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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

This case is about much more than eminent-domain procedure in Natural Gas Act (NGA) takings cases. It also implicates important limits on the injunctive power of federal courts. The approach of the Fourth Circuit and its followers disregards those critical limits, encroaches on Congress's power to prescribe the methods of federal condemnation, and permits pipeline companies to violate the Takings Clause. The Seventh Circuit's approach honors the limits of injunctive power and thereby avoids constitutional problems. The two approaches could not be more different—either in how they frame the question presented or the outcomes they produce.

As numerous amici attest, this case is exceptionally important. Besides presenting an abiding circuit split, the petition raises questions about federal judicial power to create substantive rights that Congress never authorized and that the Constitution does not allow. The petition should be granted.

ARGUMENT

I. Courts Are Divided on the Question Presented.

There is a definite and mature circuit split on the question presented. This case would have

turned out differently under the Seventh Circuit's approach. As Judge Flaum explained in *Northern Border*, neither the NGA nor state law give a pipeline company any "preexisting entitlement" to immediate possession. *N. Border Pipeline Co.* v. *86.72 Acres of Land*, 144 F.3d 469, 472 (7th Cir. 1998). That lack of a substantive "entitlement to the defendants' land *right* now" always answers the question presented in favor of landowners. *Id.* at 471. The decisions of the Fourth Circuit and five other courts of appeals, in contrast, always answer that question in favor of pipeline companies.

A. The approaches of the Seventh and Fourth Circuits are irreconcilable.

An analogy illustrates the reality of the conflict between the Seventh and Fourth Circuits. Every year, thousands of runners apply to run the Boston Marathon. The Boston Athletic Association extends certain qualifying runners an invitation to participate. The invitation is the applicant's ticket to run. Only those runners who cross the finish line are offered finisher's medals. Most finishers accept the medal; a few decline. See *FAQ*, BOSTON ATHLETIC ASSOCIATION, http://baa.org/faq.

Under the Seventh Circuit's approach, the FERC certificate plays the same function as the

marathon's invitation letter: it allows the applicant to participate in a process. Like qualified runners, qualified pipeline companies can take steps toward the finish line. For pipeline companies, the finish line comes when there is a final judgment setting the amount of just compensation. To get the finisher's medal (possession of property), the company must pay the amount of the final judgment.

A FERC certificate entitles a pipeline company to a process, not the finisher's medal. To take the finisher's medal without first crossing the finish line, the company under the Seventh Circuit's approach must point to substantive law allowing it to take first and pay later. See *N. Border*, 144 F.3d at 471-472. Neither the NGA nor the FERC certificate grants that substantive right. *Ibid*. Courts cannot simply assume the pipeline company will finish the course and give it a finisher's medal at mile marker 3.

The Fourth Circuit approach, by contrast, hands every pipeline company a finisher's medal at the starting line. Under *Sage*, the invitation itself (the FERC certificate) qualifies the company for immediate possession—as long as the district court determines, by summary judgment, that the FERC order is valid and that Rule 65's injunction factors are otherwise satisfied. See *E. Tennessee Nat. Gas Co.* v. *Sage*,

361 F.3d 808, 828-830 (4th Cir. 2004). *Sage* and its progeny transform possession of the property from a finisher's medal into a mere participation trophy. The two approaches are irreconcilable.

B. Attempts to deny the split are unavailing.

The Fourth Circuit believes that the pipeline company in *Northern Border* would have prevailed if only it had sought "an order determining that it had the right to condemn." *Sage*, 361 F.3d at 826. Not so. A summary-judgment order affirming the company's eminent-domain power under the NGA would not have changed *Northern Border*'s outcome. The Seventh Circuit's analysis accepts the very thing that such an order purports to confirm—the pipeline company's "substantive claim to property, based on its eminent domain power under [NGA] §717f." *N. Border*, 144 F.3d at 471. Yet the Seventh Circuit still finds no authority to confer prejudgment possession.

The Seventh Circuit rightly identifies the FERC certificate, not judicial recognition of its validity, as the true source of a pipeline company's condemnation power; it further recognizes that district courts cannot decide (and thus must presume) a certificate's validity. *N. Border*, 144 F.3d at 471-472 ("[N]o one disputes the validity of the FERC certificate conferring

the eminent domain power, nor could they do so in this proceeding."); 15 U.S.C. §717r(b) (granting FERC and certain courts of appeals "exclusive" jurisdiction "to affirm, modify, or set aside" a FERC certificate). Blessing a certificate holder's eminent-domain power—by granting partial summary judgment—is thus purely symbolic. *Northern Border* makes clear that judicial recognition of the pipeline company's takings power under the NGA would not have changed the Seventh Circuit's analysis.

MVP attempts to distinguish *Northern Border* based on the concession of the pipeline company there that it had no substantive right to immediate possession. But MVP effectively makes the same concession here. It points to no substantive right to immediate possession because it cannot. After conceding that the NGA contains no such provision, MVP also concedes that no one has a right to equitable relief. Br. in Opp.21. MVP thus puts itself in the same boat as the *Northern Border* pipeline company: both companies admit, as they must, that no substantive right to immediate possession exists. MVP's attempted distinction thus fails to harmonize the Seventh and Fourth Circuit approaches.

Indeed, MVP's theory of the case confirms the conflict. MVP argues that an underlying substantive right to immediate possession was

not necessary to support the equitable relief granted here—and that proving up the four injunction factors was enough. In doing so, MVP ignores that the Seventh Circuit squarely addresses—and rejects—that argument. *N. Border*, 144 F.3d at 471-472 (dismissing the argument that a district court has "equitable power to enter a preliminary injunction order" when the company holds a "FERC certificate conferring the eminent domain power" and "satisfies all the other equitable preliminary injunction factors").

As Judge Flaum explains, the injunctive-factors-are-enough argument that MVP echoes here "misapprehends the relief available in preliminary injunction proceedings." *N. Border*, 144 F.3d at 471. "A preliminary injunction may issue only when the moving party had a substantive entitlement to the relief sought" that "was fully vested even before initiation of the lawsuit." *Id.* at 471-472. The pipeline company in *Northern Border* could not obtain an injunction because it could not point to any "substantive entitlement to the defendants' land *right now*." *Id.* A FERC certificate is no basis for awarding immediate possession. *Id.*

MVP would have lost at the Seventh Circuit. At the Fourth Circuit, MVP's injunctive-factors-are-enough argument prevailed. The circuits are thus split on the question presented.

II. This Is the Right Case to Resolve the Circuit Split.

A. The petitioners have live claims.

Congress set up a "balanced framework" for NGA takings. *Allegheny Defense Project* v. *Fed. Energy Reg. Comm'n*, 932 F.3d 940, 952 (D.C. Cir. 2019) (Millett, J., concurring). FERC first decides whether a particular pipeline is in the public interest. If it is, FERC issues a certificate and attaches conditions to it, such as securing federal and state permits.

A FERC certificate triggers a two-track system. The landowners, after exhausting administrative remedies, can challenge FERC's public-interest determination and the required permits in designated federal courts. 15 U.S.C. §717r(a)-(b). The certificate also allows the pipeline company to begin the ordinary condemnation process in district court. 15 U.S.C. §717f(h).

Through this two-track system, Congress intended to create space for judicial review of required permits and of FERC's public-use determination *before* allowing pipeline companies to take possession and inflict "functionally irreversible" harm to the land. *Allegheny Defense*, 932 F.3d at 952 (Millett, J., concurring). That is why Congress granted pipeline companies only the straight power of

condemnation—not quick-take power—under the NGA. See *ibid.* (explaining that "as Congress designed the . . . system, eminent domain proceedings would likely not conclude" before "judicial review of the public-use determination").

FERC and federal courts—other than the Seventh Circuit—have "upend[ed] that balanced framework." *Allegheny Defense*, 932 F.3d at 952 (Millett, J., concurring). Challenges to a pipeline company's power to take were supposed to be resolved before pipeline companies obtained possession. But the combination of FERC tolling orders and district-court orders granting immediate possession flipped Congress's intended process. *Ibid.* By granting immediate possession, the courts subvert Congress's intent, "run[] roughshod over basic principles of fair process," and "forestall judicial review while people's homesteads are being destroyed." *Id.* at 950.

Most landowners simply give up and settle once the pipeline company has "bulldoz[ed] and blast[ed] its pipeline into their homesteads." *Allegheny Defense*, 932 F.3d at 950 (Millett, J., concurring). Once that damage is done, courts are reluctant "to unshuffle the deck." *Id.* at 953.

MVP's mantras—that 85% of the pipeline is constructed, that 85% of landowners have settled, and that it has spent billions on the project—

thus expose reasons to grant review, not deny it. By the time a landowner's challenge to an immediate-possession order reaches the appellate level, the pipeline is usually already "cemented" in place, *Allegheny Defense*, 932 F.3d at 950 (Millett, J., concurring), and trials on just compensation have usually occurred. See, *e.g.*, *Transcon. Gas Pipe Line Co.* v. *6.04 Acres*, 910 F.3d 1130, 1151 (11th Cir. 2018); *Columbia Gas Transmission, LLC* v. *76 Acres*, 701 F. App'x 221, 225, 231 (4th Cir. 2017).

Here, however, the petitioners' claims are live: none of the petitioners has had a trial on just compensation. Indeed, MVP has not installed the pipeline on their lands. This case thus offers the Court a rare opportunity to resolve the circuit split and restore the balanced system that Congress created for NGA condemnations.

B. Meaningful redress is available.

Landowners "suffer[] a special kind of injury when a stranger directly invades and occupies the owner's property." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). Court intervention would redress the violation of the petitioners' right to exclude others from their homesteads at least through the time of trial. By invoking the specter of "looming" mootness (Br. in Opp.27-28), MVP

concedes that the petitioners' claims are still alive and that at least some redress is possible.

And if MVP ultimately fails in its "hopes" to obtain missing permits (Br. in Opp.6 n.2), a decision from this Court could prevent landowners from "suffer[ing] needless and avoidable harm" from the remaining construction activities. *PennEast Pipeline Co.*, 163 FERC ¶61,159, 2018 WL 2453596, at *4 (May 30, 2018) (Glick, Comm'r, concurring).

The opportunity for meaningful redress will not disappear. It is unlikely that all nine of the petitioners' trials would be over before the Court issued a decision. Further, if the Court grants review, the petitioners will again ask the courts below—and, if necessary, this Court—for a stay of proceedings.[1] And in any event, an exception to the mootness doctrine would ensure continuing jurisdiction. See *infra*.

C. Other factors make this case an ideal vehicle.

The petitioners preserved the key arguments on the question presented: whether immediate-

[1] The petitioners repeatedly asked the district courts and the court of appeals for stays of the immediate-injunction orders, but all such requests were denied.

possession injunctions exceed the scope of the district courts' equitable powers, violate the Rules Enabling Act, offend the NGA, and breach constitutional separation-of-powers limits.[2] The courts of appeals have drawn clear lines on those issues (Part I), rendering further percolation unnecessary.

Jurisdiction is also protected through the "capable of repetition, yet evading review" exception to mootness. That exception applies "where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration" and "(2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016).

This case checks both boxes. Compensation trials usually occur before orders granting pretrial possession reach this Court. And regardless of when trials happen here, there is

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[2] Contrary to MVP's suggestion (Br. in Opp.19 & n.11), the petition explicitly argues that "the injunctions are a judicial infringement on Congress's power to prescribe the methods of condemnation" and inflicts "structural harm to constitutional separation of powers." Pet. 23-24, 27.

more than a "reasonable expectation" that the petitioners will face such orders again.

Three undisputed facts demonstrate that likelihood. First, as the country's largest source of natural gas, the Marcellus Shale will undergo continued development, requiring additional pipelines for transport to the East Coast. [3] Second, FERC requires applicants to consider colocating new pipelines along the same path as existing ones. 18 C.F.R. 380.15(e)(1) (FERC's rule that "[t]he use, widening, or extension of existing rights-of-way must be considered in locating proposed [pipeline] facilities"). Third, pipeline companies have uniformly obtained immediate possession in the Fourth Circuit. Because additional pipelines are a certainty, because those pipelines are likely to be colocated with MVP's line, and because Fourth Circuit courts have repeatedly awarded immediate possession, the petitioners can reasonably expect to face such orders again.

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[3] See Alan Bailey, *Appalachia to the rescue*, PETROLEUM NEWS (Jan. 27, 2008), https://perma.cc/WNQ5-TXQX?type=image.

III. The Fourth Circuit's Decision Runs Headlong Into Constitutional Problems, Warranting Intervention.

A. The decision below ignores critical limits on federal judicial power.

In awarding equitable relief, the first principle is that "equity follows the law." *Douglas* v. *Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 619-620 (2012). More than a pithy maxim, the rule is an if-then statement:

> *If* a claimant has a substantive legal right, *then* the court can consider granting equitable remedies tailored to enforce or protect that underlying legal right.

MVP's brief focuses exclusively on the "then" statement, arguing that federal courts are presumed to have broad equitable powers to fashion remedies. Br. in Opp.17-18. But that misses the point. The problem is with the "if" statement: pipeline companies have no substantive right to immediate possession in NGA condemnations and thus cannot satisfy the condition precedent to obtaining such relief.

The Court has described a condemnor's right in straight-condemnation proceedings: the condemnor is entitled to a process, not possession.

Straight condemnation is merely "a means by which the sovereign may find out what any piece of property will cost." *Danforth* v. *United States*, 308 U.S. 271, 284 (1939). Payment of the final judgment—not the condemnation process itself—is what creates the right to possession. *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 4 (1984). (holding that "[i]f the [condemnor] wishes to exercise that option, it tenders payment to the private owner, whereupon title and right to possession vest"); *Danforth*, 308 U.S. at 284-285 ("[T]itle does not pass until compensation has been ascertained and paid.").

The Court has also instructed that a condemnor's right to take property is limited to those "sovereign powers . . . expressed or necessarily implied" in the condemnation statute. *United States* v. *Carmack*, 329 U.S. 230, 243 n.13 (1946); see also Pet.23-24.

The Fourth Circuit's approach departs from both of those norms. It creates a right to immediate possession that far exceeds a condemnor's rights in a straight-condemnation proceeding, which is all an NGA condemnation is. And the Fourth Circuit's approach also violates the Court's prohibition on giving condemnors rights beyond what the legislature has expressly provided.

By endorsing a remedy untethered from any right to immediate possession, the Fourth Circuit blessed giving pipeline companies a new right and abridging landowners' substantive rights under state property law. This trespasses both "traditional principles of equity jurisdiction," *Grupo Mexicano de Desarrolo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-319 (1999), and the Rules Enabling Act's prohibition on using the federal rules to "abridge, enlarge, or modify any substantive right," 28 U.S.C. §2072(b). Pet.15-18.

B. Abandoning those limits, the Fourth Circuit's decision invites rather than avoids constitutional problems.

The failure to heed the limits of judicial power led the Fourth Circuit into a thicket of constitutional problems. Its decision strays into the exclusive domain of Congress and authorizes violations of the Takings Clause.

Congress decides not only *who* may exercise the federal eminent-domain power but also *how* that power may be used. See, *e.g.*, *Kirby Forest*, 467 U.S. at 3-5; *Secombe* v. *Milwaukee & St. P. R. Co.*, 90 U.S. 108, 118 (1874) ("[T]he mode of exercising the right of eminent domain . . . is within the discretion of the legislature.").

Congress gives pipeline companies holding a FERC certificate only the straight power of condemnation. The injunctions here subvert that choice, giving pipeline companies an additional sovereign right that Congress withheld. The role of the federal judiciary is to enforce rights, not create them. The district courts' injunctions invade Congress's territory, violating constitutional separation of powers.

And after *Knick* v. *Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), there should be no confusion that immediate-possession orders exceed judicial power for another reason: "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." *Id.* at 2170. These injunctions allow pipeline companies to take the properties without first paying just compensation. Regardless of whether the petitioners have a stand-alone Takings Clause claim, it cannot be that district courts can use injunctive power to authorize constitutional violations.

Those problems make this case about more than just interpreting federal statutes and resolving the entrenched circuit split. This case involves questions about constitutional limits and the proper scope of federal judicial power. The petitioners ask the Court to protect the

property rights of landowners, restore Congress's prerogative to prescribe the methods for exercising federal eminent-domain power, and reattach equitable powers to their traditional moorings.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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