

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**

**MOTION FOR LEAVE TO FILE BRIEF AS AMICI
CURIAE AND BRIEF OF AMICI CURIAE OWNERS'
COUNSEL OF AMERICA, PENNEAST NEW
JERSEY PROPERTY OWNERS, MVP AND ACP
VIRGINIA AND WEST VIRGINIA LANDOWNERS,
CATO INSTITUTE, AND NATIONAL FEDERATION
OF INDEPENDENT BUSINESS SMALL BUSINESS
LEGAL CENTER IN SUPPORT OF PETITIONERS**

Robert H. Thomas
Counsel of Record
Loren A. Seehase
DAMON KEY LEONG
KUPCHAK HASTERT
1003 Bishop Street
16th Floor
Honolulu, HI 96813
(808) 531-8031
rht@hawaiilawyer.com

Anthony Della Pelle
Joseph W. Grather
MCKIRDY, RISKIN, OLSON
& DELLA PELLE, P.C.
136 South Street
Morristown, NJ 07960
(973) 539-8900

(additional counsel listed on inside cover)

Counsel for Amici Curiae

Additional counsel

Christopher S. Johns
JOHNS & COUNSEL PLLC
14101 Highway 290 West
Suite 400A
Austin, TX 78737
(512) 399-3150

Ilya Shapiro
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org
tburrus@cato.org

Karen R. Harned
Luke A. Wake
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW
Suite 200
Washington, DC 20004
(202) 314-2061

**MOTION FOR LEAVE TO FILE
BRIEF AS AMICI CURIAE**

Pursuant to this Court's Rule 37.2, Owners' Counsel of America, PennEast New Jersey Property Owners, MVP and ACP Virginia and West Virginia Property Owners, Cato Institute, and National Federation of Independent Business Small Business Legal Center respectfully request leave to submit a brief as amici curiae in support of Petitioners.

All counsel of record for the parties received timely notice of the intention to file this brief. Counsel for Petitioners consented to the filing of this brief. Counsel for Respondent did not respond to a request to consent.

The interests of the amici are set out in the attached proposed brief. This petition presents fundamental questions about the delegated power of eminent domain, separation of powers, and whether the courts can use their equitable powers to grant a substantive right to private condemnors that Congress never delegated. This is an issue affecting the parties, the amici, and property owners across the nation. We believe our viewpoint and this brief will be helpful to the Court, and request the Court grant this motion and accept the attached brief for filing.

Respectfully submitted.

Robert H. Thomas
Counsel of Record
Loren A. Seehase
DAMON KEY LEONG
KUPCHAK HASTERT
1003 Bishop Street
16th Floor
Honolulu, HI 96813
(808) 531-8031
rht@hawaiilawyer.com

Anthony Della Pelle
Joseph W. Grather
MCKIRDY, RISKIN, OLSON
& DELLA PELLE, P.C.
136 South Street
Morristown, NJ 07960
(973) 539-8900

Christopher S. Johns	Ilya Shapiro
JOHNS & COUNSEL PLLC	Trevor Burrus
14101 Hwy 290 West	CATO INSTITUTE
Suite 400A	1000 Mass. Ave. N.W.
Austin, TX 78737	Washington, DC 20001
(512) 399-3150	(202) 842-0200

Karen R. Harned
Luke A. Wake
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW
Suite 200
Washington, DC 20004
(202) 314-2061

Counsel for Amici Curiae

APRIL 2019.

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?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iv
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT	5
I. Title Transfer Is the “Substantive” Right in Federal Condemnations.....	5
II. Summary Judgment Did Not Transfer Title, but Instead Only Recognized Transcontinental’s Standing as the Plaintiff	6
III. A Court Cannot Use Preliminary Injunctions to Shortcut the Usual, Straight Takings Process and Transfer the Owners’ Substantive Rights to Transcontinental	8
IV. The Rules of Civil Procedure Cannot Abridge the Landowners Substantive Rights or Enlarge Transcontinental’s Power, Which Congress Limited to Straight Takings	10

TABLE OF CONTENTS—Continued

	Page
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

<i>Albert Hanson Lumber Co. v. United States</i> , 261 U.S. 581 (1923).....	14
<i>Appalachian Voices v. Fed. Energy Reg. Comm'n</i> , No. 17-1271, (D.C. Cir. Feb. 19, 2019)	7
<i>Cherokee Nation v. Kan. Ry. Co.</i> , 135 U.S. 641 (1890).....	14, 16
<i>Cobb v. City of Stockton</i> , 909 F.2d 1256 (9th Cir. 2018).....	15
<i>Danforth v. United States</i> , 308 U.S. 271 (1939)	5
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994)	13
<i>Goldenberg v. Transcontinental Gas Pipe Line Co., LLC</i> , No. 18-1174 (Mar. 6, 2019).....	4
<i>Kirby Forest Industries v. United States</i> , 467 U.S. 1 (1984).....	<i>passim</i>
<i>Lynch v. Household Finance Corp.</i> , 405 U.S. 538 (1972).....	9
<i>Monongahela Nav. Co. v. United States</i> , 148 U.S. 312 (1893).....	15
<i>Mountain Valley Pipeline, LLC v. 6.56 Acres of Land</i> , No. 18-1159 (4th Cir. Feb. 5, 2019)	4
<i>Nexus Gas Transmission, LLC v. City of Green, Ohio</i> , No. 18-3325 (6th Cir. Dec. 7, 2018)	4
<i>Transcontinental Gas Pipe Line Co., LLC v. 6.04 Acres, more or less</i> , No. 16-17503 (11th Cir. Dec. 6, 2018).....	4
<i>Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa Cnty.</i> , 550 F.3d 770 (9th Cir. 2008).....	13
<i>United States v. Dow</i> , 357 U.S. 17 (1958).....	6

TABLE OF AUTHORITIES--Continued

	Page
<i>United States ex rel. Tenn. Valley Auth. v. Powelson</i> , 319 U.S. 266 (1943)	16
<i>United States v. Gen. Motors Corp.</i> , 323 U.S. 373 (1945).....	10
CONSTITUTIONS, STATUTES, AND RULES	
U.S. Const. amend. V	<i>passim</i>
Natural Gas Act	
15 U.S.C. § 717f(h).....	<i>passim</i>
Rules Enabling Act	
28 U.S.C. § 2072	11
Declaration of Taking Act	
40 U.S.C. § 3114(b)	6, 8
40 U.S.C. § 3115.....	8, 14
40 U.S.C. § 3118.....	6
Supreme Court Rule 37.....	1
Ariz. Rev. Stat. § 12-1126(A)	12

TABLE OF AUTHORITIES--Continued

	Page
Cal. Code of Civ. P. § 1268.030(a).....	12
Haw. Rev. Stat. § 101-26.....	12
Mont. Code Ann. § 70-30-309(1)	12
OTHER AUTHORITIES	
James W. Ely, <i>The Guardian of Every Other Right: A Constitutional History of Property Rights</i> (3d ed. 2008)	1
John Locke, <i>Of Civil Government</i> (1924)	9
<i>Property owners along pipeline notified of possible liens</i> , https://www.wgal.com/article/property-owners-along-pipeline-notified-of-possible-liens/26951370 (Mar. 26, 2019)	9

INTEREST OF AMICI CURIAE¹

Owners' Counsel of America. Owners' Counsel of America (OCA) is an invitation-only national network of experienced eminent domain and property rights attorneys. They joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is “the guardian of every other right,” and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a 501(c)(6) organization sustained solely by its members. Only one lawyer is admitted from each state. OCA members and their firms have been counsel for a party or amicus in many of the property cases this Court has considered in the past forty years and participated as amicus in the court below. OCA members have also authored and edited treatises, books, and articles on eminent domain, property law, and property rights, including the authoritative treatise on eminent domain law, *Nichols on Eminent Domain*.

PennEast New Jersey Property Owners. These amici are owners whose properties are being condemned under the Natural Gas Act by the PennEast Pipeline Company, LLC, which is constructing a 36-inch pipeline project to transport natural gas from Pennsylvania's Marcellus Shale field to New Jersey. These owners have been subject to preliminary

1. Pursuant to this Court's Rule 37.2(a), all counsel of record for the parties received timely notice of the intention to file this brief. Counsel for Petitioners consented to the filing of this brief. Counsel for Respondent did not respond to a request to consent. No counsel for any party authored any part of this brief; no person or entity other than amici made a monetary contribution intended to fund its preparation or submission.

injunctions that allow PennEast to obtain immediate possession of their properties, in much the same way as in this case.²

MVP and ACP Virginia and West Virginia Landowners. These amici are landowners whose properties are being condemned under the Natural Gas Act by Mountain Valley Pipeline LLC or Atlantic Coast Pipeline LLC. Each company is building a 42-inch pipeline to transport natural gas from West Virginia's Marcellus Shale fields to interconnections in Virginia and North Carolina. Like the New Jersey landowners, these owners have been subject to preliminary injunctions that have ordered them to give immediate possession to the pipeline company or are facing motions seeking such injunctive relief.³

NFIB Legal Center. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the

2. Case No. 3:18-cv-1853, Jacqueline H. Evans (112 Worman Road, Delaware Tp); Case No. 3:18-cv-2508, Foglio & Associates, LLC (155 Lower Creek Rd, Delaware Tp); Case No. 3:18-cv-1722, Joseph and Adele Gugliotta (111 Worman Rd, Stockton Bor); Case No. 3:18-cv-1779, Richard and Elizabeth Kohler (40 Lambertville HQ Rd, Del Tp); Case No. 3:18-cv-2014, Dan and Carla Kelly-Mackey (60 Sanford Rd, Delaware Tp); Case No. 3:18-cv-1811, Virginia James (Block 29 Lot 12, West Amwell Tp); Case No. 3:18-cv-1798, Carl and Valerie Vanderborcht (60 Hamp Rd., Lambertville); Case No. 3:18-cv-2028, Frank and Bernice Wahl (815 Milford-Frenchtown Rd, Alexandria Tp).

3. Case No. 7:17-cv-00492 (W.D. Va.), Karolyn W. Givens (MVP Tract No. VA-GI-200.041); Case No. 2:17-cv-04214 (S.D. W.Va.), Orus Ashby Berkley (MVP Parcel Nos. 7-15A-13, 7-15A-13.1); Civil Action No. 3:18-cv-00098 (W.D. Va.), Rockfish Valley Investments, LLC (ACP Parcel No. 08-001-B037); Civil Action No. 3:18-cv-00079 (W.D. Va.), Shahir and Nancy Kassam-Adams (ACP Parcel Nos. 46-3-1, 46-3-2A).

voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about \$500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

Amici are filing this brief because this case presents fundamental questions about the delegated power of eminent domain, separation of powers, and whether the courts can use their equitable powers to grant a substantive right to private condemnors that Congress never delegated. This is an issue affecting the parties, the amici, and property owners across the nation. We believe our viewpoint and this brief will be helpful to the Court.

◆

SUMMARY OF ARGUMENT

The unstated premise at the heart of the reasoning by the Third Circuit and the other courts which

adhere to the same approach is that, once initiated, a Natural Gas Act condemnation is all but inevitable.⁴ Because the pipeline company will eventually obtain the property after it pays the adjudicated compensation, the reasoning goes, what's the harm in giving it possession now? Once the pipeline company obtains summary judgment on the three predicates that a private condemnor must satisfy to institute an eminent domain action under section 717f(h) of the NGA, it's all over but the shouting because the summary judgment order resolved the substantive issues.

There are several fundamental problems with this approach: most critically, a misunderstanding about what the "substantive" rights are in an eminent domain action. The substantive right at stake in all federal takings, these included, is ownership of the property. And in straight takings, ownership and title are transferred to the plaintiff only after it agrees to pay the adjudicated price and exercises its option to buy at that price. Only then, and after the owner either is provided with compensation or has an irrevocably vested right to recover it, may the condemnor obtain possession. The Third Circuit concluded the district court's summary judgment order granted Transcontinental a substantive right to Petitioners' properties.

4. This issue is not isolated. Besides the Third Circuit, the Fourth, Sixth, and Eleventh Circuits have recently considered the same issue. *See Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, No. 18-1159 (4th Cir. Feb. 5, 2019); *Nexus Gas Transmission, LLC v. City of Green, Ohio*, No. 18-3325 (6th Cir. Dec. 7, 2018); *Transcontinental Gas Pipe Line Co., LLC v. 6.04 Acres, more or less*, No. 16-17503 (11th Cir. Dec. 6, 2018). Nor is the issue going away. A separate petition seeking this Court's review of the Eleventh Circuit's opinion has been filed, *see Goldenberg v. Transcontinental Gas Pipe Line Co., LLC*, No. 18-1174 (Mar. 6, 2019), and others may soon be forthcoming in the other cases.

But the summary judgment order did no such thing. It merely determined Transcontinental could be a straight taking plaintiff-condemnor and maintain a federal condemnation lawsuit. Any protections in the preliminary injunction process are hollow substitutes for the usual constitutional safeguards, because here, Transcontinental unquestionably retained the ability to walk away if it did not like the adjudicated compensation eventually established by the trial court.

By virtue of these injunctions, Transcontinental possesses both its cake (prejudgment possession of the properties), and the ability to eat it (the option to not buy if it doesn't like the final price).

ARGUMENT

I. Title Transfer Is the “Substantive” Right in Federal Condemnations

In *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984), this Court described the “straight taking”—or “standard” condemnation—power, noting its key feature: ownership of the property being condemned is the substantive right to which possession is tied:

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. 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*. If the Government decides not to exercise its option, it can move for dismissal of the condemnation action.

Id. at 2 (emphasis added) (citing *Danforth v. United States*, 308 U.S. 271, 284 (1939)).

Similarly, in the two other forms of federal statutory takings, the right to possession similarly vests only upon title transfer. In a quick-take, “[o]n filing the declaration of taking and depositing in the court, ‘title . . . vests in the Government; the land is condemned and taken . . . ; and the right to just compensation for the land vests in the persons entitled to the compensation.’” 40 U.S.C. § 3114(b)(1)–(3); *see also* 40 U.S.C. § 3118 (“the right to take *possession and title* in advance of final judgment” in quick-take eminent domain actions) (emphasis added).

Finally, in a pure statutory taking, a statute itself vests “all right, title, and interest” in the government. *Kirby*, 467 U.S. at 5, n.5; *see also United States v. Dow*, 357 U.S. 17, 21-22 (1958) (“in both classes of ‘taking’ cases—condemnation and physical seizure—title to the property passes to the Government only when the owner receives compensation, or when the compensation is deposited into court pursuant to the [Declaration of] Taking Act”).

II. Summary Judgment Did Not Transfer Title, but Instead Only Recognized Transcontinental’s Standing as the Plaintiff

Here, by contrast, the Third Circuit concluded that the district court’s summary judgment order on the three predicates that a private condemnor must satisfy in order to institute an eminent domain action in federal court under 15 U.S.C. § 717f(h) granted Transcontinental a substantive right, even though the court

acknowledged that title would not transfer until the end of the case.⁵

The Third Circuit’s focus on the summary judgment orders as the substantive actions fundamentally misconstrued the nature and effect of the ruling. Because Congress delegated to Transcontinental only the straight takings power, the district court’s order could only determine—at most—that Transcontinental may exercise the straight taking power.⁶ Thus, the order only determined that Transcontinental may exercise the delegated federal eminent domain power and could prosecute a condemnation lawsuit, and that the takings are for public purposes. Could the order determine the substantive issue in these cases: how much is owed as just compensation? No. Or at least *not yet*. And that is key, because until the properties are actually taken after final adjudication of compensation owed, there is no right of possession.

That is best illustrated by what the district court’s order did *not* do. It did not vest title to the properties in Transcontinental. It did not establish the amount of just compensation owed the owners. It did not obligate Transcontinental to pay whatever compensation may eventually be adjudicated. It did not obligate

5. Pet. App. 19 (“Here, unlike in a ‘quick take’ action, Transcontinental does not yet have title but will receive it once final compensation is determined and paid.”).

6. The D.C. Circuit concluded recently in *Appalachian Voices v. Fed. Energy Reg. Comm’n*, No. 17-1271, Slip Op. at 3 (D.C. Cir. Feb. 19, 2019), that in the NGA Congress delegated the “usual” power of eminent domain: “The eminent domain power conferred to Mountain Valley . . . requires the company to go through the ‘usual’ condemnation process, which calls for ‘an order of condemnation and a trial determining just compensation’ prior to the taking of private property.”

Transcontinental to complete the condemnations if it is not willing to pay that amount and Transcontinental remains free to refuse to exercise its “option” to buy. The order did not vest in the property owners an irrevocable right to compensation.

Rulings recognizing the power to institute and maintain an eminent domain action are not the same as rulings on the ultimate issue: whether Transcontinental has actually acquired *title* to the properties. There is a fundamental difference between the “right to exercise eminent domain” and having actually obtained ownership of the properties being condemned.

III. A Court Cannot Use Preliminary Injunctions to Shortcut the Usual, Straight Takings Process and Transfer the Owners’ Substantive Rights to Transcontinental

Lacking the transfer of a substantive right to Transcontinental (the owners’ titles) and the corresponding vesting of a substantive right in the owners (the condemnor’s irrevocable obligation to pay whatever is determined to be just compensation)—which in every other federal condemnation is the predicate to possession—the Rule 65 preliminary injunction process falls woefully short. Although the district courts attempted to structure the injunctions so that they look somewhat like a quick-take, they lack the key protections of a constitutional prejudgment possession: a quick-take condemnor obtains title and possession and in return foregoes the ability to decline to pay whatever compensation the court may eventually determine. *See* 40 U.S.C. § 3115 (a quick-take under § 3114 results in the government’s “irrevocable commitment” to pay whatever compensation is eventually determined).

These injunctions have real-world consequences for property owners who, despite the fiction that eminent domain actions are *in rem*, are being subject to *personal* deprivations of their fundamental rights. As this Court held,

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a “personal” right, whether the “property” in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (citing John Locke, *Of Civil Government* 82-85 (1924)). For example, some Pennsylvania property owners who were subject to possession-by-injunction for a pipeline have been threatened with mechanics’ liens after a pipeline subcontractor did not get paid. *See, e.g., Property owners along pipeline notified of possible liens*, <https://www.wgal.com/article/property-owners-along-pipeline-notified-of-possible-liens/26951370> (Mar. 26, 2019). Others have seen a pipeline recording an interest in their land with the local recorder of deeds, even though title to the easement has not yet granted. And early takings will continue to cause landowners significant damages that are likely not compensable as part of the condemnation process.

For example, allowing the pipeline company to take possession now rather than after trial has caused lost farm and business income that is likely unrecoverable as part of a just compensation award. *Cf. United States v. Gen. Motors Corp.*, 323 U.S. 373, 379–80 (1945).

By contrast, Transcontinental has obtained prejudgment possession without any corresponding obligation to pay the yet-to-be determined amount. Because there’s no question it retains the straight-take option of walking away if the compensation eventually determined is too dear. The critical flaw in the Third Circuit’s reasoning is that Transcontinental still possesses, in this Court’s words, the “option” to decline to pay the “adjudicated price.” *Cf. Kirby*, 467 U.S. at 2. In other words, after title transfers, any other federal condemnor who obtains possession cannot decide to *not* obtain title while, here, Transcontinental as a preliminary injunction condemnor can. That this scenario may be unlikely is beside the point. What matters is that Transcontinental is under no legal obligation to exercise its “option.”

IV. The Rules of Civil Procedure Cannot Abridge the Landowners Substantive Rights or Enlarge Transcontinental’s Power, Which Congress Limited to Straight Takings

A judicial order of possession before title transfer intrudes on Congress’s sole power to establish whether—and most importantly how—to take property. Neither the district courts’ equitable powers, nor the Rules Enabling Act, nor the rules of civil procedure can recognize in Transcontinental more rights (or powers) than Congress has delegated. *See* 28 U.S.C. § 2072(b) (the rules of civil procedure

“shall not abridge, enlarge or modify any substantive right.”).

But the panel concluded that although Congress did not delegate the quick-take power in NGA takings, neither did it take away district courts’ equitable powers, nor did it expressly *prohibit* the use of preliminary injunctions to give private condemners prejudgment possession. This is wrong for four reasons, each rooted in the standards for Rule 65 injunctions:

1. The key element to any injunction is likelihood of success on “the merits.” In reviewing a preliminary injunction, the court looks at the underlying claim. Here, the taking by Transcontinental of the properties upon either the actual payment of just compensation or vesting of the right to obtain whatever amount is finally determined to be just compensation. If it appears as if Transcontinental is likely to prevail at trial on the merits of this underlying claim, the court then evaluates the other preliminary injunction factors. And the issue being evaluated for determining whether the plaintiff is likely to prevail on the merits must be identical to the issue it is asking the court to enjoin (or in this case to affirmatively order).

That is not the case here. Transcontinental sought immediate possession under the three factors in 15 U.S.C. § 717f(h). But the underlying merits question in these condemnation cases is what will be the just compensation owed to the owners, an issue not a part of the § 717f(h) calculus, on which Transcontinental submitted no evidence allowing the district court to reach a conclusion about the amount of final compensation, and which admittedly has yet to be determined.

The panel, however, wrongly concluded the district court's grant of summary judgment was a "merits" determination. Pet. App. 13. It also mischaracterized the district court's summary judgment order as an "order of condemnation." *Id.* at 22. As outlined earlier, in straight-takings cases like these, the merits question is whether the condemnor has title, which can only happen here once Transcontinental exercises its option to buy. That, in turn, can only come after the court finally determines the amount of compensation. And that has not yet happened. An "order of condemnation" is the document by which the court transfers title to the condemnor after payment of the final adjudicated compensation.⁷ In short, a summary judgment

7. *See, e.g.*, Ariz. Rev. Stat. § 12-1126(A) ("When the final judgment has been satisfied and all unpaid property taxes which were levied as of the date of the order for immediate possession, including penalties and interest, on the property that is the subject of the condemnation action have been paid, the court shall make a final order of condemnation, describing the property condemned and the purposes of the condemnation."); Cal. Code of Civ. P. § 1268.030(a) ("Upon application of any party, the court shall make a final order of condemnation if the full amount of the judgment has been paid as required by Section 1268.010 or satisfied pursuant to Section 1268.020."); Haw. Rev. Stat. § 101-26 ("When all payments required by the final judgment have been made, the court shall make a final order of condemnation, which shall describe the property condemned and the purposes of the condemnation, a certified copy of which shall be filed and recorded in the office of the registrar of conveyances, and thereupon the property described shall vest in the plaintiff."); Mont. Code Ann. § 70-30-309(1) ("When payments have been made and the bond, if appropriate, has been given as required by 70-30-307 and 70-30-308, the court shall make a final order of condemnation. The order must describe the property condemned, the purposes of the condemnation, and any appropriate payment for damages

ruling under section 717f(h) did not recognize a substantive right.

2. The injunction did not preserve the status quo; it instead dramatically altered the status quo by affirmatively depriving the property owners of their substantive rights—including the right to exclude—which this Court has repeatedly emphasized is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994).⁸ In every other federal taking, owners retain the right to exclude until such time as their right to just compensation irrevocably vests (which has not occurred here). Thus, as detailed earlier, not only did the summary judgment orders *not* grant Transcontinental a substantive right; the injunction actually deprived the owners of one of their most essential substantive rights, the right to exclusive possession of their land and the vested right to compensation when that right is taken.

3. It does not matter that the injunction bond sort of looks like a quick-take deposit. Pet. App. 59 “(Additionally, Transco will post sufficient bonds upon the grant of the preliminary injunction; therefore, any

to the property actually taken as well as to any remaining parcel of property that may be adversely affected by the taking.”).

8. In *Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa Cnty.*, 550 F.3d 770 (9th Cir. 2008), the court recognized, “preliminary injunctions . . . are primarily issued to preserve the status quo of the parties and as a means for the court to retain jurisdiction over the action”. *Id.* at 776. In denying the injunction, the court noted, “[h]ere, Transwestern [the private NGA pipeline condemnor] seeks not to preserve the status quo, but instead seeks a mandatory injunction, which is ‘particularly disfavored’ in law.” *Id.*

amount of money damages any landowner may suffer will be secure and a remedy will be available.”). A bond, however, does not obligate Transcontinental irrevocably to pay whatever the district court later determines is just compensation, and thus is a poor substitute for a quick-take deposit. *Cf.* 40 U.S.C. § 3115 (government’s “irrevocable commitment” to pay whatever compensation is eventually determined). The injunction also did not vest in the owner the corresponding *irrevocable* right to compensation. *See Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587 (1923) (“The owner is protected by the rule that title does not pass until compensation has been ascertained and paid, nor a right to the possession until reasonable, certain, and adequate provision is made for obtaining just compensation.”) (citing *Cherokee Nation v. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)). *Cf.* Pet. App. 23-24.

The reason a bond is not a “reasonable, certain, and adequate” guarantee of compensation is because when the federal government occupies property without having obtained title, the owners have a governmentally-guaranteed and vested ability to obtain whatever compensation the court determines—and the means to obtain it. Because the power to take property is an attribute of sovereignty and the Fifth Amendment’s command is self-executing, this obligation cannot be avoided; Congress has provided a vehicle to obtain after-the-fact compensation: a lawsuit under the Tucker Act, either in a district court (for compensation claims up to \$10,000) or in the Court of Federal Claims (for all others). The panel viewed a state-law trespass action as the equivalent: “the landowners could proceed with a trespass action if the company did not promptly make up the difference” between the

bond and the final compensation. Pet. App. 28, 58. But a bond and an inchoate state-law trespass cause of action are not the same as the self-executing right to compensation backed by the federal government and the availability of a federal inverse condemnation judgment to guarantee collection.

The injunctions do not compel Transcontinental to pay whatever the courts determine is just compensation. What if the final adjudicated compensation exceeds Transcontinental's current estimate, and the bonds and deposits are insufficient? *See* Pet. App. 59. Or what if Transcontinental simply abandons the project because it no longer is profitable to continue? Critically, nothing in the injunction overrules Transcontinental's option under the NGA *not* to take the properties if it does not like the option price, or if it just decides not to proceed at any stage. And what if Transcontinental becomes insolvent, something that owners whose property is taken by the federal government need not worry about? In that situation, any state-law trespass claims these owners may have against Transcontinental would likely not represent the "full and perfect equivalent for the property taken." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893). *Compare* Pet. App. 28 (a state court trespass action is all the protection the property owners need) *with Cobb v. City of Stockton*, 909 F.2d 1256, 1267(9th Cir. 2018) (state-law inverse condemnation claims against a municipality that have not been reduced to final judgment may be "adjusted in bankruptcy").

In sum, the preliminary injunction bonds are merely *security* for Transcontinental's future conduct, not Transcontinental's irrevocable and enforceable obligation to pay—backed by the self-executing Fifth Amendment—whatever final compensation the courts

may ultimately determine. Injunctions do not provide the “reasonable, certain, and adequate” vesting of the right to just compensation this Court envisioned in *Cherokee Nation*.

4. Finally, quick-take injunctions—which grant immediate possession rather than an option to possess the land after trial—abridge the substantive rights of property owners in violation of the Rules Enabling Act. Landowners lose not only the right to exclude pipeline workers and heavy machinery from their properties during the months or years before the final determination of just compensation at trial, they also lose the right to use their property as they see fit during the pendency of the case. Some of the harms flowing from the abridgement of their property rights—such as lost business, farm, and rental income that could have been earned during the pendency of the case—are often noncompensable in eminent domain proceedings. See, e.g., *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 283 (1943) (“[S]ettled rules of law preclude[] a consideration of consequential damages for losses of a business or its destruction”) (internal quotation marks omitted). Premature possession likewise deprives the landowners of the opportunity to prevent or mitigate environmental damage to the springs, streams, hillsides, and other features of their land.

Some courts of appeals have reasoned that the pipeline company will get the property anyway—and that the timing of possession therefore does not matter. But anyone familiar with property law—with its life estates, determinable fees, remainders, reversions, rights of entry, leases, and options—knows that substantive property rights are inextricably linked to,

and are indeed often defined by, the timing of possession.

Landowners facing quick-take injunctions rarely talk about their injuries in the language of substantive rights. They talk instead of losing one or two more years of walking through their forests, watching wildlife playing on the ground and in the trees, caring for a dying relative, earning a living from farming and ranching, listening to the sound of the wind blowing through the trees, and enjoying peace and quiet. The real-world consequences of losing these blessings of property are certainly “substantive” to the landowners who are forced to endure premature takings.

CONCLUSION

The Court should grant the petition and review the judgment of the Third Circuit.

Respectfully submitted.

Robert H. Thomas <i>Counsel of Record</i>	Anthony Della Pelle Joseph W. Grather
Loren A. Seehase DAMON KEY LEONG KUPCHAK HASTERT	MCKIRDY, RISKIN, OLSON & DELLA PELLE, P.C.
1003 Bishop Street 16th Floor Honolulu, HI 96813 (808) 531-8031 <i>rht@hawaiilawyer.com</i>	136 South Street Morristown, NJ 07960 (973) 539-8900

Christopher S. Johns JOHNS & COUNSEL PLLC 14101 Hwy 290 West Suite 400A Austin, TX 78737 (512) 399-3150	Ilya Shapiro Trevor Burrus CATO INSTITUTE 1000 Mass. Ave. N.W. Washington, DC 20001 (202) 842-0200
--	---

Karen R. Harned
Luke A. Wake
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW
Suite 200
Washington, DC 20004
(202) 314-2061

Counsel for Amici Curiae

APRIL 2019.