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 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WADE W. MASSIE
PENN, STUART & ESKRIDGE
208 E. Main Street
Abingdon, VA 24210
(276) 623-4409

COLIN E. WRABLEY
Counsel of Record
NICOLLE R. SNYDER BAGNELL
STEFANIE L. BURT
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131
cwrabley@reedsmith.com
Counsel for Respondent

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QUESTION PRESENTED

Whether a federal court has the equitable authority to issue an injunction entitling a natural gas pipeline company to the possession of private property—before a final determination of the just compensation owed to the property's owner—where: (i) the court granted summary judgment on the company's right to condemn the property interests necessary for the construction of a pipeline authorized by the Federal Energy Regulatory Commission; (ii) no federal statute or other law displaces the court's inherent power to issue such equitable relief; (iii) the requirements for injunctive relief are conclusively satisfied; and (iv) the property owner's right to just compensation is fully secured by deposits with the court and surety bonds.

CORPORATE DISCLOSURE STATEMENT

Petitioner Mountain Valley Pipeline, LLC is a limited liability company.

MVP Holdco, LLC is a member of Mountain Valley Pipeline, LLC that owns more than 10% of the interest in Mountain Valley Pipeline, LLC, and is a subsidiary of EQM Midstream Partners, L.P. EQM Midstream Partners, LP is a publicly traded limited partnership, and is an indirect subsidiary of Equitrans Midstream Corporation, a publicly traded corporation.

US Marcellus Gas Infrastructure, LLC is a member of Mountain Valley Pipeline, LLC that owns more than 10% of the interest in Mountain Valley Pipeline, LLC, and is an indirect subsidiary of NextEra Energy, Inc., a publicly traded company.

Con Edison Gas Midstream, LLC is a member of Mountain Valley Pipeline, LLC that owns more than 10% of the interest in Mountain Valley Pipeline, LLC, and is a subsidiary of Consolidation Edison, Inc., a publicly traded company.

WGL Midstream, Inc. is a member of Mountain Valley Pipeline, LLC that owns 10% of the interest in Mountain Valley Pipeline, LLC, and is a subsidiary of WGL Holdings, Inc., a publicly traded company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statutes

Regulations

Rules

Other Authorities

BRIEF IN OPPOSITION

In an effort to delay—but not prevent—the completion of a natural gas pipeline approved by federal regulators that is more than 85 percent constructed, the petition seeks review of a question that the courts of appeals have decided unanimously against landowners such as Petitioners, and consistent with this Court's precedent: whether, where a natural gas pipeline company has an undisputed, statutorily conferred, and court-adjudicated right to condemn private property, a federal court may, where the requirements for injunctive relief are satisfied, issue an injunction entitling the pipeline company to possession of that property prior to a final determination of the just compensation owed the property owner.

Six circuits—including the Fourth Circuit below—have squarely addressed this question and answered it in the affirmative. Contrary to Petitioners' contention, no circuit has taken a different view, while scores of district courts are in accord. In fact, over the past 15 years since Petitioners claim a circuit split has existed, courts have repeatedly rejected the existence of any such split. For these reasons alone, certiorari is not warranted.

Additionally, the consensus position of the lower courts on the question presented is correct. It is consistent with this Court's decisions recognizing that courts may exercise their equitable authority unless Congress, by statute, clearly and unmistakably prohibits it. No such statute exists here—and Petitioners do not claim otherwise. The injunctions affirmed by the Fourth Circuit likewise are tied to the

ultimate relief available in these cases—possession of the properties along the pipeline route—and just compensation for the Petitioners is fully secured by deposits with the district courts and surety bonds.

As if these were not sufficient reasons to deny the petition, this case is a poor vehicle for reviewing the question presented. The injunctions at issue have never been stayed—indeed, Petitioners did not ask this Court for a stay following the Fourth Circuit's decision below in early February 2019, and they last sought a stay (unsuccessfully, from the court of appeals) in February 2018. Moreover, Mountain Valley has already exercised its injunctive rights to begin pipeline construction work on each of Petitioners' properties. In addition, several of the Petitioners have settled their just-compensation claims with Mountain Valley since the filing of their petition; several of the remaining Petitioners have their claims set for trial in the coming months; more than 85 percent of the pipeline project is complete; and the pipeline is expected to be in service by the middle of 2020. As a result, the Court's resolution of the merits in this case would have little, if any, practical import to the parties here—if the dispute is not already moot by then. This case is therefore decidedly unsuitable for addressing the uncertworthy question presented by the Petitioners. The petition should be denied.

STATEMENT OF THE CASE

A. Factual and Statutory Background

1. Congress enacted the Natural Gas Act (NGA) in 1938 for the "principal purpose" of "encourag[ing] the orderly development of plentiful supplies of . . .

natural gas at reasonable prices." *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669–70 (1976). The NGA declares that "'the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest . . . .'" *Fed. Power Comm'n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 581 (1942) (citation omitted).

To further this acknowledged public interest, the NGA delegates to "natural gas companies the power to acquire property by eminent domain" for the purpose of building pipelines. *Transcontinental Gas Pipe Line Co., LLC v. Permanent Easements*, 907 F.3d 725, 728 (3d Cir. 2018), *cert. denied sub nom. Like v. Transcontinental Gas Pipe Line Co., LLC*, 139 S. Ct. 2639 (2019).[1] The statute authorizes the holder of a certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission (FERC) to condemn property rights necessary to construct, operate, and maintain a natural gas pipeline. *See* 15 U.S.C. § 717f(h).

Pipeline companies initiate the certificate process by filing an application with FERC, which, in turn, conducts a thorough review of market demand and the public need for the pipeline. *See* 15 U.S.C. § 717f(d); 18 C.F.R. pt. 157. FERC also must evaluate environmental impacts and issue an environmental impact statement concerning the pipeline. *See* 42 U.S.C. §§ 4321 *et seq.*; *see also* 18 C.F.R. pt. 380;

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[1] Congress may "delegate" the federal government's eminent-domain power "to private corporations, to be exercised by them in the execution of works in which the public is interested." *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

Delaware Riverkeeper Network v. FERC, 857 F.3d 388, 394 (D.C. Cir. 2017). If FERC determines that the construction of the project "is or will be required by the present or future public convenience and necessity," it issues a "certificate" approving the pipeline. *See* 15 U.S.C. § 717f(e). Any party aggrieved by a certificate can seek a stay of the certificate, rehearing by FERC, and review in a federal court of appeals. *Id.* at § 717r.

2. This case concerns Mountain Valley's 303.5-mile natural gas pipeline in West Virginia and Virginia. Appendix (App.) 23. The pipeline is fully subscribed under long-term contracts with shippers that have committed to transporting gas at full capacity for a period of 20 years, thus helping to meet the growing demand for gas in the Northeast, Mid-Atlantic, and Southeast regions of the country. App. 24; *Mountain Valley Pipeline, LLC*, 161 F.E.R.C. ¶ 61,043, ¶¶ 9, 10, 41 (2017).

Prior to applying for a FERC certificate for its pipeline, Mountain Valley engaged in FERC's pre-filing environmental review process for nearly a year. *See* FERC Docket No. PF15-3, No. 20141027-5136 (Oct. 27, 2014). In April 2015, FERC issued a notice of intent to prepare an environmental impact statement, which informed affected landowners that their property could be condemned if FERC approved the project and that they had a right to comment and intervene. *Id.* No. 20150417-3022 (Apr. 17, 2015).

In October 2015, Mountain Valley filed its certificate application for the pipeline. App. 23. "Close to 300 parties, including residents and environmental groups, intervened in [FERC's review] process, and FERC received more than 2,000 written and oral

comments during its review[,]" *id.*, many from the landowners who were parties to the underlying lawsuit here. Court of Appeals Appendix (C.A. App.) 2795–2798, 2858–2868.

In October 2017, FERC issued a certificate of public convenience and necessity authorizing Mountain Valley's pipeline. App. 23. FERC found that "the public at large will benefit from increased reliability of natural gas supplies" and that "upstream natural gas producers will benefit from the project by being able to access additional markets for their product." C.A. App. 2774. It further concluded that the "benefits that the [pipeline] will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and landowners or surrounding communities." C.A. App. 2773–2774. FERC set an expected pipeline in-service date of October 2020. App. 23.

Many of the affected landowners asked FERC to stay and rehear the certificate, but it refused. App. 24 & n.1. At least five petitions seeking review of the certificate and a stay were then filed in the U.S. Court of Appeals for the D.C. Circuit, which denied all of them. *Id.*; *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *3 (D.C. Cir. Feb. 19, 2019) (denying petitions for review).

3. In 2018, the Fourth Circuit vacated two permits Mountain Valley had obtained in connection with the pipeline project. *See Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018) (Forest Service and Bureau of Land Management rights-of-way through national forests); *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635 (4th Cir. 2018) (Army Corps'

Section 404 permit under the Clean Water Act). Mountain Valley has taken substantial steps to secure these permits,[2] and there is no indication that construction will not continue and be completed. In fact, the pipeline is already 85 percent complete.[3] *See* Equitrans Midstream Corporation SEC Form 8-K, Item 2.02, Ex. 99.1, "Earnings News Release" (filed July 30, 2019) (available at https://tinyurl.com/y3y3jkwb (last visited August 14, 2019) ("Equitrans July 30, 2019 Form 8-K"). And Mountain Valley expects the pipeline to be placed into service by the middle of 2020. *See id.*

B. Proceedings Below

1. To construct its pipeline, Mountain Valley needed to acquire easements for permanent and exclusive rights-of-way, access roads, temporary construction, and temporary workspace rights-of-way across properties along the pipeline's route. App. 25. Approximately 85 percent of the 2,000-plus

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[2] For instance, following the Fourth Circuit's decision in *Army Corps of Engineers*, the State of West Virginia undertook a public process to modify the Clean Water Act 401 certification for the Corps' nationwide permit 12. Earlier this year, the State finalized the certification, received the Environmental Protection Agency's agreement on it, and is awaiting the Corps' completion of its own process. Mountain Valley hopes to avail itself of the new Corps permit with modified State conditions later this year.

[3] Construction is ongoing. At the time of this filing, Mountain Valley has nearly completed three certificated compressor stations and four certificated interconnects, and has completed or nearly completed the pipeline construction process through welding, coating, and wrapping on seven of the nine pipeline sections. *See* FERC Docket No. CP16-10-000, Weekly Report No. 91 (Aug. 8, 2019).

landowners along the pipeline route entered into agreements providing Mountain Valley the rights it needed, but despite Mountain Valley's efforts to negotiate, some landowners—including the Petitioners here—declined to come to an agreement. App. 22, 25. The Petitioners who have not yet settled their just-compensation claims against Mountain Valley are seven of these landowners,[4] and they own 13 of the 2,064 properties encompassed by the pipeline project. *See* FERC Docket No. CP16-10-000.

Mountain Valley proceeded to file lawsuits against the landowners in three district courts. Invoking the NGA, and in accordance with the procedures outlined by the Fourth Circuit in *East Tennessee Natural Gas Company v. Sage*, 361 F.3d 808 (4th Cir. 2004), Mountain Valley moved for partial summary judgment on its right to condemn under the NGA's delegation of eminent-domain authority, and sought preliminary injunctions for immediate access to the landowners' properties to enable tree-clearing and construction. App. 22.

Following evidentiary hearings, the district courts issued a collective 155 pages of opinions granting Mountain Valley's motions for partial summary judgment and for preliminary injunctions granting immediate possession of the landowners' properties. App. 22, 55–217. The district courts each found the summary-judgment record undisputed on the elements of Mountain Valley's right to condemn,

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[4] Petitioners Eagle's Nest Ministries, Inc., Sizemore Incorporated of Virginia, and Dowdy Farm LLC have agreed to settle their just-compensation claims.

rulings the landowners did not challenge on appeal. App. 22, 26–27.

With respect to the injunctions, the district courts found that Mountain Valley already had prevailed on the merits of its condemnation claim and would be irreparably harmed absent injunctive relief because requiring Mountain Valley to wait until the conclusion of all just-compensation trials would result in unrecoverable economic injury and would cause Mountain Valley to miss the October 2020 in-service deadline established by the FERC certificate. App. 28–29. The district courts also found the public interest strongly favored the injunctions, relying in part on FERC's findings—based on an extensive record and following lengthy agency review—that construction of the pipeline was in the public interest. App. 29–30.

The district courts rejected the landowners' claims that they would be disproportionately harmed by the immediate-possession injunctions because any harm to landowners would result not from the injunctions but from the uncontested exercise of eminent-domain power itself. App. 29. Acknowledging that the landowners were entitled to a "reasonable, certain, and adequate provision" for just compensation, the district courts further ordered Mountain Valley to: (i) make deposits with the courts in amounts three to four times the estimated value of each condemned easement; and (ii) post surety bonds equal to double each easement's estimated value, conditioned on the payment of just compensation. App. 30–31, 35 n.5. The district courts also authorized the landowners to draw down the deposited funds, and

several Petitioners have done so. *See Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Natural Gas Pipeline Over Tracts of Land in Giles County et al.*, No. 7:17-cv-492-EKD, Docket Entry Nos. 979, 996, 999, 1126, 1146 (W.D. Va.).

2. On appeal, a unanimous panel of the Fourth Circuit (Harris, J., joined by Gregory, C.J. and Wynn, J.) affirmed the three district courts' rulings.[5] At the outset, the court of appeals noted that the landowners had "not appealed the entry of partial summary judgment against them, nor the merits determination on which it rests: that under 15 U.S.C. § 717f(h), Mountain Valley currently has the right to exercise eminent domain and take easements on their property to build and operate the FERC-approved pipeline." App. 31. As for the injunctions, the court of appeals found no abuse of discretion in the findings that the four injunctive-relief factors supported the immediate-possession injunctions—findings Petitioners do not contest in their petition. App. 36–54.

The court of appeals also rejected Petitioners' contention that the district courts lacked the power to order immediate possession of the landowners' condemned property because the landowners' just compensation had not yet been determined. The court first observed that this argument was statutory, not

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[5] In early 2018, Petitioners sought an initial hearing en banc in the Fourth Circuit and stays from the district courts and the Fourth Circuit, but all of these requests were denied. C.A. No. 18-1165, Docket Entry No. 12 (order denying motion to stay); *id.* at Docket Entry No. 41 (order denying petition for initial hearing en banc); C.A. App. 1447, 1972, 2729 (district court orders denying motions to stay).

constitutional (App. 32)—a feature reflected in Petitioners' sole question presented. On the merits, the court reasoned—just as it had done 15 years earlier in *Sage*, 361 F.3d 808—that immediate-possession injunctions in these cases were consistent with Federal Rule of Civil Procedure 65 and the "normal rules governing the availability of injunctive relief." App. 34. The federal courts' injunctive powers, the court explained, were "adopted with the tacit approval of Congress" which, to date, has taken no steps to preclude the availability of immediate-possession injunctions predicated on NGA condemnations. App. 34. The court thus concluded that "[o]nce a gas company had established its substantive right to eminent domain under the Natural Gas Act"—which Mountain Valley indisputably had done here—"it was entitled" to seek a preliminary injunction under Rule 65, subject to the strict requirements for obtaining that relief. App. 34.

3. Petitioners sought rehearing and rehearing en banc, App. 218, though they did not ask the en banc court or this Court to stay the injunctions. The Fourth Circuit, after not ordering a response to the rehearing petition and without a request for a poll on rehearing, denied the petition. *Id.*

4. As noted, since the filing of the petition for writ of certiorari, three of the Petitioners have resolved their just-compensation claims through settlement. Just-compensation trials are scheduled for all but three of the Petitioners between October 2019 and May 2020. *Mountain Valley Pipeline, LLC v. 4.88 Acres of Land, Owned By Clarence B. Givens and Karolyn W. Givens*, No. 7:19-cv-221-EKD-RSB, Docket

Entry No. 1 (W.D. Va.); *Mountain Valley Pipeline, LLC v. 8.60 Acres of Land, Owned By Dowdy Farm LLC*, No. 7:19-cv-223-EKD-RSB, Docket Entry No. 1 (W.D. Va.); *Mountain Valley Pipeline, LLC v. 10.67 Acres of Land, Owned By Doe Creek Farm, Incorporated*, No. 7:18-cv-609-EKD-RSB, Docket Entry No. 1 (W.D. Va.); *Mountain Valley Pipeline, LLC v. 0.18 Acres of Land, Owned By Georgia Lou Haverty*, No. 7:18-cv-611-EKD-RSB, Docket Entry No. 1 (W.D. Va.); *Mountain Valley Pipeline, LLC v. 0.47 Acres of Land, Owned By Bruce M. Coffey and Mary E. Coffey*, No. 7:19-cv-148-EKD-RSB, Docket Entry No. 1 (W.D. Va.); *Mountain Valley Pipeline, LLC v. 7.18 Acres of Land, Owned By Michael Edward Slayton, Trustee or Margaret McGraw Slayton, Trustee, Margaret McGraw Slayton Living Trust*, No. 7:19-cv-222-EKD-RSB, Docket Entry No. 1 (W.D. Va.).[6]

REASONS FOR DENYING THE PETITION

There is no circuit split on the single question presented in the petition—not only have all six circuits that have addressed the question agreed on its proper resolution, but several have explicitly rejected the purported split with the Seventh Circuit that Petitioners posit, and multiple district courts in the Seventh Circuit have done the same. The decision below is, in any event, correct and consistent with this Court's precedents.

Moreover, the injunctions at issue have never been stayed, Mountain Valley already has accessed

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[6] Trials in the remaining two cases involving three Petitioners—James and Kathy Chandler, and Orus Berkley—have not yet been scheduled.

and initiated construction activities on each of the Petitioner's properties, more than 85 percent of Mountain Valley's pipeline is now complete, and the pipeline is expected to be in service by the middle of 2020. As a result, any decision on the merits in this case will have little, if any, practical effect—if the dispute is not already moot by that time. Each of these reasons alone supports denial of the petition; together, they compel it.

I. There Is No Conflict In The Circuits On The Question Presented.

Contrary to Petitioners' contention, the courts of appeals uniformly agree on the answer to the question presented and have resolved it in favor of the pipeline companies and against landowners.

Specifically, in addition to the court of appeals in this case, five other circuits—without a single dissenting opinion—have squarely rejected Petitioners' contention that federal courts lack the power to issue immediate-possession injunctions following NGA condemnations. *See Transcontinental Gas Pipe Line Co., LLC v. 6.04 Acres, More or Less, Over Parcel(s) of Land of Approximately 1.21 Acres, More or Less, Situated in Land Lot 1049*, 910 F.3d 1130, 1152 (11th Cir. 2018), *cert. denied sub nom. Goldenberg v. Transcontinental Gas Pipe Line Co., LLC*, 139 S. Ct. 1634 (2019) (observing that "[e]very circuit that has addressed this issue has held that a preliminary injunction granting immediate access is permissible so long as the pipeline company's right to condemn the property has been finally determined, such as through the grant of a motion for summary judgment, and all other requirements for issuance of a

preliminary injunction have been met") (citing *Transcontinental Gas Pipe Line Co.*, 907 F.3d at 735–37; *Alliance Pipeline L.P. v. 4.360 Acres of Land*, 746 F.3d 362, 368–69 (8th Cir. 2014); *Transwestern Pipeline Co., LLC v. 17.19 Acres of Prop.*, 550 F.3d 770, 776–78 (9th Cir. 2008); and *Sage*, 361 F.3d at 823–30); *see also Nexus Gas Transmission, LLC v. City of Green, Ohio*, 757 F. App'x 489, 492 n.2 (6th Cir. 2018) (following the other circuits and rejecting argument that the district court should not have granted a preliminary injunction "because Congress never granted federal courts the authority to give private parties the right to take immediate possession of another's property").[7]

Petitioners contend that there is disagreement between this legion of authority and a single decision of the Seventh Circuit—*Northern Border Pipeline Company v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998). Pet. 18–22. But as multiple courts of

[7] Numerous district courts—with virtual unanimity—are in accord. *See, e.g., Maritimes & Ne. Pipeline, LLC v. 6.85 Acres*, 537 F. Supp. 2d 223, 227 (D. Me. 2008); *In re Algonquin Nat. Gas Pipeline Eminent Domain Cases*, No. 15-CV-5076, 2015 WL 10793423, at *11 (S.D.N.Y. Sept. 18, 2015); *Cadeville Gas Storage LLC v. 18.935 Acres*, No. 12-cv-2822, 2013 WL 12181634, at *2–4 (W.D. La. July 31, 2013); *Gas Transmission Nw., LLC v. 15.83 Acres*, 126 F. Supp. 3d 1192, 1199–1201 (D. Ore. 2015); *Humphries v. Williams Nat. Gas Co.*, 48 F. Supp. 2d 1276, 1280 (D. Kan. 1999); *Transcontinental Gas Pipe Line Co. v. Parcel of Land Comprising 6.896 Acres*, No. 2:17-cv-12, 2017 WL 459858, at *1 (M.D. Ala. Feb. 2, 2017); *but see Transwestern Pipeline Co., LLC v. 9.32 Acres*, 544 F. Supp. 2d 939 (D. Ariz. 2008) (denying injunction where pipeline company did not move for summary judgment and had not yet established condemnation right), *aff'd sub nom. Transwestern Pipeline Co.*, 550 F.3d 770.

appeals—as well as district courts in the Seventh Circuit[8]—correctly have pointed out over the 15 years since the supposed split first developed after the Fourth Circuit's decision in *Sage*, there is no such division between the circuits. *See*, *e.g.*, App. 35–36 n.6; *Transcontinental Gas Pipe Line Co.*, 910 F.3d at 1152; *Transcontinental Gas Pipe Line Co.*, 907 F.3d at 736–37; *Transwestern Pipeline*, 550 F.3d at 778.

Indeed, in *Northern Border*, the Seventh Circuit concluded that the pipeline company was not entitled to an immediate-possession injunction because it *conceded* it had no substantive right to the property, and had not even sought, much less obtained, a court order condemning the property at issue—the pipeline company instead relied solely on a FERC certificate of public convenience and necessity. 144 F.3d at 470–71; *see also Transcontinental Gas Pipe Line Co.*, 907 F.3d at 736–37 (reasoning that "*Northern Border* is clearly distinguishable because of the gas company's failure to 'obtain an order determining that it had the right to condemn before it sought a preliminary injunction'") (citing *Sage*, 360 F.3d at 827–28); Br. of Amici Curiae Public Law Scholars, *et al.* in Support of Petitioners at 6 (acknowledging that the pipeline company in *Northern Border* explicitly "'disavow[ed]'" that it had

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[8] *See, e.g., Rockies Express Pipeline, LLC v. 123.62 Acres*, No. 1:08-cv-0751, 2008 WL 4493310, at *2 (S.D. Ind. Oct. 1, 2008) ("[O]nce a natural gas company's condemnation authority is confirmed, its right to immediate possession follows."); *Guardian Pipeline, LLC v. 295.49 Acres*, No. 08-cv-0028, 2008 WL 1751358, at *22 n.11, 23 (E.D. Wis. Apr. 11, 2008) (distinguishing *Northern Border* and granting immediate possession to gas company that had obtained condemnation ruling); *Guardian Pipeline, LLC v. 950.80 Acres*, 210 F. Supp. 2d 976, 979 (N.D. Ill. 2002) (same).

any substantive entitlement to the property) (quoting *Northern Border*, 144 F.3d at 471). This would be the same result in every other circuit that has decided the issue—each of which requires a finding of the authority to condemn by the district court before an immediate-possession injunction can be awarded.

Relying on an Arizona district court ruling distinguishable for the same reasons *Northern Border* is,[9] Petitioners claim this explanation for the consistency between *Northern Border* and the rulings in the other six circuits—the existence, or absence, of a condemnation judgment—is illusory because a condemnation order "is not the source of any substantive power." Pet. 20–21. But that is just an argument challenging the outcomes in unbroken line of precedent in the circuits—with which *Northern Border* is aligned—*not* an argument that exposes any disagreement among the circuits.

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[9] *See Transwestern Pipeline*, 544 F. Supp. 2d 939. To the extent the district court in *Transwestern Pipeline* found that immediate-possession injunctions could not be issued even after an order of condemnation at summary judgment, that was dicta because the pipeline company there moved for a preliminary injunction based on its FERC certificate, not for summary judgment under Federal Rule of Civil Procedure 56 seeking an order of condemnation. *Id.* at 942. In any event, the Ninth Circuit squarely repudiated the district court's dicta on appeal, finding that "the substantive right to condemn under § 717f(h) of the NGA ripens only upon the issuance of an order of condemnation." *Transwestern Pipeline*, 550 F.3d at 778. "At that point," the court of appeals concluded, "the district court may use its equitable powers to grant possession to the holder of a FERC certificate if the gas company is able to meet the standard for issuing a preliminary injunction." *Id.*

Amici Public Law Scholars nevertheless assert that in *Northern Border*, the Seventh Circuit reached a definitive ruling that the "preexisting," "substantive" "entitlement" to property that is prerequisite to an immediate-possession injunction cannot arise until after just compensation is determined and paid. Public Law Scholars Br. at 7–9. But as amici themselves acknowledge, and the Seventh Circuit's opinion makes clear, the issue of whether the pipeline company had the necessary preexisting, substantive entitlement was not contested in *Northern Border*—indeed, the pipeline company explicitly "disavowed" any such entitlement. 144 F.3d at 471. The Seventh Circuit's discussion of the issue accordingly was dictum at best. *See United States v. Daniels*, 902 F.2d 1238, 1241 (7th Cir. 1990) ("[J]udicial discussions of issues that are not contested are not holdings.") (citations omitted). And "dicta does not a circuit split make." *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 334 n.10 (D.C. Cir. 2015).[10]

Accordingly, there is no disagreement among the circuits on the question presented, and the petition should be denied for that reason alone.

II. The Decision Below Is Correct.

The petition also should be denied because the Fourth Circuit's ruling that federal courts have the power to issue immediate-possession injunctions based on NGA condemnations is fully consistent with

[10] Amici ignore the facts that no court (with one, since-repudiated exception) has endorsed their interpretation of *Northern Border*, and that numerous courts—including many district courts in the Seventh Circuit—have adopted Mountain Valley's and the Fourth Circuit's reading.

this Court's precedents and firmly established legal principles.

Time and again, this Court has recognized the powerful presumption that, unless Congress explicitly says otherwise, federal courts may exercise all of their broad equitable authority. *See, e.g., United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001) ("[W]hen district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise"); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 66 (1992) ("[W]e presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise.") (citation omitted); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (stating that, without an explicit statutory restriction, "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction"). These "equitable powers assume an even broader and more flexible character" in this case because of the "public interest'" implicated by the underlying pipeline project. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291 (1960) (citation omitted); App. 51 (noting FERC's "finding that [Mountain Valley's] pipeline will benefit the public by meeting a market need for natural gas, and will do so in a way that is environmentally acceptable"); 15 U.S.C. § 717(a) ("[T]he business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest.").

Neither the NGA nor any other federal statute even suggests that courts may not issue immediate-possession injunctions predicated on condemnation

orders, much less explicitly strips them of the authority to do so, *see Transcontinental Gas Pipe Line Co.*, 907 F.3d at 738 ("Nothing in the NGA suggests either explicitly or implicitly that the rules governing preliminary injunctions should be suspended in condemnation proceedings"), and Petitioners (and their amici) do not point to any. In fact, Petitioners and their amici never mention the presumption against displacement of equitable remedies at all.

Additionally, as the Eleventh Circuit recently observed, there is nothing in Rule 71.1 of the Rules of Civil Procedure—which governs condemnation proceedings, including those involving the NGA, but which the petition never mentions—"indicat[ing] that Congress intended to limit a district court's authority to issue a preliminary injunction in condemnation proceedings under the Natural Gas Act." *Transcontinental Gas Pipe Line Co.*, 910 F.3d at 1153. To the contrary, "Rule 71.1(a) expressly states that the other Rules of Civil Procedure"—including, relevant here, Rule 65—"apply in federal condemnation proceedings unless Rule 71.1 itself provides a governing rule," and Rule 71.1 does no such thing when it comes to the availability of injunctive relief in NGA proceedings. *Id.*; *see also Transcontinental Gas Pipe Line Co.*, 907 F.3d at 739 (same). In fact, Rule 71.1 assumes that in condemnation proceedings, possession may precede a determination (or payment) of just compensation. *See* Fed. R. Civ. P. 71.1(i)(1)(C) ("*At any time before compensation has been determined and paid*, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff *has already taken* title, a lesser interest, or *possession as to any part of it*, the court must award

compensation for the title, lesser interest, or possession taken.") (emphasis added).

Without addressing the need to show an explicit statutory command before federal courts can be deemed to be stripped of their broad equitable powers in NGA condemnation cases, Petitioners argue that the decision below is wrong because payment of just compensation must precede possession unless Congress provides some "special right to early access." Pet. 13 (citing *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 3–5 (1984)); *see also id.* 23 ("When, as here, a condemnation statute is silent on the issue of immediate possession, congressional silence means 'no.'") (citing *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946); *City of Cincinnati v. Vester*, 281 U.S. 439, 448 (1930); *W. Union Tel. Co. v. Pa. R. Co.*, 195 U.S. 540, 569 (1904)).

But there is no statutory basis for this asserted principle—in the NGA or elsewhere—and Petitioners do not claim there is. Nor do Petitioners invoke a constitutional ground for their claimed rule—indeed, they do not cite the Takings Clause even once.[11] And Petitioners' cited cases do not deal with immediate-possession injunctions, say that Congress must specifically provide a "special right of early access," or even address, much less reject the application of, the presumption that statutory silence means that courts retain the full panoply of their equitable powers.

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[11] In the court of appeals, Petitioners argued that the injunctions were "quick-take injunctions" that violated separation-of-powers principles. This is absent from their question presented. Pet. i.

Petitioners further contend that the court of appeals erred because "neither federal statute nor state law gives pipeline companies any substantive right to immediate possession . . . ." Pet. 2. The immediate-possession injunctions thus are unlawful, Petitioners assert, because they purportedly "create new rights or change existing ones" by conferring a "new right to possession 'right now.'" Pet. 15 (quoting *N. Border*, 144 F.3d at 471). This argument fails in every particular.

First, Petitioners have the controlling analysis backwards—the question is whether a statute clearly and explicitly *forbids* federal district courts from issuing certain equitable relief, not whether a statute (or state law) clearly and explicitly *authorizes* them to do so. As this Court has said, "[t]hat a statute does not authorize the remedy at issue 'in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment.'" *Franklin*, 503 U.S. at 68 (citation omitted). Federal courts are deemed inherently to possess the full range of equitable authority "exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73)." *Grupo Mexicano De Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 318–319 (1999) (citation omitted)). They do not need a statute to provide them equitable authority they already have.[12]

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[12] Amici Public Law Scholars' contention (at 11) that no "implication of quick take authority" can be found in the NGA fails for the same reason.

Second, contrary to Petitioners' apparent claim (Pet. 2), one need not have a "substantive right"—conferred by federal statute or state law—to the equitable relief itself in order for a federal court to award that relief. Indeed, there is no "right" to equitable relief at all, *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right"), and neither the Fourth Circuit below nor Mountain Valley have suggested otherwise. Nor is "an injunctive right of immediate possession . . . a substantive right, conferrable only by Congress." *Transcontinental Gas Pipe Line Co.*, 907 F.3d at 735. Rather, immediate-possession injunctions simply "haste[n] the enforcement of the substantive right" to condemn using eminent domain conferred by Congress in the NGA. *Id.* at 735–36.

Third, the injunctions here do not themselves create any new "substantive rights." *Transcontinental Gas Pipe Line Co.*, 907 F.3d at 736 (holding that immediate-possession injunctions "do not create any new rights"). Injunctive relief is "appropriate to grant intermediate relief of the same character as that which may be granted finally," *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945)—here, possession of the taken property. *See Seymour v. Freer*, 75 U.S. 202, 213–14 (1868) (holding that property rights "distinct from the legal ownership . . . constitute an equity which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked"); *Sage*, 361 F.3d at 824 (a "right to condemn" entitles its holder "to possession upon the entry of final judgment"). Once final judgment is entered and just compensation is paid, the ultimate

relief is in fact the same as the intermediate injunctive relief awarded: possession of the property.

Petitioners try to resist these conclusions by claiming that the ultimate relief to which a condemnor is entitled following just-compensation proceedings is simply an "option" to buy the condemned property—relief, they claim, of a different substantive character from immediate possession. Pet. 14–15. This is wrong. By rule, once condemnation has been determined and the condemnor has taken possession of the property, the condemnor *must* pay the just compensation later adjudicated, just as it would be bound to pay any court order requiring payment. *See* Fed. R. Civ. P. 71.1(i)(1); *WBI Energy Transmission, Inc.*, No. CV 14-130-BLG-SPW, 2017 WL 532281, at *6 (D. Mont. Feb. 8, 2017) (after awarding pipeline company an immediate-possession injunction, stating that, under Rule 71.1(i)(1), the landowner "is assured compensation for the grant of possession to [the company] in the Subject Property"). Indeed, this is true even if, "after a motion and hearing" on just compensation, the court "dismiss[es] the action as to a piece of property," in which case the court still "*must* award compensation for the . . . possession taken." Fed. R. Civ. P. 71.1(i)(1)(C) (emphasis added). The condemnor thus has no mere "option" to pay. Nor can condemnors in Mountain Valley's shoes jettison their obligations under the surety bonds and court deposits that fully secure Petitioners' right to just compensation.

Petitioners separately argue that the injunctions here "undermine" the "bedrock principle[] of equitable relief" that injunctions are intended "'merely to

preserve the relative positions of the parties'" pending trial. Pet. 17 (quoting *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018)). This, too, is based on a mischaracterization of the circumstances of this case, where the award of injunctive relief followed a summary-judgment order of condemnation under the NGA in favor of the holder of a FERC certificate authorizing the construction of a pipeline—a judgment conveying a right to condemn property that is subject to equitable protection by the courts. *See Seymour*, 75 U.S. at 213–14 (holding that property rights "distinct from the legal ownership . . . constitute an equity which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked"). As such, the injunctions were in fact tailored to preserving the "relative positions of the parties" at the time of entry—including Mountain Valley's as condemnor.

In any event, courts have broad injunctive power both to prevent the parties from taking action and to order them to do so. *See*, *e.g.*, *In re Lennon*, 166 U.S. 548, 556 (1897) ("mandatory" injunctions are "clearly not beyond the power of a court of equity, which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it") (citations omitted); *California v. Am. Stores Co.*, 495 U.S. 271, 280–83 (1990) (holding that statute entitling party to "injunctive relief" provides for both prohibitory and mandatory injunctions under the "traditional principles of equity"). *Benisek* does not hold or suggest otherwise.

Petitioners surmise that injunctions like those issued here could result in uncompensated damage to private properties if pipelines are later canceled and pipeline companies "shutter operations and leave no money to compensate the landowners . . . ." Pet. 26. But this conjecture is not a possibility where, as here, the condemnor, Mountain Valley, has deposited with the district courts funds equal to three-to-four times the appraised value of each condemned easement, and posted surety bonds double each easement's appraised value. App. 30–31, 33, 35 n.5; *see also*, *e.g.*, C.A. App. 1510–1543.[13] In addition, the landowners here were permitted to—and many did—draw down the deposited funds pending trials on just compensation. *Supra* at 8–9.

Petitioners also claim that the injunctions in this case "infringe on a State's ability to exercise its veto power [under the Clean Water Act]—before potential damage is done—on pipeline projects that impact water sources." Pet. 24–25. This ignores, however, the extensive environmental-impact analysis undertaken by FERC in approving Mountain Valley's pipeline in the first place. And Petitioners had ample opportunity to raise this argument below, but never did—it is, accordingly, waived and provides no basis to grant the petition. *See Timbs v. Indiana*, 139 S. Ct.

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[13] In a similar vein, amicus The Niskanen Center wishes the Court to "grant review to determine whether the measure of just compensation, when denied to the landowner at the time of taking, should include consequential losses . . . ." Br. of Amicus Curiae The Niskanen Center at 6. This issue plainly is far outside the boundaries of the Petitioners' question presented (*infra* at 26 n.15) and unripe to boot since just compensation for the remaining Petitioners has not yet been decided.

682, 690 (2019) ("'[W]e are a court of review, not of first view'") (citation omitted).

Petitioners' amici—but not Petitioners themselves—invoke this Court's June 2019 ruling in *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), suggesting that it undermines the injunctions the Fourth Circuit upheld. Relying on the Takings Clause, *Knick* abrogated the requirement (inapposite here) that a property owner must first seek just compensation for a taking under state law in state court before bringing a federal constitutional takings claim under 42 U.S.C. § 1983 in federal court. 139 S. Ct. at 2179 (overruling *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). In reaching that conclusion, the Court reasoned that a "property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it." *Id.* at 2167. But the Court reiterated that "that does *not* mean that the government [or, here, a pipeline company with delegated power] must provide compensation in advance of a taking or risk having its action invalidated . . . ." *Id.* at 2167–68 (emphasis added). Rather, the Court made clear, "[s]o long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities." *Id.* at 2168.[14]

That Petitioners did not even mention *Knick* (or the Takings Clause) in their petition thus is not

[14] Not only do the Petitioners have "some way to obtain compensation after the fact"—their just-compensation trials—that compensation is fully secured by Mountain Valley's substantial court deposits and surety bonds. *Supra* at 8.

surprising: they made no Takings-Clause argument in the lower courts and their sole question presented focuses narrowly on "whether district courts have power" to issue immediate-possession injunctions in NGA condemnation proceedings. Pet. i.[15] Moreover, *Knick* had nothing at all to say on this narrow question, which was far afield from the constitutionality of *Williamson County*'s state-litigation requirement that was the reason the Court granted certiorari in that case. *See Knick*, 139 S. Ct. at 2169; Public Law Scholars Br. at 18 (acknowledging that "*Knick* dealt with a different question from the one presented in this case"). And, as noted, *Knick* explicitly found that the party exercising a taking need not "provide compensation in advance" or else "risk having its action invalidated." *Knick*, 139 S. Ct. at 2167–68.

In sum, the Fourth Circuit's decision is correct and consistent with this Court's precedents. This Court's review therefore is unwarranted for this reason as well.

III. This Case Is A Poor Vehicle For Plenary Review.

Even if the question presented met any of the criteria supporting the exercise of this Court's certiorari jurisdiction—and it does not—this case provides an unsuitable vehicle in which to resolve it. That is because the relief Petitioners seek—vacatur of

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[15] Amici's contentions predicated on *Knick* thus fall far outside Petitioners' question presented and should not be considered. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 267 n.4 (2010) ("'[W]e do not ordinarily address issues raised only by *amici*'") (citation omitted).

the injunctions granting Mountain Valley immediate possession of Petitioners' properties—would not meaningfully redress Petitioners' claimed harm: Mountain Valley's possession of Petitioners' properties in January and February 2018, and the pipeline construction work Mountain Valley has performed on those properties since.

This case thus is already on the verge of being moot. The Court cannot "turn back the clock" now and preclude Mountain Valley from accessing Petitioners' properties and conducting the construction work already completed on those properties over the past 18 months. *Matos ex rel. Matos v. Clinton Sch. Dist.*, 367 F.3d 68, 72 (1st Cir. 2004); *see also Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 425 (5th Cir. 2013) ("Mootness applies when intervening circumstances render the court no longer capable of providing meaningful relief to the plaintiff."). Moreover, as noted, construction of the pipeline is more than 85 percent complete and the pipeline is expected to be in service by the middle of 2020—at which point the Court will be unable to meaningfully (if at all) redress Petitioners' alleged injuries.[16]

Petitioners ignore all of this—as well as their failure even once to seek a stay of the injunctions following the Fourth Circuit panel's denial of their stay request more than 18 months ago. Instead, citing two Fourth Circuit decisions from last year vacating some permits and rights-of-way along the pipeline

[16] In addition, the latest of Petitioners' scheduled just-compensation trials is set for May 2020. *Supra* at 10–11. Only two just-compensation trials remain unscheduled. *Supra* at 11 n.6.

route, Petitioners speculate that Mountain Valley "may never be able to" complete the pipeline. Pet. 10. This unsupported conjecture defies both the facts and common sense and cannot dispel any mootness concerns here.

As noted, Mountain Valley has completed more than 85 percent of the pipeline and is maintaining a brisk construction pace. *Supra* at 6 & n.3. It is inconceivable that Mountain Valley would abandon a nearly-completed project of this magnitude in which it already has invested several billion dollars. *See* Equitrans July 30, 2019 Form 8-K (available at https://tinyurl.com/y3y3jkwb). Petitioners' bald speculation that Mountain Valley nonetheless would walk away from such an investment, without a speck of supporting evidence, cannot alone create an ongoing, actual case or controversy. *See City News & Novelty v. City of Waukesha*, 531 U.S. 278, 283 (2001) (explaining that claimant's "speculation" cannot "shield [a] case from a mootness determination").

Petitioners try to head off their looming mootness problem with the conclusory assertion that this case would fall within the "capable of repetition, yet evading review" exception to mootness. Here they offer more speculation that pipelines "tend to be 'collocated' in pipeline corridors" so Petitioners "will likely face more immediate-possession requests as new pipeline routes are announced . . . ." Pet. 29 n.14. But Petitioners cite nothing to support their claims about "collocated" pipelines or the likelihood that *they* will be subject to future immediate-possession injunctions like those in this case.

This falls well short of the demanding standard that must be met to satisfy the "capable of repetition" exception, which requires a "'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party. . . ." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (citation omitted). Nor is the purely speculative possibility that unidentified third parties not party to this litigation may, in the future, seek to lay their own pipeline in the vicinity of Mountain Valley's pipeline sufficient to permit Petitioners to continue with this case *against Mountain Valley*. *See Columbia Gas Transmission, LLC v. 76 Acres*, 701 F. App'x 221, 231 (4th Cir. 2017) (rejecting application of exception in challenge to immediate-possession injunctions where landowner-defendants "have not shown (and cannot feasibly show) that there is a reasonable expectation that *Columbia* will again seek immediate possession of the Landowners' property") (emphasis added).

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

WADE W. MASSIE
PENN, STUART & ESKRIDGE
208 E. Main Street
Abingdon, VA 24210
(276) 623-4409

COLIN E. WRABLEY
Counsel of Record
NICOLLE R. SNYDER BAGNELL
STEFANIE L. BURT
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131
cwrabley@reedsmith.com
Counsel for Respondent

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