terms, as we discuss in Part III, *infra*. But in any event, any general equity powers that district courts enjoy under the civil rules are superseded here by Congress's clear statutory intent. Congress's explicit creation of both "straight condemnation" and "quick take" procedures, and its equally explicit decision to limit quick takes to condemnations by the national government,[3] forecloses the implication of quick take authority under the NGA.

That conclusion follows from the statutory text and structure alone. But a variety of interpretive presumptions and clear statement rules press toward the same interpretation. First, "eminent domain statutes

[3] We are unaware of any quick take statutes extending that power to private actors, and the general provision plainly does not do so.

are strictly construed to exclude those rights not expressly granted." *Transwestern*, 550 F.3d at 774. That is particularly true of eminent domain statutes granting condemnation powers to private entities, which are necessarily limited grants of authority. *See United States v. Carmack*, 329 U.S. 230, 243 n. 13 (1946) ("A distinction exists . . . in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers.").[4]

Second, federal eminent domain statutes both alter property rights created by state law and preempt state procedures for adjudicating condemnation proceedings. As such, they should be construed narrowly to protect the traditional prerogatives of the states and avoid preempting state law. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (presumption against altering traditional federal balance); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (presumption against preemption). Those prerogatives extend to efforts by states to preserve the natural environment within their borders. *Cf. Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding that Massachusetts had standing to sue the Environmental Protection Agency (EPA) over potential damage caused to its territory by EPA's failure to regulate carbon dioxide and other greenhouse gasses).

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[4] *See also Nat'l R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264-65 (2d Cir. 1987).

Finally, principles of separation of powers likewise suggest that delegations of authority to non-legislative actors, and especially to *private* actors, should be construed narrowly. *See, e.g.*, *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion) (construing the scope of statutory delegation narrowly to avoid nondelegation concerns); *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1237-38 (2015) (Alito, J., concurring) (questioning the constitutionality of private delegations); *id.* at 1252 (Thomas, J., concurring in the judgment) (same). Only explicit congressional command should suffice to extend to private actors the most drastic version of the eminent domain power—which divests private persons of property interests before the completion of judicial proceedings.

III. Federal Rule of Civil Procedure 65(a) Cannot Support the Preliminary Injunctions at Issue Because They Alter Substantive Rights.

Given the statutory structure, courts allowing quick takes in pipeline cases have generally *not* implied statutory authority for such actions; they have instead relied on their general equitable authority in conjunction with Rule 65(a). *See, e.g.*, *Sage*, 361 F.3d at 823-24. That rule simply provides that a federal district court "may issue a preliminary injunction . . . on notice to the adverse party." Fed. R. Civ. P. 65(a). As we have noted, Congress's specific distinction between straight condemnation and quick takes, and its limitation of quick takes to federal government actors, surely

supersedes whatever equitable powers courts otherwise possess. But even viewing the courts' equitable powers in isolation, the Fourth Circuit's extension of those powers here is indefensible as a matter of both equitable practice and application of the federal rules of procedure.

As the Fourth Circuit acknowledged in *Sage*, the federal courts' power to grant equitable relief "is circumscribed by the venerable principle that 'equity follows the law.'" *Id.* at 823 (quoting *Hedges v. Dixon Cty.*, 150 U.S. 182, 192 (1893)). As a result, "[e]quity . . . may not be used to create new substantive rights." *Id.* The key question, then, is whether the preliminary injunctions allowing immediate possession of the pipeline easements created a new substantive right or simply enforced a right that MVP already had. As the Fourth Circuit put it, "when a substantive right exists, an equitable remedy may be fashioned to give effect to that right if the prescribed legal remedies are inadequate." *Id.*

One gets to the same place by focusing on the authority to grant a preliminary injunction provided by FRCP 65(a). Under the Rules Enabling Act, 28 U.S.C. § 2072(b), the federal rules "shall not abridge, enlarge or modify any substantive right." If the preliminary injunctions added anything to MVP's substantive rights, they would be outside the scope of Rule 65(a).

Both common sense and binding Supreme Court precedent answer the question of whether a preliminary injunction creates a new substantive right or

enforces a pre-existing right. First, as Petitioners informed the district court, *see* Petition for *Certiorari* at 9-10, their right to occupy their land during the period when compensation would be determined had a significant independent value to them. To the extent that this value may not be recoverable in the condemnation proceeding, *see United States v. Gen. Motors Corp.*, 323 U.S. 373, 379-80 (1945), Petitioners' substantive rights are abridged by the order of immediate possession. And certainly MVP's own submissions establish the very great value to it of immediate possession. As this Court recognized in its "temporary takings" cases, *see First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304 (1987), time is money in eminent domain litigation.

Second, the Court's holding in *Kirby Forest* requires the same conclusion. The issue in that case was the point at which a taking occurred under the "straight condemnation" statute, which mattered because of the need to determine whether interest was due on the just compensation award. The Court concluded that "title and right to possession vest in the United States" when "it tenders payment to the private owner." 467 U.S. at 4. Referring back to the statutory distinction between straight condemnation and quick takes, the Court said that "Congress' understanding that a taking does not occur until the termination of condemnation proceedings brought under § 257 is reflected in its adoption of § 258a for the purpose of affording the Government the option of peremptorily appropriating land prior to final judgment, thereby

permitting immediate occupancy and improvement of the property." *Id.* at 12.

By contrast, the Fourth and Ninth Circuits have concluded that a pipeline's substantive right to occupancy is established by a judicial judgment that it is entitled to take the easement in question. *See Sage*, 361 F.3d at 827-28; *Transwestern Pipeline*, 550 F.3d at 776-77. But under *Kirby Forest*, an order establishing as a legal matter that the condemnor has the *right* to take property is insufficient to transfer rights. *Kirby Forest* explains that "[t]he 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"; the "right to possession" does not "vest in the United States" until the Government "tenders payment to the private owner." 467 U.S. at 4. After all, if the cost is too high, the Government may still "decide[] not to exercise its option" and "move for dismissal of the condemnation action." *Id. Kirby Forest* thus makes clear that the partial summary judgments relied upon by the Fourth Circuit here (and other circuits in other cases) were insufficient to give MVP a substantive right to possession. And because a substantive right to possession is the necessary predicate for the exercise of a district court's equitable authority, the district courts lacked power to issue the injunctions at issue in this case.

IV. The Takings Clause, as Interpreted in *Knick*, Warrants Construing both the NGA and Rule 65(a) to Avoid the Constitutional Difficulties Associated with Private Quick Takes.

Courts have invariably considered preliminary injunctions providing for immediate occupancy to pose questions of statutory authority under the NGA or 40 U.S.C. § 257—not constitutional questions under the Takings Clause. In this case, the Fourth Circuit "note[d] at the outset" that Petitioners' argument that district courts may grant MVP access to the easements at issue only after completion of eminent domain proceedings "is a statutory argument, not a constitutional one." *Mountain Valley Pipeline*, 915 F.3d at 213.[5] The court of appeals reasoned that "the Constitution does not prohibit condemnations in which possession comes before compensation" because "[t]he Supreme Court settled that question nearly 130 years ago in *Cherokee Nation*, holding that the Constitution 'does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken.'" *Id*. (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)). "So long as the owner is assured through 'reasonable, certain, and adequate' means that he ultimately will be compensated fairly," the Fourth Circuit continued, "constitutional requirements are met." *Id*. at 213 (quoting *Cherokee Nation*, 135 U.S. at 659).

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[5] Notwithstanding the Fourth Circuit's view, Petitioners did preserve their arguments that constitutional concerns should influence the construction of the NGA's eminent domain provision and Rule 65(a).

That constitutional calculus has been affected significantly, however, by this Court's recent decision in *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019). *Knick* held that a government violates the Takings Clause when it takes property without providing just compensation, and a property owner may bring a Fifth Amendment claim under 42 U.S.C. § 1983 at that time. In so holding, the Court overruled the requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* that property owners follow state compensation procedures before bringing federal takings claims. 473 U.S. 172 (1985). Although *Knick* dealt with a different question from the one presented in this case, the Court's decision in *Knick* is pertinent in two respects.

First, *Knick* made clear that "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." 139 S. Ct. at 2170. In the instant case, the *Knick* Court's legal conclusion means that the Takings Clause is violated as soon as district courts grant pipeline companies immediate possession of other people's land.[6] To be sure, that is a violation that can be

[6] Any doubt that possession amounts to a taking is resolved by *United States v. Dow*, 357 U.S. 17 (1958), which *Knick* cited with approval. *See* 139 S. Ct. at 2170. In *Dow*, the United States utilized the "quick take" procedure under 40 U.S.C. § 258a to obtain easements for a pipeline, but it filed its declaration of taking three years *after* it had obtained an order from the district court authorizing immediate possession of the easement. The Court held that the taking occurred not when the Government filed its declaration of taking, but rather when the United States entered into possession of the land. *See* 357 U.S. at 23. (The Court noted

remedied by just compensation; "[a]s long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking." 139 S. Ct. at 2176. Still, the *Knick* Court insisted that "such a procedure is a remedy for a taking that violated the Constitution," rejecting the proposition that "the availability of the procedure somehow prevented the violation from occurring in the first place." *Id.* at 2177.[7]

Those sorts of statements raise a constitutional question concerning statutes authorizing occupation prior to compensation—including the "quick take" provision of 40 U.S.C. § 258a (now 40 U.S.C. § 3114). But the Court need not decide that question in the present case; rather, the canon of constitutional avoidance counsels against the implication of quick take authority under the NGA or FRCP 65(a). Serious separation of powers concerns would be raised by federal court orders granting pipeline companies immediate possession of privately owned land absent a clear statement from Congress authorizing such possession. After all, the power of eminent domain belongs not to the federal

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that in the ordinary "quick take" sequence, when the declaration is filed *prior* to occupation, the taking dates from the Government's filing. *See id.*).

[7] *See also* 139 S. Ct. at 2180 (Thomas, J., concurring) ("[J]ust compensation [is] a 'prerequisite' to the government's authority to 'tak[e] property for public use.' A 'purported exercise of the eminent-domain power' is therefore 'invalid' unless the government 'pays just compensation before or at the time of its taking.' ") (quoting *Arigoni Enters., LLC v. Durham*, 136 S. Ct. 1409, 1409-10 (2016) (Thomas, J., dissenting from denial of *certiorari*)).

courts, but to Congress, which is the only federal body that can raise and spend the funds needed to provide just compensation. *See* U.S. CONST. art. I, § 8, cl. 1 (conferring on Congress the powers to tax and spend). And critically, courts should be extremely hesitant to read a general provision like Rule 65(a) as authorizing actions that, according to this Court's decision in *Knick*, violate the Fifth Amendment at the moment they occur.

The second reason that Knick is relevant concerns the *Knick* Court's treatment of *Cherokee Nation v. Southern Kansas Railway Company*, 135 U.S. 641, 659 (1890). That case figures prominently in *Mountain Valley Pipeline*, *Sage*, and other decisions authorizing immediate possession of land by pipeline companies. *Cherokee Nation* stated that the Constitution "does not provide or require that compensation be paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed." *Id*. at 659 (quoted in *Mountain Valley Pipeline*, 915 F.3d at 213, and *Sage*, 361 F.3d at 824). That language has redirected judicial scrutiny away from when the taking occurs to the adequacy of the procedure for ensuring compensation down the line.

But *Knick* rejects expansive readings of *Cherokee Nation*, which was the primary authority relied upon by Justice Kagan's dissent. *See* 139 S. Ct. at 2181-82 (Kagan, J., dissenting). The *Knick* Court read *Cherokee Nation* as simply a case about the propriety of injunctive

relief: when a landowner has a compensatory remedy, that precludes equitable relief. *See id.* at 2175 (majority opinion). But, the Court insisted, "[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." *Id.* *Knick* thus makes clear that however good after-the-fact remedies may be, they do not make it *constitutional* to take property rights without *prior* payment. In light of *Knick*, the Fourth Circuit and other courts of appeals have over-relied on *Cherokee Nation*.

Finally, it is worth noting that, in *Cherokee Nation* itself, the statute in question ordinarily required that "full compensation" be paid to landowners prior to occupation by the condemnor. *See* 10 S. Ct. at 966. The question there was simply whether the condemnor could take occupation prior to completion of appeals concerning the amount of compensation. Here, by contrast, MVP sought immediate occupancy of easements all along its planned route as a matter of course. *See Mountain Valley Pipeline*, 915 F.3d at 210. *Cherokee Nation* is thus an unstable rock on which to build a general proposition that condemnors may always take first and pay later.

We would propose that the Court draw a relatively sharp line between private and public condemnors, based on decisions indicating that quick takes are less problematic when executed by governmental bodies than when performed by private entities. *See, e.g.*, *Transwestern Pipeline*, 550 F.3d at 775 (noting that private condemnors have "neither the sovereign authority

nor the backing of the U.S. Treasury to assure adequate provision of payment"). That distinction would also avoid the constitutional concerns, noted earlier, associated with private delegations.

V. The Fourth Circuit's Policy Concerns Are Irrelevant and Misplaced.

The Fourth Circuit repeatedly expressed the concern that preliminary injunctions were required because FERC, in issuing a certificate of public convenience and necessity to MVP's pipeline in October 2017, imposed a time limit. The court of appeals wrote, for example, that "without preliminary relief, Mountain Valley almost certainly would be unable to meet FERC's October 2020 in-service deadline, which could come and go before the courts had finally determined due compensation for the hundreds of easements at issue." *Mountain Valley Pipeline*, 915 F.3d at 211 (describing the reasoning of the district courts on irreparable harm); *see id*. at 216 (embracing that same reasoning). Although those practical policy concerns are relevant to the irreparable harm component of the standard for injunctive relief, they cannot supply the underlying substantive right that is a necessary condition for such relief. It should likewise go without saying that FERC-imposed deadlines do not take precedence over the legal limits on quick take authority imposed by Congress and the Constitution. The tail must not be permitted to wag the dog.

In any event, such policy concerns are misplaced. The Fourth Circuit's concern may have been misinformed as to the flexibility of the rules. When the Ninth Circuit considered the same issue a decade ago, it noted that the pipeline company had been able to obtain an extension of its FERC deadline when the district court denied a preliminary injunction. *See Transwestern Pipeline*, 550 F.3d at 772 n. 1 (citing 18 C.F.R. § 157.20(b)). More fundamentally, if this Court grants review and holds that the Seventh Circuit's understanding of the law is the correct one, FERC will presumably take that legal guidance into account in setting deadlines in the future. And if FERC does not do so, Congress can intervene as appropriate and require FERC to alter its approach. Either way, it is extraordinarily unlikely that pipeline companies like MVP will often find themselves in the position of not being able to complete projects, thereby losing significant amounts of money, out of failure to meet FERC's in-service deadlines.

There is, moreover, the countervailing risk that a pipeline company may gain entry upon landowners' property and make changes that are difficult or impossible to reverse, only to have the necessary permits denied or vacated and the whole project thrown into doubt. On July 26, 2019, the Fourth Circuit vacated the Endangered Species Act permit for Atlantic Coast Pipeline's West Virginia line. *See Defenders of Wildlife v. U.S. Dep't of the Interior*, ___ F.3d ___, No. 18-2090, 2019 WL 3366598 (4th Cir. July 26, 2019). That decision illustrates the sobering reality that risks attend

upon moving too quickly as well as upon moving too slowly. Courts should not short-circuit established statutory eminent domain procedures based on perceived exigencies, especially when those very exigencies are uncertain.

CONCLUSION

This Court should grant the petition for *certiorari*.

Respectfully submitted,

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