

No. 18-1206

In the
Supreme Court of the United States

LYNDA LIKE, ET AL.,
Petitioners,
v.

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,
Respondent.

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

**BRIEF IN OPPOSITION OF
RESPONDENT TRANSCONTINENTAL
GAS PIPE LINE COMPANY, LLC**

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QUESTION PRESENTED

The Natural Gas Act provides that:

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 . . . 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

15 U.S.C. § 717f(h). Transcontinental Gas Pipe Line Company, LLC (“Transco”), the holder of a certificate of public convenience and necessity, filed complaints in condemnation under Federal Rule of Civil Procedure 71.1 against the property of each of the Petitioners in the District Court for the Eastern District of Pennsylvania, together with motions for partial summary judgment to confirm Transco’s right to condemn the necessary and specific rights of way authorized by the certificate, and with an omnibus motion for injunction seeking possession of the necessary rights of way on each of Petitioners’ properties upon the posting of a bond.

The question presented is:

Whether the decision of the court below affirming the issuance of an injunction granting possession of specific rights of way on each of the Petitioners’ properties by the district court under the Natural Gas

Act, after a two day hearing, and after the district court granted partial summary judgment and determined that Transco had the authority to condemn the rights of way under the Natural Gas Act, conflicts with the decisions of this Court or the Seventh Circuit's decision in *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998).

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Transcontinental Gas Pipe Line Company, LLC (“Transco”) is a natural gas pipeline company engaged in the transportation of natural gas in interstate commerce, which owns and operates an interstate natural gas transmission system that extends from Texas, Louisiana and the offshore Gulf of Mexico area to a terminus in the New York City metropolitan area. Its parent corporation is Williams Partners Operating, LLC, which is a wholly-owned subsidiary of The Williams Companies, Inc. (NYSE: WMB). We have no knowledge of any other entity owning 10% or more of Transco or Williams Partners Operating, LLC.

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INTRODUCTION

Transcontinental Gas Pipe Line Company, LLC (“Transco”) is the holder of a Certificate of Public Convenience and Necessity issued by the Federal Energy Regulatory Commission (“FERC”) for the Atlantic Sunrise Project (the “Project”), which provides enough clean-burning natural gas to meet the daily needs of more than 7 million American homes. The Project involves the construction and operation of approximately 199.5 miles of interstate natural gas pipeline and related facilities primarily in Pennsylvania, as well as the construction of some new facilities and the modification of existing facilities in other states.¹ Transco was able to negotiate rights of way for the Project with the vast majority of the approximately 1100 landowners who were affected by the Pennsylvania portion of the Project, but Petitioners are three landowners who would not grant those rights of way.

Transco sought to condemn the rights of way necessary for the Project on Petitioners’ properties under the authority granted in the Natural Gas Act to holders of certificates of public convenience and necessity.² Transco filed in each case in the District Court for the Eastern District of Pennsylvania a complaint in condemnation under Federal Rule of Civil Procedure 71.1, a motion for partial summary

¹ *Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61,125 (Feb. 3, 2017) (“Certificate Order”), at ¶¶ 4-6, 8.

² 15 U.S.C. § 717f(h).

judgment to confirm Transco's right to condemn the necessary rights of way, and then an omnibus motion for injunction seeking possession of the necessary rights of way on each of Petitioners' properties upon the posting of a bond. After a two day hearing at which each of the Petitioners and Transco's witnesses testified, the district court granted Transco's motion for partial summary judgment in each case, finding that Transco had met the test under the Natural Gas Act and had the substantive right to condemn specific rights of way on each property. Those orders are not at issue here. In each case, the district court then issued an order granting to Transco an injunction for possession of necessary rights of way on the property of each Petitioner, once Transco posted a bond. Those injunction orders were appealed to the Third Circuit, which affirmed the decisions of the district court. Petitioners seek review of that decision.

The question presented in the petition has no merit. Contrary to Petitioners' claims, the issuance of an injunction granting possession of necessary rights of way on each of the Petitioners' properties by the district court under the Natural Gas Act, after a two day hearing, and after the district court granted partial summary judgment and determined that Transco had the authority to condemn the rights of way under the Natural Gas Act, does not conflict with the decisions of this Court or the Seventh Circuit's decision in *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998), and in fact the process followed by Transco has been approved not just by the Third Circuit, but by the Fourth, Sixth, Eighth, Ninth and

Eleventh Circuits.³ While Petitioners complain that they have not received compensation yet, there is no constitutional requirement that just compensation be paid contemporaneously with a taking, and Transco has filed substantial bonds to secure eventual payment of just compensation, as required by the district court.⁴

STATEMENT OF THE CASE

I. The Atlantic Sunrise Project.

The Project, which has been installed and is in service, is a nearly \$3 billion investment in critical energy infrastructure designed to supply enough natural gas to meet the daily needs of more than 7 million American homes by connecting producing regions in northeastern Pennsylvania to markets in the mid-Atlantic and southeastern States. *See Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 190 (3d Cir. 2018).⁵ Following an intensive and thorough multi-

³ *See Transcon. Gas Pipe Line Co. v. 6.04 Acres*, 910 F.3d 1130 (11th Cir. 2018) (collecting cases), *petition for cert. filed*, (U.S. Mar. 6, 2019) (No. 18-1174); *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197 (4th Cir. 2019), *aff'd sub nom, Mountain Valley Pipeline v. W. Pocahontas Props. Lmt. P'ship*, 918 F.3d 353 (4th Cir. 2019); *Nexus Gas Transmission, LLC v. City of Green, Ohio*, No. 18-3325, 2018 WL 6437431 (6th Cir. Dec. 7, 2018); *All. Pipeline L.P. v. 4.360 Acres*, 746 F.3d 362 (8th Cir. 2014); *Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770 (9th Cir. 2008).

⁴ *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890).

⁵ *See also Williams, Overview*, Atlantic Sunrise Pipeline Project, <http://atlanticsunriseexpansion.com/about-the-project/overview/> (last visited Apr. 13, 2019).

year review process, FERC approved the Project when it issued the Certificate Order for the Project on February 3, 2017, finding that “the public convenience and necessity requires approval of Transco’s proposal,” based on “the benefits that [the Project] will provide, the absence of adverse effects on existing customers . . . and the minimal adverse effects on landowners or surrounding communities.” *Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61,125 at ¶ 33.

Installation of the Project is complete, and FERC authorized Transco to place the Project into service on October 4, 2018.⁶

II. The FERC Review Process.

On July 29, 2014, FERC published a *Notice of Intent to Prepare an Environmental Impact Statement for the Planned Atlantic Sunrise Expansion Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings* in the *Federal Register*, see 79 Fed. Reg. 44,023-02 (July 29, 2014), and mailed it to nearly 2,500 interested parties to provide notice of the proposed Project, see *Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres*, 907 F.3d 725, 729 (3d Cir. 2018), App. 6. FERC received more than six hundred written comments from various interested parties, and ninety-three speakers provided comments at Project scoping meetings. See *id.*, App. 7. Thereafter, on March 31, 2015, Transco filed its formal

⁶ Accession No. 20181004-3012, Letter order granting Transco’s request to place facilities into service (Oct. 4, 2018), available on FERC’s eLibrary in Docket Number CP15-138-000, <https://www.ferc.gov/docs-filing/elibrary.asp>.

application with FERC for a Certificate of Public Convenience and Necessity for the Project. *See id.*

Over the course of its proceedings, FERC held multiple notice-and-comment periods and public meetings, and provided comprehensive responses to public input on the Project. Petitioners actively participated in the proceedings before FERC, and submitted numerous comments,⁷ which were among the 1,185 written comments, 296 oral comments, and more than 900 letters that FERC received and considered regarding the Project. *See Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61,125 at ¶¶ 69, 72, 73; *Transcon. Gas Pipe Line Co.*, 907 F.3d at 731-32, App. 11.⁸

FERC issued its Draft Environmental Impact Statement in May 2016 and received over 1,000 comments and letters in response. *See Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61,125 at ¶ 72. After considering the issues raised in these comments, FERC issued its Final Environmental Impact Statement in December 2016, *see id.* ¶ 75, and, on February 3, 2017, issued Transco a Certificate of Public Convenience and Necessity for the Project, *see Transcon. Gas Pipe Line Co.*, 907 F.3d at 730, App. 7.

⁷ Petitioners Hilltop Hollow and Hoffman submitted 9 comments to FERC, including comments submitted by Gary and Michelle Erb, the principals of Hilltop Hollow Limited Partnership. Petitioner Like submitted 42 comments to FERC. *See* FERC's eLibrary in Docket No. CP15-138-000, <https://www.ferc.gov/docs-filing/elibrary.asp>.

⁸ *See also generally* FERC Dkt. CP15-138-000.

On March 6, 2017, Petitioners requested rehearing of the Certificate Order before FERC challenging, among other things, FERC's determination that the Project serves a public use.⁹ The rehearing requests also included requests to stay the Certificate Order and construction of the Project. *See id.*

On August 31, 2017, FERC denied the stay requests. FERC found that: the parties requesting a stay had not shown they would suffer irreparable injury without a stay; a stay would substantially harm Transco because it had a limited window to comply with Fish and Wildlife tree clearing recommendations necessary to mitigate impacts on threatened and endangered species in the Project area; and a stay was not in the public interest because delaying construction could delay completion of the Project, which FERC determined was required by the public convenience and necessity.¹⁰ On December 6, 2017, FERC issued an

⁹ *See* Request for Rehearing and Motion for Stay of Certain Landowners (Mar. 6, 2017), Accession No. 20170306-5123; Petition for Rehearing of Lynda Like of Order Issuing Certificate for the Atlantic Sunrise Project and Request for Stay of Certificate (Mar. 6, 2017), Accession No. 20170306-5204. The Requests for Rehearing are available on FERC's eLibrary in Docket No. CP15-138-000, at <https://www.ferc.gov/docs-filing/elibrary.asp>.

¹⁰ *See* Order Denying Stay, *Transcon. Gas Pipe Line Co.*, 160 FERC ¶ 61,042 (Aug. 31, 2017), ¶¶ 5-17, available on FERC's eLibrary in Docket No. CP15-138-000, <https://www.ferc.gov/docs-filing/elibrary.asp>.

Order on Rehearing denying Petitioners' requests for rehearing of the Certificate Order.¹¹

Before FERC issued the Order on Rehearing, Petitioners Hilltop Hollow and Hoffman filed a petition for review of the Certificate Order with the United States Court of Appeals for the District of Columbia Circuit, challenging, among other things, the public use for the Project. *See Hilltop Hollow Ltd. P'ship v. FERC*, No. 17-1128, Petition for Review (D.C. Cir. May 12, 2017). The petition for review remains pending before the D.C. Circuit. Petitioner Like has not appealed the Certificate Order or the Order on Rehearing.

III. The Eminent Domain Proceedings.

The Natural Gas Act 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

¹¹ Order on Rehearing, *Transcon. Gas Pipe Line Co.*, 161 FERC ¶ 61,250 (Dec. 6, 2017), Accession No. 20171206-3073, available on FERC's eLibrary in Docket No. CP15-138-000, <https://www.ferc.gov/docs-filing/elibrary.asp>.

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 located¹²

On February 15, 2017, following Transco's unsuccessful attempts to negotiate the rights of way necessary for the Project, Transco filed condemnation complaints against the properties of Petitioners under Federal Rule of Civil Procedure 71.1 in the United States District Court for the Eastern District of Pennsylvania. *See Transcon. Gas Pipe Line Co.*, 907 F.3d at 731, App. 10. On February 20 and February 22, 2017, Transco filed motions for partial summary judgment in each action seeking an order that Transco has the substantive right to condemn the rights of way sought on Petitioners' properties pursuant to the Natural Gas Act and the Certificate Order issued by FERC. *See id.* Courts have uniformly held that the Natural Gas Act authorizes an interstate natural gas pipeline company to exercise the federal power of eminent domain only if it meets the three-prong test set forth in the Act: (1) that the company must hold a FERC Certificate of Public Convenience and Necessity; (2) that the company has not been able to acquire the property rights required to construct, operate and maintain a FERC-approved pipeline by agreement with the landowners; and (3) that the value of property sought to be condemned is more than \$3,000.

¹² 15 U.S.C. § 717f(h).

On June 28, 2017, Transco filed an omnibus motion for preliminary injunction for possession of the rights of way so that Transco could proceed with construction. *See id.*, App. 11.

The district court held an evidentiary hearing on the motions for partial summary judgment and the omnibus injunction motion during two full-day hearings on July 17 and July 20, 2017, during which Petitioners were heard. *See id.* Petitioners gave testimony in which they each admitted participating in the FERC proceedings. *See id.* at 731-32, App. 11. Petitioners' counsel argued, among other things, that the taking constituted a "quick take" and that awarding possession would violate the separation of powers doctrine. *See id.* at 732, App. 11-12.

The district court granted the motions for partial summary judgment and the omnibus motion for injunction on August 23, 2017. *See id.*, App. 12. The district court "found no dispute that [Transco] met the three requirements for seeking eminent domain under the [Natural Gas Act] and held that the company was therefore entitled to the entry of partial summary judgment." *Id.* Those orders were not reviewed by the Third Circuit and are not the subject of this Petition.

In granting the omnibus motion for injunction, the district court found that Transco satisfied the four-factor test for a preliminary injunction. *See id.*, App. 13. With respect to the first factor, the district court determined that Transco had "already succeeded on the merits" because the court had already issued an order finding that Transco had the right to the rights of way by eminent domain. *See id.* (quotations omitted); *see*

also App. 53-54. On the second factor – irreparable harm – the district court found that, without the injunction, Transco “would suffer irreparable harm in the form of construction delays, inability to complete surveys required to satisfy environmental conditions, risk of non-compliance with shipper contracts, and monetary harm.” *Id.* at 733, App. 14. In balancing the harm to Petitioners, the district court explained that Transco “already had the substantive right to possession and the only question was the timing.” *Id.* (quotations omitted). To the extent “the permits to build certain pipeline sections on the [Petitioners] property were eventually denied, the [Petitioners] would have legal recourse to recover their property.” *Id.* With respect to the public interests involved, the district court “noted the project’s potential to provide the general public throughout a vast area of the country with access to natural gas” (quotations omitted) and “that FERC had found the project to be in the public interest.” *Id.*, App. 14-15.

Petitioners appealed to the Third Circuit the district court’s orders entering the preliminary injunction and awarding possession to Transco. *See id.*, App. 15.

IV. The Third Circuit Affirms the Preliminary Injunction Orders Entered in the Eminent Domain Proceedings.

On October 30, 2018, the Third Circuit issued a precedential opinion holding “that the [Natural Gas Act]’s grant of standard condemnation powers to natural gas companies does not preclude federal courts from granting equitable relief in the form of a preliminary injunction when gas companies have

obtained the substantive right to condemn and otherwise qualify for equitable relief.” *See id.* at 741, App. 32.

The Third Circuit found that Transco did not perform a “quick take.” Instead, Transco “followed standard condemnation procedure,” by filing “condemnation complaints under Rule 71.1, not a declaration of taking.” *See id.* at 734, App. 18. As the Third Circuit explained, “[t]he different procedures and opportunities for participation distinguish the grant of the injunction here from an exercise of ‘quick take’ power.” *Id.* at 735, App. 19-20; *see also id.* at 739, App. 28 (in Natural Gas Act condemnations, “a gas company that seeks immediate possession has a much stiffer burden than the government does under the [Declaration of Taking Act]’ because the gas company must first establish the substantive right to condemn and then prevail on the four factors considered in preliminary injunctions”) (quoting *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 825 (4th Cir. 2004)). Here, “[o]nly **after** the District Court granted summary judgment in [Transco]’s favor did it grant injunctive relief.” *Id.* at 735, App. 18 (emphasis added). Conversely, if Transco “had in fact exercised ‘quick take,’ it would have simply filed a declaration of taking with an estimate of compensation; title would have vested automatically.” *Id.*, App. 19. “[U]nlike in a ‘quick take’ action, [Transco] does not yet have title but will receive it once final compensation is determined and paid.” *Id.* And “[u]nlike in a ‘quick take’ action, the [Petitioners] had the opportunity to brief the summary judgment motions and participate in the preliminary injunction hearing.” *Id.* Transco also was

required by the district court's orders to post a "bond at three times the appraised value of the rights of way." *Id.*, App. 18.

The Third Circuit rejected Petitioners' argument "that even if the procedure below was not *technically* an exercise of 'quick take' eminent domain, the use of a preliminary injunction *amounted to* a 'quick take.'" *Id.*, App. 20. "[T]he technical distinctions they seek to elide are, in the end, meaningful distinctions in the law." *Id.* The Third Circuit found "no case law to support the proposition that an injunctive right of immediate possession is a substantive right, conferrable only by Congress." *Id.* "The only substantive right at issue is the right to condemn using eminent domain, conferred by Congress in the [Natural Gas Act]," which Transco "had obtained" through partial summary judgment and prior to gaining possession via preliminary injunction. *Id.* For this reason, the court explained, "[t]he preliminary injunction merely hastened the enforcement of the substantive right—it did not create any new rights." *Id.* at 735-36, App. 20-21.

The Third Circuit found the cases Petitioners relied upon, including the Seventh Circuit's decision in *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998), "easily distinguishable as they involve gas companies that failed to obtain the crucial substantive right to condemn before seeking a preliminary injunction." *Id.* at 736, App. 21-22. The Third Circuit also found lacking in support Petitioners' argument that "a district court's authority to issue a preliminary injunction should disappear when a

condemnation proceeding has been filed” under the Natural Gas Act simply “because the [Natural Gas Act] does not grant ‘quick take’ power.” *Id.* at 738, App. 25. As the court explained, “[t]he fact that ‘quick take’ power exists does not prohibit other kinds of immediate access.” *Id.* at 735, App. 20. “Nothing in the [Natural Gas Act] suggests either explicitly or implicitly that the rules governing preliminary injunctions should be suspended in condemnation proceedings.” *Id.* at 738, App. 25. To the contrary, Federal Rule of Civil Procedure 71.1, which governs condemnation proceedings under the Natural Gas Act, “incorporates the other Federal Rules of Civil Procedure—including the preliminary injunction rule, Rule 65—in condemnation proceedings to the extent Rule 71.1 does not govern.” *Id.* at 739, App. 27; *see also* Fed. R. Civ. P. 71.1(a) & advisory committee’s note to subdivision (a). Because “the preliminary injunction was permitted by the Rules, permitted by the [Natural Gas Act], and did not amount to a grant of ‘quick take’ eminent domain power in either name or substance,” *id.* at 740, App. 29, the Third Circuit concluded that the district court did not “overstep the boundaries of its judicial power,” *id.*, and affirmed the district court’s orders “granting the motions for preliminary injunctions,” *id.* at 741, App. 32.

On November 13, 2018, Petitioners filed a petition for panel rehearing or rehearing *en banc* with the Third Circuit. The Third Circuit denied the rehearing petition on December 13, 2018, and issued its certified judgment in lieu of a formal mandate on December 21, 2018.

REASONS FOR DENYING THE PETITION**I. The Decision Below Does Not Merit This Court's Review Because It Does Not Conflict with the Decisions of This Court or Any Federal Courts of Appeals.**

The decision below does not merit this Court's review. The Third Circuit performed a straightforward analysis that is fully consistent with the decisions of this Court and the federal Courts of Appeals, including the Seventh Circuit's decision in *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998).

A. The Decision Below Is Not Inconsistent with This Court's Precedents and Transco Did Not Engage in a "Quick Take."

Without citing any relevant precedent of this Court, Petitioners argue that the process followed by Transco is not "straight condemnation," *see* Pet. at 11, though they appear to have abandoned their argument below that Transco was engaged in a quick take under the Declaration of Taking Act, an argument that was roundly dismissed by the court below. *See Transcon. Gas Pipe Line Co.*, 907 F.3d at 734-36, App. 18-21. The court below properly found that Transco "followed standard condemnation procedure." *Id.* at 734, App. 18. Transco filed complaints under Rule 71.1, and "established its substantive right to the property by filing for summary judgment." *Id.* at 735, App. 18. Thereafter, the district court exercised its equitable power to grant possession, and Transco filed the

required bonds of three times the appraised value of the rights of way. *Id.*

Petitioners argue that Transco had “only the ‘standard’ kind of eminent domain power,” Pet. at 12, and could not use any of the number of other methods to take property that reside only with the sovereign, as described in a brief overview in *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984). There is no disagreement on this point, however. As the court below found, the Natural Gas Act “is an example of a grant of eminent domain power from Congress to a private actor to condemn land for public use, but it only embodies the second type—standard condemnation power, not ‘quick take.’” In the case before us, Transcontinental followed standard condemnation procedure.” *Transcon. Gas Pipe Line Co.*, 907 F.3d at 734, App. 18. While Petitioners claim that the decision below “deviates sharply” from this Court’s precedents, they fail to identify any precedent involving condemnation which was violated by the process followed by Transco in these cases.

Kirby, relied upon by Petitioners, did not rule on the procedure used by Transco here. In *Kirby*, the Supreme Court granted certiorari only “to resolve a conflict in the Circuits regarding the date on which the taking, in a ‘straight-condemnation’ proceeding, should be deemed to occur and the constitutional obligation of the United States to pay interest on the adjudicated value of the property.” *Kirby*, 467 U.S. at 9. The background discussion in *Kirby*, upon which Petitioners seemingly rely, provides a brief overview of the methods the government “customarily employs” for

takings, but does not suggest that the methods it describes represent an exhaustive list of acceptable procedures. *See id.* at 3. In any event, the Court in *Kirby* observed as a general matter that “the Fifth Amendment does not forbid the Government to take land and pay for it later” and acknowledged that a condemnation cannot be dismissed if the condemnor has taken possession prior to the payment of compensation. *Id.* at 10, 12, n.18. As Petitioners note, “this Court has held that there is no constitutional requirement that just compensation be paid contemporaneously with a taking.” Pet. at 26 (citing *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)). Petitioners argue that Congress has revealed a “preference” for payment at the time of taking, but fail to cite any precedent of this Court addressing the issue, including *Kirby*. *Id.*

As the court below found, Transco followed the process for a standard condemnation in these cases. The Petitioners had an opportunity to answer the complaint, the motions for partial summary judgment, and the omnibus motion for preliminary injunction, and had an opportunity to present evidence at two days of hearings, and the district court then exercised its right to grant equitable relief to Transco, all in accordance with the process outlined in the Federal Rules of Civil Procedure. Petitioners fail to identify any precedent of this Court which is violated by the process followed by Transco.

1. Transco Only Exercised Those Powers Specifically Granted by the Natural Gas Act.

Petitioners incorrectly argue that the court below erred in failing to follow certain principles outlined in *United States v. Carmack*, 329 U.S. 230, 243, n.13 (1946). *See* Pet. at 13. To the contrary, the decision below is consistent with *Carmack*. The footnote in *Carmack* cited by Petitioners simply provides:

In the instant case, we deal with broad language employed to authorize officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself. This is a general authorization which carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication. A distinction exists however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. . . .¹³

As the court below noted, the grant of eminent domain power to Transco under the Natural Gas Act is not a grant of the full power to act on behalf of the sovereign, but is a grant to a private entity. *See*

¹³ *Carmack*, 329 U.S. at 243, n.13.

Transcon. Gas Pipe Line Co., 907 F.3d at 734, App. 18. *Carmack* does not address the process to be followed by private entities granted condemnation authority, nor does *Carmack* address Federal Rule of Civil Procedure 71.1, and its incorporation of Federal Rule of Civil Procedure 65. Petitioners argue without citation to any case that “the statute” (presumably the Natural Gas Act) does not grant to Transco the power to take possession prior to a final judgment in the condemnation action. *See* Pet. at 14. To the contrary, the court below directly addressed that question:

According to the Landowners, there is a difference between the substantive right to access that arises under the NGA, and the substantive right to *immediate* access, which only Congress can authorize. . . . There is, however, no case law to support the proposition that an injunctive right of immediate possession is a substantive right, conferrable only by Congress. The fact that “quick take” power exists does not prohibit other kinds of immediate access. The only substantive right at issue is the right to condemn using eminent domain, conferred by Congress in the NGA.¹⁴

Carmack does not conflict with the decision of the court below, and Petitioners’ argument must fail.

¹⁴ *Transcon. Gas Pipe Line Co.*, 907 F.3d at 735, App. 20.

2. This Court's *Grupo Mexicano* Decision Has No Application Here.

Petitioners attempt to use *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund*, 527 U.S. 308 (1999), which is not a condemnation case, to support an argument that the district court does not have the authority to grant an injunction for possession of the rights of way prior to a final judgment on compensation in a condemnation. Petitioners cited *Grupo Mexicano* below for the proposition that a district court could not use its equitable powers to grant the power of eminent domain. That is clearly not what happened in this case. Instead, the district court, through the grant of an order of summary judgment, determined that Transco was entitled to exercise the power of eminent domain granted in the Natural Gas Act.

Grupo Mexicano has no relevance to the condemnation cases at issue here, and the condemnation process generally. In *Grupo Mexicano*, this Court reversed a district court's grant of a preliminary injunction because the "District Court had no authority to issue a preliminary injunction preventing [debtors] from disposing of their assets pending adjudication of [creditors'] contract claim for money damages." *Grupo Mexicano*, 527 U.S. at 333. *Grupo Mexicano* involved plaintiff creditors in a breach of contract action obtaining a preliminary injunction to prevent the defendant debtors from disposing of certain assets, in order to ensure that the defendants would be able to satisfy a money judgment – even though the plaintiffs had not yet obtained a judgment establishing their substantive right to collect any money from the

defendants. *Id.* at 312-13. In *Grupo Mexicano*, this Court was concerned that allowing creditors to freeze the assets of debtors in order to satisfy a judgment not yet obtained would set a sweeping precedent that could apply to any cause of action and that would be susceptible to abuse. 527 U.S. at 327, 330-32. Those concerns are simply inapplicable here, where the substantive right, the right to condemn, had already been decided by the court, and is not the subject of review here. Further, unlike the creditors in *Grupo Mexicano*, Transco was not seeking injunctive relief that was wholly outside the scope of the underlying action.

Petitioners claim that the decision below authorized preliminary injunctions that are different in character from the final relief that could be entered, *see* Pet. at 15, but their argument is based on a mischaracterization of the final relief that could be entered in a straight condemnation as an “option to purchase.” While it is true that title does not vest until compensation is paid in a straight condemnation, the condemnor is nonetheless required to pay the amount of just compensation at the end of the proceedings unless excused by the court or by agreement of the parties; the condemnor cannot simply “opt” not to pay. *See* Fed. R. Civ. P. 71.1(i)(1). The cases cited by Petitioners illustrate condemnors moving to dismiss condemnations in lieu of paying the amount of compensation determined by the court, which is very different from an option because the condemnor cannot unilaterally dismiss a case in the manner that an option can be unilaterally exercised. To the contrary, once there is a hearing on compensation, the

condemnor cannot dismiss the case – i.e., decline the purported “option” – absent court approval (following a motion) or an agreement by the parties. *See* Fed. R. Civ. P. 71.1(i)(1). Likewise, “if no compensation hearing on a piece of property has begun” but the condemnor has taken possession, as is the case here, then under Federal Rule of Civil Procedure 71.1(i)(1)(A), the condemnor is not presented with an “option” to exercise or decline because it may not dismiss the condemnation and must proceed to the payment of compensation.

Further, by conceding that Transco had a “contingent future right to [Petitioners’] property,” Pet. at 19, Petitioners are admitting that Transco had at least an equitable interest in the rights of way when the preliminary injunctions were granted. An equitable interest is nonetheless a property right, and a district court can exercise its equitable power on that property interest. *See Grupo Mexicano*, 527 U.S. at 322-23; *see also Seymour v. Freer*, 75 U.S. 202, 213-14 (1868) (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”).

Petitioners also claim that the preliminary injunctions affirmed by the decision below run afoul of *Grupo Mexicano* because they create new substantive rights. *See* Pet. at 16, 18-19. But *Grupo Mexicano* only limits the use of preliminary injunctions that would deprive property rights prior to the entry of judgment when those property rights are ***outside the scope of relief in the case***. *See Grupo Mexicano*, 527 U.S. at

322-23, 326-27. Transco's possession of the rights of way is not outside the scope of relief in the condemnation proceedings. Far from it, Transco's substantive entitlement to the rights of way has already been vindicated by judgment. *Transcon. Gas Pipe Line Co.*, 907 F.3d at 732, App. 13.¹⁵

For all these reasons, the grant of preliminary injunctions affirmed by the decision below did not run afoul of *Grupo Mexicano* or this Court's precedents.

B. There Is No Split Between Circuit Courts of Appeal and the Decision Below Is Fully Compatible with the Seventh Circuit's *Northern Border* Decision.

Petitioners attempt to identify a split between Circuit Courts of Appeal by citing *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998), a case which has been distinguished on the facts by every Circuit Court of Appeals which has considered it in upholding the standard condemnation practice that Transco followed. In *Northern Border*, the Seventh Circuit affirmed a district court's denial of a pipeline company's motion for an injunction awarding immediate possession when the company lacked a "substantive entitlement" to the property required to build the pipeline. *See N. Border*, 144 F.3d at 471-72.

¹⁵ The weakness of Petitioners' argument is further highlighted in the decision below, where the Third Circuit noted that there is "no case law to support the proposition that an injunctive right of immediate possession is a substantive right, conferrable only by Congress." *Id.* at 735, App. 20.

The pipeline company in *Northern Border* did **not** seek an order determining its authority to condemn (and its substantive entitlement to) the property, instead choosing to rely solely on the existence of a certificate of public convenience and necessity issued to it by FERC. *See N. Border*, 144 F.3d at 471-72; *Sage*, 361 F.3d at 827-28. As the court below noted, “*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.’” *Transcon. Gas Pipe Line Co.*, 907 F.3d at 736, App. 23 (quoting *Sage*, 361 F.3d at 827). “Without having that right in substantive law determined, the company could not invoke equity.” *Id.* at 736-37, App. 23 (quoting *Sage*, 361 F.3d at 828). In *Northern Border*, “the district court had no authority to enter a preliminary injunction awarding immediate possession” only because the pipeline company had not “establish[ed] a preexisting entitlement to the property.” *N. Border*, 144 F.3d at 472. In other words, the pipeline company had not demonstrated that it had the authority to condemn the property by meeting the test set forth in the Natural Gas Act, before seeking possession. For this reason, Petitioners’ contention that a “substantive entitlement” to the property arises only at the conclusion of the condemnation proceeding finds no support in *Northern Border*. *See* Pet. at 20 (citing *N. Border*, 144 F.3d at 471).

The Seventh Circuit’s decision in *Northern Border* is wholly consistent with the decision below and the legion of cases holding that a district court may exercise its equitable powers to grant a preliminary injunction for possession of rights of way **once the**

substantive right to condemn the property has been established. Indeed, following *Northern Border*, district courts in the Seventh Circuit have consistently granted immediate possession after first finding a substantive right to condemn.¹⁶ “Every 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,” provided “all other requirements for issuance of a preliminary injunction have been met.” *See most recently, Transcon. Gas Pipe Line Co. v. 6.04 Acres*, 910 F.3d 1130, 1152 (11th Cir. 2018) (collecting cases), *petition for cert. filed*, (U.S. Mar. 6, 2019) (No. 18-1174); *see also Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 214 (4th Cir. 2019) (“What the landowners’ argument overlook[ed], we explained, was the preliminary injunction remedy provided in the Federal Rules of Civil Procedure that were adopted with the tacit approval of Congress.”) (quotations omitted); *Nexus Gas Transmission, LLC v. City of Green, Ohio*, No. 18-3325, 2018 WL 6437431, at *2 n.2

¹⁶ *See, e.g., Rockies Express Pipeline, LLC v. 123.62 Acres*, No. 1:08-cv-0751-RLY-TAB, 2008 WL 4493310, at *2 (S.D. Ind. Oct. 1, 2008); *Guardian Pipeline, LLC v. 295.49 Acres of Land*, Nos. 08-C-0028, 08-C-54, 08-C-29, 08-C-30, 2008 WL 1751358, at *21-22 (E.D. Wis. Apr. 11, 2008), *amended by*, No. 08-C-0028, 2008 WL 2717597 (E.D. Wis. July 8, 2008) *and* No. 08-C-0028, 2008 WL 2790179 (E.D. Wis. July 15, 2008); *Guardian Pipeline, LLC v. 950.80 Acres*, 210 F. Supp. 2d 976, 979 (N.D. Ill. 2002); *N. Border Pipeline Co. v. 64.111 Acres of Land*, 125 F. Supp. 2d 299, 301 (N.D. Ill. 2000); *ANR Pipeline Co. v. 11.66 Acres of Land*, No. 06-C-0190, 2006 WL 1277913, at *1 (E.D. Wis. May 5, 2006).

(6th Cir. Dec. 7, 2018) (“Since [*East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004)], dozens of courts have held that after a federal court determines the petitioner has a substantive right to condemn the disputed property, it possesses inherent equitable power to grant this type of injunction.”) (collecting cases); *cf. N. Border*, 144 F.3d at 471–72 (concluding that pipeline company could not obtain preliminary injunction allowing immediate possession of defendants’ properties because it did not first demonstrate a substantive entitlement to the property).

CONCLUSION

For each of the foregoing reasons, the Court should deny the petition.

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