No.

In the Supreme Court of the United States

LYNDA LIKE, ET AL.,

Petitioners,

v.

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC

Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Natural Gas Act (15 U.S.C. § 717f(h)) delegates to certain private companies the ordinary eminent domain power: that is, the power to bring a condemnation lawsuit and then buy land at an adjudicated price after final judgment. The Act does not delegate the separate power to take immediate possession of land.

Notwithstanding the Act's limited delegation, are district courts empowered to enter preliminary injunctions giving private companies immediate possession of land before final judgment in Natural Gas Act condemnations?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The opinion below consolidated four separate appeals, case number 17-3075, 17-3076, 17-3115, and 17-3116.

In case number 17-3075, Petitioners Hilltop Hollow Limited Partnership and Hilltop Hollow Partnership, LLC were appellants; the full caption was *Transcontinental Gas Pipe Line Company, LLC* v. *Permanent Easements for 2.14 Acres and Temporary Easements for 3.59 Acres in Conestoga Township, Lancaster County, Pennsylvania, Tax Parcel Number 1201606900000; Hilltop Hollow Limited Partnership; Hilltop Hollow Partnership LLC General Partner Of Hilltop Hollow Limited Partnership; Lancaster Farmland Trust; All Unknown Owners*.

In case number 17-3076, Petitioner Stephen D. Hoffman was the appellant; the full caption was *Transcontinental Gas Pipeline Company, LLC* v. *Permanent Easement for 2.02 Acres and Temporary Easements for 2.76 Acres in Manor Township, Lancaster County Pennsylvania, Tax Parcel Number 4100300500000, 3049 Safe Harbor Road, Manor Township, Lancaster, Pa; Stephen D. Hoffman; and All Unknown Owners*.

In case number 17-3115, Petitioner Lynda Like was the appellant; the full caption was *Transcontinental Gas Pipeline Company, LLC* v. *Permanent Easement For 1.33 Acres and Temporary Easements For 2.28 Acres Conestoga Township, Lancaster County, Pennsylvania Tax Parcel Number 1202476100000, 4160 Main Street Conestoga, PA, 17516; Lynda Like, also known as Linda Like, and All Unknown Defendants*.

In case number 17-3116, appellants were Blair B. Mohn and Megan E. Mohn, who do not join in this petition, and the full caption was *Transcontinental Gas Pipeline Company, LLC* v. *Permanent Easement for 0.94 Acres and Temporary Easements for 1.61 Acres in Conestoga Township, Lancaster County, Pennsylvania, Tax Parcel Number 1203589400000, Sickman Mill Road; Blair B. Mohn; Megan E. Mohn, and All Unknown Owners*.

Petitioners Hoffman and Like are natural persons. Petitioner Hilltop Hollow Limited Partnership is a Pennsylvania limited partnership whose general partner is Petitioner Hilltop Hollow Partnership, LLC. Hilltop Hollow Partnership, LLC, has no parent corporations and no publicly held company owns 10% or more its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit is reported at 907 F.3d 725 and reproduced at App. 1. The district court's memorandum opinion and orders granting preliminary injunctions are unreported and reproduced at App. 33–80.

JURISDICTION

The opinion of the Third Circuit was filed on October 30, 2018. App. 1. On December 13, 2018, the Third Circuit denied a timely filed petition for rehearing and rehearing en banc. App. 99. This Court's jurisdiction rests on 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Respondent's asserted authority to condemn petitioners' property stems from the Natural Gas Act, 15 U.S.C. § 717f(h), which provides::

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

> way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

STATEMENT

Respondent Transcontinental Gas Pipe Line Company filed this condemnation action in early 2017 and a few months later was granted a preliminary injunction giving it immediate possession of large swaths of petitioners' land in rural Lancaster County. Transcontinental sent work crews to take over petitioners land and, in the ensuing year and a half, the company has completed construction of the pipeline that necessitated the condemnation actions in the first place. Meanwhile, because the underlying lawsuits have not reached final judgment, none of the petitioners has received any compensation whatsoever.

This take-first-pay-later structure is unusual in federal condemnations. Ordinarily, a property owner is compensated at the moment her property is taken away: In a normal eminent domain case (what this Court has called a straight-condemnation action), a court determines the value of the property a condemnor wishes to acquire and, after judgment, the condemnor has the option to either purchase the property at the adjudicated price or move to dismiss the condemnation. "The practical effect of final judgment on the issue of just compensation," in other words, "is to give the Government an option to buy the property at the adjudicated price." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 4 (1984). And while the federal Government has the separate power to take immediate possession of land under the Declaration of Taking Act, 40 U.S.C. § 3114, that mechanism also pairs possession with payment. Like in straight-condemnation actions, an agency proceeding under the Declaration of Taking Act must pay landowners compensation (or an estimate thereof) before entering onto land. *Id.* § 3114(b).

Here, though, petitioners face the worst of both worlds. Transcontinental, as a private actor, has been delegated less power than the usual federal condemnor. But, paradoxically, companies like Transcontinental exercise a power that is far more severe than anything Congress has authorized for anyone: the power to take land *now* but delay the owner's compensation for months or years after the fact. The Natural Gas Act, which delegates the power of eminent domain to certain private companies like Transcontinental, delegates only the authority to bring straight-condemnation actions, not the power to take immediate possession. 15 U.S.C. § 717f(h). Lacking the statutory power to take immediate

possession, Transcontinental instead harnessed the equitable power of the federal courts. Notwithstanding this Court's well-established rule that equitable remedies like preliminary injunctions may not be invoked to rearrange parties' substantive rights, the company sought and obtained a preliminary injunction granting it immediate possession of petitioners' land. At the same time, petitioners were not entitled to (and still have not received) any compensation. The upshot is that, even though Transcontinental has been delegated less power than the typical federal condemnor, it has been allowed to exercise more—and to leave property owners in a worse position—than if Congress had delegated the power of immediate possession in the first place.

While this situation is unusual in the context of the federal power of eminent domain, it is all too common in the context of condemnations under the Natural Gas Act. In that sense, petitioners are far from alone: District courts across the country have entered similar preliminary injunctions in Natural Gas Act condemnations as a matter of course. Like Transcontinental, pipeline companies thereby secure immediate possession of private property without congressional approval while landowners wait months or years for any compensation. Indeed, preliminary injunctions in Natural Gas Act cases are very much the rule rather than the exception—they are requested and granted in such condemnations routinely, which means district courts have entered hundreds of these injunctions, transferring the rights to thousands of acres of land without a final judgment or contemporaneous payment of compensation.

Congress could, of course, authorize this state of affairs if it so chose. But it has not. In fact, when Congress actually authorizes condemnors to take immediate possession of land, it routinely insists that property owners be paid for their loss immediately. In short, in the absence of congressional authorization to grant immediate possession of land, the district courts have instead fashioned a substitute harsher than anything contemplated by the legislature. This Court should grant review to determine whether district courts are empowered to rearrange property rights among private parties in this manner.

A. Background

1. Petitioners are rural Lancaster County landowners who have carved out homes for themselves in what they consider one of the most beautiful places in America. Gary Erb, who owns his home through Petitioner Hilltop Hollow Limited Partnership, described his joy at having moved into his "dream property"—a rural home where he and his three sons can hunt deer and where the boys, as they get older, will be able to build homes of their own to stay close to family. C.A. App. A01069–A01072 (Tr. Evid. Hrg. (July 20, 2017)). Petitioner Stephen Hoffman is a professional forester who with his wife Dorothea has lived in a carefully selected woodland retreat for over a decade. *Id.* at A01109–A01111. And Petitioner Lynda Like inherited acreage of farmland from her father in 1993 having promised him that she would preserve it for her family and allow her sons to build homes there when they eventually reached adulthood. *Id.* at A01185, AO1190.

Petitioners' rural paradises have been disrupted by the eminent domain action at the heart of this

case, which has brought noise, construction crews, equipment and permanent disruption to their land and lives. That much is not unusual; eminent domain frequently means disruption for rural landowners as local or state governments build roads or schools or highways. But petitioners have not been condemned for a road or a school or a highway; they have been condemned for the construction of a private natural-gas pipeline. As a result, this condemnation is governed by the Natural Gas Act—which, as discussed below, has had dramatic consequences for petitioners' substantive property rights.

2. Under the Natural Gas Act, it is unlawful to build a facility (including a pipeline) for the transmission of natural gas without first obtaining a certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission (FERC). 15 U.S.C. § 717f(c)(1)(A). Any such certificate automatically carries with it the power to take any necessary property that cannot be voluntarily acquired by initiating an eminent domain proceeding in state or federal court. 15 U.S.C. § 717f(h).

Because the power of eminent domain flows automatically from the issuance of the FERC certificate, eminent domain actions under the Natural Gas Act proceed somewhat differently from other eminent domain actions. While property owners are ordinarily entitled to raise any and all defenses challenging a condemnor's right to take their land, courts have consistently held that property owners who want to contest a company's right to exercise eminent domain under the Natural Gas Act can do so only by directly appealing FERC's initial grant of the underlying certificate. *See* 15

U.S.C. § 717r(b) (providing for direct appeal to D.C. Circuit or the Circuit in which the project is located). Courts have uniformly held that they lack jurisdiction to hear objections to a taking outside the context of a direct appeal of the certificate, including in a condemnation action itself. *See, e.g.*, *Adorers of the Blood of Christ* v. *FERC*, 897 F.3d 187, 194–95 (3d Cir. 2018) (no jurisdiction to hear Religious Freedom Restoration Act challenge to pipeline condemnation); *accord Maritimes & Ne. Pipeline, LLC* v. *Decoulos*, 146 Fed. Appx. 495, 498 (1st Cir. 2005) ("Once a [certificate] is issued by the FERC, and the gas company is unable to acquire the needed land by contract or agreement with the owner, the only issue before the district court in the ensuing eminent domain proceeding is the amount to be paid to the property owner as just compensation for the taking."). In other words, once a FERC-certified pipeline company a condemnation action, its legal authority to maintain that action is, as far as the district court is concerned, effectively beyond question.

Respondent Transcontinental Gas Pipe Line Company holds a certificate from FERC authorizing the construction of the Atlantic Sunrise Pipeline Project, a natural-gas pipeline that runs through five states, including ten counties in Pennsylvania. The route runs directly through petitioners' rural Lancaster County homesteads. Petitioners did not want a pipeline running across their land or near their homes, and they declined Transcontinental's offer to purchase easements across their land, believing that the offer would not compensate them for the business losses, inconvenience, and permanent displacements that would come along with the pipeline. Condemnation followed.

B. Proceedings Below

Transcontinental filed the three[1] substantially identical condemnation actions that give rise to this petition in early 2017, seeking to condemn both permanent easements for the pipeline as well as broader temporary easements to allow for the construction of the pipeline. *E.g.*, App. 103–05, 118. That summer, the district court granted a motion for partial summary judgment, finding that the company possessed the necessary certification from FERC and was therefore legally authorized to condemn the properties at issue. App. 40–41. Simultaneously, the court issued preliminary injunctions, granting the company immediate possession of the rights of way while the underlying condemnation litigation continued. App. 53. While the company was required to post a bond to ensure eventual payment of just compensation, the landowners were not entitled to (and, to date, have not received) any compensation. *See* App. 60.[2]

The landowners appealed, arguing that the preliminary injunction was invalid as a matter of law because the Natural Gas Act delegates to companies

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[1] A fourth condemnation action—against landowners Blair and Megan Mohn—was decided alongside these three in the consolidated appeals resolved by the Third Circuit in the opinion below. The Mohns, however, have moved away from Lancaster County and do not join in this petition.

[2] In the meantime, respondent has taken full possession of the required easements and, as it reported to FERC last August, essentially completed construction of the pipeline. *See* Letter from Michael Dunn, Executive Vice President and Chief Operating Officer, The Williams Companies, to Federal Energy Regulatory Commission (August 24, 2018), https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15003167 (last visited March 8, 2019).

like Transcontinental only the ordinary power of eminent domain—not the more drastic power to take immediate possession of property. They contended that, as the Seventh Circuit held in *Northern Border Pipeline Co.* v. *86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998) (*Northern Border*), a preliminary injunction would be appropriate only where a condemnor could show a "preexisting entitlement to the property" rather than only the future entitlement to the property that would be created at the end of the condemnation action. *Id.* at 472; *see also* App. 22–23.

The Third Circuit rejected these arguments and upheld the injunctions. App. 22–23. The panel held that the district court's grant of a motion for partial summary judgment determining Transcontinental's right to bring the condemnation action had established the sort of preexisting entitlement to the land contemplated by the Seventh Circuit in *Northern Border*. App. 22–23. Given that determination, the only question was what the district court had called "'the timing of the possession.'" App. 14. And an order that merely "hastened" Transcontinental's possession of petitioners' land, the Third Circuit concluded, involved only the sort of non-substantive right that could appropriately be rearranged by means of preliminary injunctive relief. App. 20–21.

The Third Circuit denied panel rehearing and rehearing en banc. App. 99–100. The condemnation cases remain pending in the district court, and the preliminary injunctions remain in effect.

REASONS FOR GRANTING THE PETITION

I. The decision below deviates sharply from this Court's precedents governing the use of eminent domain and equitable relief.

The approach endorsed by the Third Circuit below diverges from this Court's precedent. Longstanding precedent establishes three basic principles that govern this case, all of which work together to forbid a district court from entering a preliminary injunction that transfers private property from one private owner to another under the Natural Gas Act. Put briefly, this Court has said (1) that there is a difference between the ordinary power of eminent domain and the power to take immediate possession of property, (2) that private entities exercising delegated eminent domain power must be strictly limited to the powers actually granted, and (3) that, in the absence of statutory authorization, the federal courts' equitable powers do not extend to rearranging rights to use unencumbered property before a final judgment is entered. The decision below contravenes these principles.

1. This Court has repeatedly explained that the ordinary power of eminent domain is distinct from the power to take immediate possession of property. As described in *Kirby Forest Industries* v. *United States*, there are four methods by which the United States can exercise its sovereign power to acquire land involuntarily. 467 U.S. 1, 3–5 (1984). In the first, "so-called 'straight condemnation[,]'" the Government initiates condemnation proceedings in a district court, followed by a trial to determine the appropriate just compensation for the property

interest being taken. *Id.* at 3–4. "The practical effect of final judgment on the issue of just compensation is to give the Government an option to buy the property at the adjudicated price." *Id.* at 4 (citing *Danforth* v. *United States*, 308 U.S. 271, 284 (1939)). "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.* If not, the Government is entitled to move for dismissal of the condemnation action. *Id.*

If the Government wishes to acquire land without waiting for final judgment, though, it has other options: It can, when authorized, proceed under a statute allowing it to immediately take "title and right to possession" to property. *Id.* at 4–5 ; *see also* 40 U.S.C. § 3114. Alternatively, Congress may directly appropriate land through specific legislation. *Kirby Forest*, 467 U.S. at 5. Or the executive may acquire land "summarily, by physically entering into possession and ousting the owner," who then has a right to bring a suit for inverse condemnation to recover just compensation. *Id.* There is no dispute in this case that the Natural Gas Act gives Transcontinental only the "standard" kind of eminent domain power—the power to initiate a straight-condemnation case and buy land after judgment—and not any of the others. *See* App. 18; *cf. Van Scyoc* v. *Equitrans, L.P.*, 255 F. Supp. 3d 636, 639–42 (W.D. Pa. 2015) (collecting district court cases holding that the Natural Gas Act does not preempt state-law trespass actions or authorize certificate holders to invade private property outside the confines of a straight condemnation action).

2. The limited language of the Natural Gas Act matters because delegations of the eminent domain

power to private parties must be read narrowly.. When a statute uses "broad language . . . to authorize officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself" such an "authorization . . . carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication." *United States* v. *Carmack*, 329 U.S. 230, 243 n.13 (1946). But things are very different when it comes to "statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves." *Id.* "These are, in their very nature, grants of limited powers" and thus "do not include sovereign powers greater than those expressed or necessarily implied[.]" *Id.*

This principle is nowhere to be found in the opinion below. To the contrary, the opinion below presumes that a grant of immediate possession to a private condemnor is appropriate unless Congress specifically intended to forbid such grants when it crafted the delegation of power in the Natural Gas Act. App. 16–17 ("Put another way, did Congress intend to forbid immediate access to the necessary rights of way when it granted only standard condemnation powers to natural gas companies?"). This is the wrong inquiry: As made clear by the discussion in *Carmack*, the question is whether the Natural Gas Act, expressly or by necessary implication, grants a certificate-holder like Transcontinental the power to take immediate possession of land prior to final judgment in its condemnation action. And, as the court below expressly acknowledged, the statute does no such thing.

3. Finally, specific statutory authorization for immediate possession is necessary here because this Court has already held that federal courts cannot use their equitable powers to deprive people of the use of their unencumbered property before a final judgment is entered. This Court's decision in *Grupo Mexicano de Desarrollo* v. *Alliance Bond Fund* illustrates the point. 527 U.S. 308 (1999). There, plaintiff creditors brought a breach-of-contract suit against a holding company that owed them substantial unsecured debts. *Id.* at 312–13 (1999). Finding that the defendant was on the brink of insolvency and in the process of dissipating its valuable assets in a way that would "frustrate any judgment" the plaintiff might win, the district court entered a preliminary injunction preventing the defendant from further transferring the rights to the assets in question. *Id.* (internal quotation marks omitted).

This Court reversed. Reasoning that federal courts' equitable powers remain limited to those "traditionally accorded by courts of equity," *id.* at 319, the Court held that courts had historically rejected the notion that equity could interfere with debtors' rights to their property before a creditor had obtained a final judgment against them. *Id.* at 319–23. Because there was no traditional power to grant such a preliminary injunction at equity, the wisdom of such an injunction was beyond the purview of the courts: The ability to authorize (and the wisdom of authorizing) such a remedy rested solely with Congress. *Id.* at 332–33. *Grupo Mexicano* and the cases on which it relies stand for the basic proposition that a preliminary injunction is appropriate to the extent it "'grant[s] intermediate relief of the same character as that which may be granted finally,'" but not to the extent it creates new

substantive rights. *Id.* at 326–27 (quoting *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 220 (1945)).

The Third Circuit's opinion here breaks with this principle in two important ways: First, it authorized preliminary injunctions that are different in character from the final relief that could be entered at the end of the litigation. Second, those injunctions worked to alter the substantive rights of the parties.

The preliminary injunctions here are different in character from the final relief available to a condemnor. Straight condemnations, after all, do not result in an injunction giving the condemnor ownership of the land. As noted above, the effect of final judgment in a condemnation action is to give the condemnor an option to purchase the condemned property at the adjudicated price. *Supra* 11. The condemnor is not required to exercise this option, and a properly drafted final judgment in a condemnation action reflects this fact. *See, e.g.*, Order, *United States* v. *Tract H05-08*, No. 2:04-cv-04 (M.D. Fla. Aug. 19, 2005) (ECF No. 21) (providing that "[o]n the date of deposit of the Just Compensation . . . title to the Property will vest in the Plaintiff."); *see also United States* v. *4,970 Acres*, 130 F.3d 712, 715 (5th Cir. 1997) (applying "the long standing rule that the government has an option to move for dismissal after a final condemnation judgment"); *United States* v. *122.00 Acres*, 856 F.2d 56, 57 (8th Cir. 1988) ("Ultimately, the United States determined that the jury award was beyond its budget capabilities; it chose to abandon the condemnation and move for dismissal of the action.") And, like any other condemnor, pipeline companies sometimes change their minds and elect not to purchase land they initially sought to condemn. *See,*

e.g., *Tenn. Gas Pipeline Co.* v. *104 Acres of Land*, 828 F. Supp. 123, 125 (D.R.I. 1993) (noting voluntary dismissal of condemnation action after change in pipeline route). The preliminary injunctions entered below, however, do not take the form of an option to purchase petitioners' land. Instead, they oust petitioners immediately upon the payment of a preliminary-injunction bond, giving Transcontinental the immediate right to use the land and give Trancontinental the immediate right to use the land and enjoining petitioners' from interfering with Trancontinental's possession. *E.g.* App. 64–65.

Even if the preliminary injunctions here were exactly the same as the final judgment in a condemnation action, though, they would still run afoul of *Grupo Mexicano* because they create new substantive rights. An entitlement to possess land *now* is substantively different from an entitlement to possess land *in the future.* The Third Circuit rejects this distinction and justifies the preliminary injunction on the grounds that it does not alter the parties' substantive rights at all: Since Transcontinental substantive right to condemn was unquestioned, the court reasoned, the preliminary injunction affected only the procedural question of *when* the property changed hands. App. 20–21. But this cannot be correct: Prior to the entry of the preliminary injunction, petitioners had the right to exclude Transcontinental and its agents from their land. After the entry of the preliminary injunction, the company had the right to exclude petitioners from the land. The right to exclude is, as this Court has held time and again, one of the most important substantive aspects of property ownership. *See Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994) (calling the "right to exclude others. . . . one of the most

essential sticks in the bundle of rights that are commonly characterized as property" (citation and internal quotation marks omitted)); *accord Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.").

To be sure, the property owners here were going to lose the right to exclude Transcontinental from their land eventually—or, at least, they would if the company chose to exercise its option to purchase the easements after final judgment. But the timing of property rights makes a substantive difference. There is a substantive difference between a *future* interest in property and a *present* interest in property, just as there is a substantive difference between holding an option contract to buy a piece of property and holding title to the property itself. Indeed, much of the substantive law of property—with its life estates, contingent remainders, and springing executory interests—is primarily about the timing of property ownership.

Simply put, injunctions that rearrange who can do what with property (and when) are substantive in nature. Indeed, the Court said just that in *Grupo Mexicano* itself: "Even in the absence of historical support, we would not be inclined to believe that it is merely a question of *procedure* whether a person's unencumbered assets can be frozen by general-creditor claimants before their claims have been vindicated by judgment." 527 U.S. at 322–23 (emphasis added). Instead, "that question goes to

the *substantive* rights of all property owners." *Id.* at 323 (emphasis added).[3]

The inescapable conclusion of *Grupo Mexicano* and the cases it relies on is that district courts sitting in equity cannot issue preliminary injunctions transferring unencumbered private property from one owner to another. A remainderman would not be entitled to an order granting him immediate possession of a life estate, a holder of an option contract to purchase land would not be entitled to an order granting immediate possession of that land, and Transontinental was not entitled to an injunction here for precisely the same reason. Here, as in *Grupo Mexicano*, respondent has a contingent future right to the petitioners' property that it has not yet distilled to a final judgment. Here, as in *Grupo Mexicano*, a district court has invoked its equitable jurisdiction to restrict the property owners' substantive rights to that property. And here, as in *Grupo Mexicano*, such a remedy is inappropriate absent congressional authorization.

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[3] The Court's reasoning in *Grupo Mexicano* is supported by the fact that courts at all levels treat *future* interests in property as substantively different from *present* interests. *See, e.g.*, *Fondren* v. *Commissioner*, 324 U.S. 18, 20 (1945) (holding that giving a future interest in property without "the right presently to use, possess or enjoy the property" did not qualify as a gift under relevant regulation); *In re Brunson*, 498 B.R. 160, 163 (Bankr. W.D. Tex. 2013) (noting that state law's homestead protection covers present possessory interests but not future interests).

II. Of the six courts of appeals to address this question, only the Seventh Circuit has adopted an approach consistent with this Court's precedents.

The Seventh Circuit, faced with a request for a preliminary injunction in a condemnation under the Natural Gas Act, has articulated a rule that squares perfectly with this Court's precedents: Such an injunction is appropriate only to the extent a condemnor can demonstrate a *preexisting* right to the land at issue, as distinct from the *contingent future* right created by the eminent domain action itself. Other circuit courts adopting a contrary rule have attempted to distinguish the Seventh Circuit's decision, but their distinctions are at odds with the plain text and reasoning of the decision itself, as well as being contrary to this Court's precedents.

1. Unlike the Third Circuit below, the Seventh Circuit has articulated an approach to the question presented that follows this Court's teachings exactly. In *Northern Border Pipeline Co.* v. *86.72 Acres*, 144 F.3d 469 (1998), the Seventh Circuit considered the same question presented here. There, as here, a pipeline company secured a FERC certificate authorizing the use of eminent domain. *Id.* at 470. There, as here, the company invoked that power by filing a series of actions under Section 717f(h) of the Natural Gas Act. *Id.* at 471. There, as here, the company sought "immediate possession" of the land before entry of a final judgment setting just compensation. *Id.* But there, unlike here, the district court refused.

Affirming the district court's denial of the preliminary injunction, the Seventh Circuit held that injunctive relief was unavailable as a matter of law. Like the Third Circuit here, the Seventh Circuit

noted that "the Natural Gas Act does not create an entitlement to immediate possession of the land." *Id.*; *see also* App. 5 ("The NGA . . . provides only for standard eminent domain power, not the type of eminent domain called 'quick take' that permits immediate possession."). Unlike the Third Circuit, however, the Seventh Circuit held that the federal courts have no equitable power to grant pipeline companies land in which they have no vested right. The company might well secure a "substantive entitlement" to the land "at the conclusion of the normal eminent domain process," 144 F.3d at 471—if, that is, the district court were to establish a sale price for the land and if the company were to elect to pay that price. But the prospect that the company might exercise that as-yet-undetermined option on an as-yet-unknown date does not translate to "a substantive entitlement to the defendants' land *right now*." *Id.* (emphasis in original).

In this way, the Seventh Circuit noted, an eminent domain action under the Natural Gas Act differs from the mine-run dispute where a preliminary injunction might be available. Ordinarily, the plaintiff in a property dispute "claim[s] an ownership interest in the property that, if it existed at all, was fully vested even before initiation of the lawsuit." *Id.* at 472. A condemnation action under the Natural Gas Act, by contrast, does not vindicate the pipeline company's "preexisting entitlement to the property." *Id.* It serves a different purpose entirely: It is "a means by which the sovereign [or the sovereign's delegatee] may find out what any piece of property will cost." *Danforth* v. *United States*, 308 U.S. 271, 284 (1939). That a pipeline company has standing to bring such an action thus says nothing about whether it will

ultimately possess the land. *See id.* For that reason, the Seventh Circuit affirmed, the district court could not "exercise[] . . . equitable power to enter a preliminary injunction ordering the defendants to grant the company immediate possession." *Northern Border* 144 F.3d at 471.

2. The Third Circuit (following the Fourth Circuit) distinguished the Seventh Circuit's approach on the grounds that here, unlike in *Northern Border*, the district court had granted a motion for partial summary judgment affirming the pipeline company's legal authority to maintain the condemnation action in the first place. App. 21–22; *see also E. Tenn. Natural Gas Co.* v. *Sage*, 361 F.3d 808, 827 (4th Cir. 2004) (drawing the same distinction). The Eighth and Ninth Circuits have likewise ratified district courts' power to grant pipeline companies immediate possession of land. *All. 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, 777 (9th Cir. 2008). And in the months since the Third Circuit issued its decision here, the Sixth and Eleventh Circuits have endorsed this view as well, with little more than a nod to the weight of authority elsewhere. *Nexus Gas Transmission, LLC* v. *City of Green*, No. 18-3325--- F. App'x - - , - , 2018 WL 6437431, at *3 (6th Cir. Dec. 7, 2018); *Transcon. Gas Pipe Line Co., LLC* v. *6.04 Acres*, 910 F.3d 1130, 1152 (11th Cir. 2018).[4]

[4] In addition to the courts of appeals, district courts—even within the Seventh Circuit—nearly uniformly hold that they have the power to grant immediate possession once they have granted a motion for partial summary judgment for a pipeline company. *See, e.g.*, *N. Natural Gas Co.* v. *L.D. Drilling, Inc.*, 759 F. Supp. 2d 1282, 1303 (D. Kan. 2010); *Spire STL Pipeline*

That distinction, while widely adopted, lacks merit. It is true that the courts in *Sage*, in this case, and in similar cases had entered orders confirming that the pipeline companies had the "substantive right" to sue under § 717f(h) (an exercise that demands little more than verifying the fact that FERC has issued a certificate for the pipeline in question). *Cf.* App. 20 ("The only substantive right at issue is the right to condemn using eminent domain[.]"). But the "substantive right" to file a condemnation action under § 717f(h) is simply the standing to sue in the first place; it is not the same as the "substantive entitlement" to the land that arises "at the conclusion of the normal eminent domain process" if and when compensation is adjudicated and paid. *See Northern Border*, 144 F.3d at 471.

There was also no question that the company in *Northern Border* had the same right to sue under § 717f(h). The Seventh Circuit said so explicitly: "Northern Border has a substantive claim to property, based on its eminent domain power under § 717f, that is likely to prevail on the merits." *Id.* at 471. "[N]o one," the court emphasized, "disputes the validity of the FERC certificate conferring the eminent domain power, nor could they do so in this proceeding." *Id.* at 471–72. Nothing about those statements suggests that a district court can convert the "entitlement that will arise at the conclusion of the normal eminent domain process" into a "preexisting entitlement to the property" simply by granting a motion for partial summary judgment on an issue that was not (and could not have been) disputed in the case. *Id.*

LLC v. *3.31 Acres of Land, Vector Pipeline, L.P.* v. *68.55 Acres of Land*, 157 F. Supp. 2d 949, 951 (N.D. Ill. 2001).

Far from being "clearly distinguishable" (App. 23), therefore, *Northern Border* resembles this case in every material respect. Like Transcontinental—indeed, like every condemnor under the Natural Gas Act—the Northern Border Pipeline Company undisputedly had "the right to condemn" land by invoking the Natural Gas Act. *Compare Northern Border*, 144 F.3d at 471–72 *with Sage*, 361 F.3d at 827 *and* App. 20–21. The only question is whether that right can be parlayed into immediate possession of the defendants' property. The majority view holds that it can; district courts can grant "immediate possession through the issuance of a preliminary injunction" so long as they have entered an order confirming the condemnor's substantive right to maintain the condemnation action. *Sage*, 361 F.3d at 828; *see also, e.g.*, App. 20–21; *Transcon. Gas Pipe Line Co., LLC*, 910 F.3d at 1152. The Seventh Circuit has held the opposite: District courts "ha[ve] no authority to enter a preliminary injunction awarding immediate possession." *Northern Border*, 144 F.3d at 472. Because only the Seventh Circuit's approach honors foundational constraints on the federal courts' equitable powers and this Court's instructions on proper interpretation of private delegations of the eminent domain power, the petition for certiorari should be granted.

III. The question presented is important.

The question presented is one of national importance because the landowners in this case are hardly alone. As the Inspector General of the Department of Energy has noted, recent significant growth in the natural-gas industry has dramatically increased the number of and controversy over natural-gas pipelines like the one in this case. *See* Office of Inspector General, U.S. Department of

Energy, *Audit Report: The Federal Energy Regulatory Commission's Natural Gas Certification Process* (May 24, 2018), https://www.energy.gov/sites/prod/files/2018/05/f52/DOE-OIG-18-33.pdf (last visited March 8, 2019). Under the majority rule endorsed by the decision below, all of these condemnors will be entitled to take immediate possession of private land by preliminary injunction.

And, if history is any guide, they will do exactly that. Preliminary injunctions granting immediate possession of property are not the exception in Natural Gas Act condemnations. They are the rule. Over the past twenty years, district courts have entered hundreds of preliminary injunctions granting private companies immediate possession of thousands of acres of private land. In the last five years alone, district courts in Pennsylvania (where this case arises) have issued at least 38 separate preliminary injunctions in Natural Gas Act cases, each of them transferring effective ownership of land to private companies to use for their own purposes.[5] As pipeline construction and related condemnations continue, so too will preliminary injunctions granting pipeline companies immediate possession of land.

These injunctions impose real hardships on property owners, as illustrated by those suffered by the property owners in this case. The district court granted Transcontinental immediate possession of petitioners' property on August 23, 2017. App. 35. Today, over 18 months later, the underlying condemnation actions are still pending in the district

[5] These numbers are drawn from a review of federal-court records available on the Public Access to Electronic Court Records system.

court and petitioners have therefore yet to receive a single dollar in compensation. Allowing a condemnor to take land *now* means that property owners suffer damages *now*—but can only recover months or (as here) years later.

Congress, of course, is free to imposes these hardships on landowners if it wishes; this Court has held that there is no constitutional requirement that just compensation be paid contemporaneously with a taking. *See Cherokee Nation* v. *S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890). But Congress has not authorized this state of affairs. Indeed, Congress's revealed preference is (sensibly) to ensure that property owners are compensated at the moment they lose their property. In a straight condemnation, for example, "title and right to possession vest in the United States" only after the Government "tenders payment to the private owner." *Kirby Forest Indus.*, 467 U.S. at 4. And when the Government exercise its power to take immediate possession, the Declaration of Taking Act requires immediate payment of estimate compensation to the property owners. *See* 40 U.S.C. § 3114(b). Congress has even announced, more broadly, that when the federal Government is condemnor, payment should *always* precede possession. *See* 42 U.S.C. § 4651(4) ("No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 3114(a) to (d) of Title 40, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.").

In other words, by allowing pipeline companies like Transcontinental to take immediate possession

via preliminary injunction, district courts have created a system that is far harsher and far more burdensome to property owners than any process actually authorized by Congress. It may be that there are good reasons to abandon Congress's preference for immediate compensation when a private pipeline company rather than a government agency is doing the taking. But whatever those reasons might be, the decision to impose these burdens on property owners rests "where such issues belong in our democracy: in the Congress." *Grupo Mexicano*, 527 U.S. at 333

IV. This case is a good vehicle for deciding the question presented.

This case is a good vehicle for resolving the question presented. Addressing the issue here does not require consideration of any factual disputes or deference to trial-court decisionmaking—the parties briefed this issue as a purely legal question, and the Third Circuit correctly reviewed the district court's injunctions de novo. App. 16. And, despite the fact that this case involves the review of a preliminary injunction, it will continue to present a live controversy even if the underlying condemnation actions in the district court reach final judgment while the case is pending before this Court.

First, a final judgment in the condemnation action will not resolve the question of whether the preliminary relief entered below was appropriate. As this Court noted in *Grupo Mexicano*, the entry of final judgment in favor of a plaintiff will usually moot the question of whether that plaintiff's preliminary injunction was properly granted because the final judgment "establishes that the defendant

should not have been engaging in the conduct that was enjoined." 527 U.S. at 315 (emphasis in original). But where the petitioners' claim is that the preliminary injunction wrongfully restrained lawful conduct (here, excluding Transcontinental from land that petitioners still owned and that had not yet been condemned), "the substantive validity of the final injunction does *not* establish the substantive validity of the preliminary one." *Id.* "If petitioners are correct, they *have* been harmed by issuance of the unauthorized preliminary injunction—and hence *should* be able to recover on the bond—*even if* the final injunction is proper." *Id.* at 329 (emphases in original). Even if Transcontinental litigates the condemnation action to final judgment and elects to purchase the easements at issue—and even if it were to do so after this Court grants certiorari—that will have no effect on whether it was entitled to obtain immediate possession prior to that final judgment.

Second, even if mootness were on the table, petitioners' claims would still be reviewable by this Court because they would fall within the "exception to the mootness doctrine for a 'controversy that is capable of repetition yet evading review.'" *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969, 1976 (2016) (citation omitted). 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 subjected to the same action again." *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018). Both elements are met here: The propriety of a preliminary injunction frequently cannot be fully litigated before this Court if the enjoined party's claims would be mooted by a final judgment in the

district court. And petitioners are reasonably likely to be subject to a Natural Gas Act condemnation again—and, indeed, are likely to be condemned by Transcontinental or its successor-in-interest. The complaints filed in the district court sought two different easements: a narrower easement for the pipeline itself and a broader "construction easement" for the land required to for the construction phase of the pipeline project. *See, e.g.*, App. 103–05. And the permanent easement requested in the complaint below expressly seeks the right to "alter[], repair[], chang[e] the size of, replac[e] and remov[e]" the pipeline. App. 103. If, as seems inevitable, Transcontinental needs to exercise its right to alter, repair, replace, or remove its pipeline, it will need to condemn yet another temporary construction easement. At that point, petitioners will once again be subject to having their land taken from them by preliminary injunction—unless this Court resolves the issue first.

* * * *

This case presents an important question of property law on which the courts of appeals—with one exception—have sharply deviated from this Court's precedents governing the use of eminent domain and the crafting of equitable remedies. The petition for a writ of certiorari should be granted to bring the practice of lower courts back in line with this Court's precedents, to resolve the disagreement among the lower courts about the propriety of granting immediate possession via preliminary injunction in these cases, and to ensure that Congress, rather than the courts, retains control over exactly how much of its eminent domain power it delegates to private condemnors like respondent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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