No.

In the Supreme Court of the United States

ARENTZ FAMILY, LP, ET AL.,
Petitioners,

v.

PSEG RENEWABLE TRANSMISSION LLC,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

An owner's right to keep others out is "universally held to be a fundamental element" of private property. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). A Maryland statute carves out an exception to this longstanding and traditional right to exclude, permitting those who act for the State, or for an entity "having the power of eminent domain," to enter and occupy private property to conduct studies and surveys to determine if the land is suitable for acquisition for a public use. Md. Code Ann., Real Prop. § 12-111(a). Respondent PSEG Renewable Transmission LLC, a private, for-profit developer of high-voltage corridor projects, has not been delegated the power of eminent domain. But claiming to exercise rights under this statute, PSEG sued Petitioners—landowners who had declined its demands to enter their properties—and invoked the federal courts' equitable powers to compel them to step aside. The Fourth Circuit affirmed the district court's issuance of a preliminary injunction requiring Petitioners to allow PSEG to enter their land. The court held that even though PSEG presently lacks the actual authority needed to gain entry, it was nonetheless entitled to do so because it had likely been delegated that power. The Fourth Circuit created a three-way split on whether preliminary injunctions can allow private parties to exercise eminent domain powers prior to final judgment. The question presented:

Whether a preliminary injunction may be used to allow a private party to exercise sovereign eminent domain powers before it has been delegated that authority?

PARTIES TO THE PROCEEDING

Petitioners Arentz Family, LP, Barney's Farm, LLC, HZ Properties, LLC, Charles William Bond, Morgan Davis Bond, Charlotte Ruth Bixler, Sharon A. Bohlayer (named in the Fourth Circuit's captions as "Sharon L. Bohlayer"), Morris L. Bohlayer, Gary J. Brockmeyer, Nancy M. Brockmeyer, Esther Johann Lentz-Buenger, Helen L. Bull, Christopher D. Cockey, Carmen Cockey, Thomas B. Collins, Tracey W. Collins (named in the Fourth Circuit's captions as "Tracy W. Collins"), Diane M. Cook, James R. Cook, Dorothy I. Donmoyer, Petrice Marie Donmoyer-Resh, Richard M. Doster, The Dug Hill Rod and Gun Club, Inc., Keith Emerson Ensor, Kevin Lee Ensor, Zhejun Fan, Joseph L. Gover (named in the Fourth Circuit's captions as "Joseph L. Glover"), Raina C. Gover (named in the Fourth Circuit's captions as "Raina C. Glover"), Bryan N. Hendrix, Constance M. Hendrix, Kimberly A. Johnston, Nada E. Kourani, Mohamad A. Kourani, Julia Lu, M & R, LLC, Deborah H. Maeder, Nancy P. Macbride, Rebecca McLean, Andrew D. McLean, Carl E. Miller, Catherine V. Miller, Kenneth E. Miller, Fay Ann Miller, Wayne D. Miller, Benjamin Eugene Nusbaum, Kenneth Eugene Nusbaum, Chris N. Resh, Rebecca Irene Scollan, Alene R. Stickles, Robert H. Stickles, Sr., Erich Charles Steiger, Troyer Farms, LLC, Troyer Real Estate, LLC, Matt Unkle, Tomi Unkle, Leslie Alfred White, Amy Gayle Youngblood, and Justin Wright were defendants-appellants below. The Fourth Circuit's captions also list Betty Lou Miller, Robert L. Donmoyer, and John D. Maeder as appellants, but they are deceased. Each property they co-owned is represented here by its other owners, who are Petitioners: Carl E. Miller, for the property he owned with Betty Lou Miller, Dorothy I. Donmoyer,

Petrice Marie Donmoyer-Resh, and Chris N. Resh, for the property they owned with Robert L. Donmoyer, and Deborah H. Maeder for the property she owned with John D. Maeder.

Respondent PSEG Renewable Transmission LLC was the plaintiff-appellee below.

The following parties were defendants in the district court and are named as defendants in the Fourth Circuit's captions, but they did not appeal: Dells Generation Farms, LLC, Groves Mill, LLC, Panora Acres, Inc., RBC Real Estate I, LLC, School Of Living, Allan Patrick Sanders, Roy Francis Sanders, Anne F. Price-Davis, Michael A. Davis, Austin L. Kaltrider, Joyce E. Kaltrider, Marlin L. Kaltrider, Marvin L. Kaltrider, Shawn L. Kaltrider, Brandon Hill, Bruce E. Doak, Gayle M. Doak, C. William Knobloch, Jr. And Carol Knobloch Revocable Living Trust Agreement Dated January 30, 2019, Carol J. Fertitta, Joseph V. Fertitta, III, Catherine M. Gestido, Eduardo E. Gestido, Charles Gary Atkinson, Indranee Kuruppunayake, Stephen Gordon Atkinson, Cheryl Ann Geary, Paul Joseph Geary, Christine D. Eyring, John M. Eyring, Jr., Daniel George Schwartz, Erik J. Lenz, Faith J. Weeks, Michael D. Hands, Jr., Francis Lee Dell, Marian V. Dell, Henry Whitaker, Karen A. Schleper, Hoeckel Family Self Settled Asset Protection Family Irrevocable Trust, James A. O'Donnell, Patricia J. O'Donnell, Judith A. Fiedler, Linda S. Gresock, Thomas S. Gresock, Lisa M. Ward, Zachary J. Ward, Mabel E. Wilson Revocable Deed Of Trust Dated 3/25/1998, Matthew Lee Dell, Nancy E. Cramer, Nancy Eileen Pierce, Pamela M. Wilson, Robert Keith Wilson, Phyllis A. Rehmeyer, Todd M. Rehmeyer. The Fourth Circuit's captions also list "Charles William Atkinson," but no party by that

name was named in the district court. Peter and John Radio Fellowship, Inc., Barclay G. Caras, Pamela J. Caras, and Julius J. Pitrone were dismissed from the district court case before the court of appeals ruled. Petitioners have notified the Clerk under Rule 12.6 that they believe these parties have no interest in the outcome of the petition.

CORPORATE DISCLOSURE STATEMENT

Arentz Hay & Grain, Inc. is the parent corporation of Petitioner Arentz Family, LP. No publicly held company owns 10% or more of Arentz Family, LP.

Barney's Farm, LLC has no parent corporations and no publicly held company owns 10% or more of its stock.

M & R, LLC has no parent corporations and no publicly held company owns 10% or more of its stock.

The Dug Hill Rod and Gun Club, Inc. has no parent corporations and no publicly held company owns 10% or more of its stock.

Troyer Farms, LLC has no parent corporations and no publicly held company owns 10% or more of its stock.

Troyer Real Estate, LLC has no parent corporations and no publicly held company owns 10% or more of its stock.

HZ Properties, LLC has no parent corporations and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case under Rule 14.1(b)(iii):

PSEG Renewable Transmission LLC v. Arentz Family, LP, No. 25-1730, 185 F.4th 497 (4th Cir. Aug. 6, 2026).

PSEG Renewable Transmission LLC v. Arentz Family, LP, No. 25-cv-1235-ABA, 788 F. Supp. 3d 705 (D. Md. June 20, 2025) (preliminary injunction).

PSEG Renewable Transmission LLC v. Arentz Family, LP, No. 25-cv-1235-ABA (D. Md. July 11, 2025) (amended preliminary injunction).

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PETITION FOR A WRIT OF CERTIORARI

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

The Fourth Circuit's decision has created a three-way divide in the lower courts, which have long disagreed about whether a preliminary injunction may be used to allow a private party to exercise the sovereign power of eminent domain to enter private property, before the final order of condemnation. Some require the party seeking precondemnation entry to establish a preexisting entitlement to enter private property before invoking judicial assistance via injunction. Others permit a party to invade and occupy private property before final judgment based only on a finding that such entry is in furtherance of a public use or purpose. This long-festering two-way divide about how a private entity which has been delegated eminent domain authority exercises that sovereign power—until recently confined to immediate possession in private-condemnor takings under the Natural Gas Act—has now metastasized into the Fourth Circuit's different approach, a stark demonstration of a private party using the preliminary injunction process to exercise powers it has not obtained via the usual eminent domain process. The court below affirmed the district court's issuance of a preliminary injunction prohibiting Petitioners from keeping Respondent PSEG Renewable Transmission LLC ("PSEG") out, based only on a prediction that PSEG likely holds the eminent domain power on which its claimed right of entry depends.

What may appear to be a procedural quirk has immediate and devastating practical consequences going to the very heart of the fundamental right of private property ownership: the Fourth Circuit authorized a private party to enter Petitioners' property without first establishing that the private party possesses the sovereign power on which its claimed right of entry depends. This circular approach allowed PSEG to exercise a power derivative of Maryland's sovereign power of eminent domain before PSEG possessed that authority. Moreover, the preliminary injunction grants PSEG substantially all the relief it sued for before judgment with no way to undo it, based merely on the preliminary conclusion that it likely holds or will hold the contested power. Absent this Court's intervention, this abuse of the preliminary injunction process is effectively unreviewable, because entry onto Petitioners' properties by PSEG will render a decision on the merits of PSEG's complaint unnecessary.

OPINIONS BELOW

The Fourth Circuit's opinion is published at 185 F.4th 497, reprinted at Petitioners' Appendix (App.) 1a-51a, and judgment was entered the same day, August 6, 2026. The district court's opinion granting Respondent injunctive relief is published at 788 F. Supp. 3d 705, reprinted at App. 52a-114a. The district court's order denying a stay pending appeal and requiring a bond, App. 119a-126a, is available at 2025 WL 1919947. The original and amended preliminary injunctions, App. 117a-118a, 127a-128a, are unreported.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1332(a). On June 20, 2025, it granted Respondent's motion for a preliminary injunction, App. 52a-118a, and on July 11, 2025, an amended injunction, App. 127a-128a. Petitioners filed a timely notice of appeal on June 24, 2025, and an amended notice on July 18, 2025. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1292(a)(1), and affirmed on August 6, 2026. App. 1a-51a. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The pertinent text of Federal Rule of Civil Procedure 65, 28 U.S.C. § 2072, Md. Code Ann., Real Prop. § 12-111, and Md. Code Ann., Pub. Util. § 7-207(b)(3) are reproduced at App. 129a-135a.

STATEMENT OF THE CASE

A. PSEG's project

PSEG is a New Jersey company. App. 5a. Maryland's regional transmission organization chose PSEG's proposal for the Maryland Piedmont Reliability Project, a line that would run about sixty-seven miles through Baltimore, Carroll, and Frederick Counties. *Id.* at 6a-7a. Under Maryland law, PSEG is not an "electric company." *Id.* at 25a. It does not yet, and "might never," transmit or distribute electricity to retail customers in the state. *Ibid.*

Along the route, Petitioners own multi-generational farms and land under conservation easements, and several run businesses there. App. 9a. One family raises sheep and goats, and surveyors

moving from farm to farm could carry disease to its livestock. D. Ct. Dkt. No. 92-7, at 2-3.

PSEG cannot build the line without a Certificate of Public Convenience and Necessity ("Certificate") from Maryland's Public Service Commission (the "Commission"). App. 7a. "On issuance of" a Certificate, "a person may acquire by condemnation . . . any property or right necessary for the construction or maintenance of the transmission line." Md. Code Ann., Pub. Util. § 7-207(b)(3)(v)(2); *see* App. 7a-8a, 22a; *id.* at 46a (Richardson, J., concurring in the judgment). PSEG applied for a Certificate in December 2024, and the Commission's review is still ongoing. App. 8a.

In January 2025, the Commission directed Maryland's Power Plant Research Program (the "Program") to determine whether the application was complete. *Ibid.* In March 2025, the Program reported that PSEG's application was "administratively incomplete." *Id.* at 8a-9a. PSEG had prepared its environmental studies from desktop sources, without entering the land along the route, and the Program said those studies could not be verified and that field studies were necessary. App. 9a.

PSEG asked Petitioners for access, and it offered some of them $1,000 for a temporary right of entry. D. Ct. Dkt. No. 6-2. None consented, and some refused repeatedly. App. 9a-10a, 80a.

B. PSEG's suit

Finding little success with its precondemnation entry monetary offers, in April 2025, PSEG sued 117 landowners, Petitioners among them, in the District of Maryland under diversity jurisdiction. App. 53a,

80a, 101a. Its complaint pleaded a single claim for injunctive relief allowing PSEG to enter Petitioners' land to conduct surveys under § 12-111. *Id.* at 80a. That statute lets engineers, surveyors, and appraisers who act for the State or a body "having the power of eminent domain" enter private land to survey it and gather information. Md. Code Ann., Real Prop. § 12-111(a). The court of appeals called this access "an exception to the right to exclude." App. 31a.

PSEG concurrently moved for a preliminary injunction permitting it "to enter onto the properties . . . and to remain on the property to the extent necessary to make surveys." App. 10a. Petitioners have maintained that PSEG "cannot possess the power of eminent domain until it has been issued a [Certificate]." App. 22a; *see* App. 83a-84a, 89a. Whether PSEG has that power is the parties' main dispute. App. 11a.

C. The injunction

The district court decided Petitioners' motions to dismiss and PSEG's motion for injunctive relief in one opinion, without discovery. App. 81a, 115a. In denying the motions to dismiss, the court took PSEG's allegations as true and concluded that PSEG "qualifies" as a body "having the power of eminent domain" under § 12-111. App. 53a-54a, 83a-91a, 102a. In ruling on PSEG's motion, the court repeated that conclusion and found that PSEG had made "a strong showing that it is likely to succeed on the merits." App. 103a, 106a; *see* App. 11a. It acknowledged that the relief PSEG sought by preliminary injunction was "largely congruent with the final relief that PSEG seeks through its complaint." *Id.* at 104a. It granted the injunction on June 20, 2025, allowing PSEG to

begin entering Petitioners' properties. App. 117a-118a.

On July 11, 2025, the court denied Petitioners' motion to stay the injunction pending appeal. App. 119a-126a. Petitioners asked for a $1 million bond. The court set the bond at $100,000, about $1,100 per property, and amended the injunction to make clear that PSEG may conduct only the activities that § 12-111 authorizes. *Id.* at 124a-125a. PSEG posted the bond. D. Ct. Dkt. No. 275. Like the original, the amended injunction allows PSEG to "enter" and "remain on" Petitioners' land until PSEG's application for a Certificate "is granted or denied." App. 127a. On the Program's estimate of about thirty months to assess an application, PSEG's application "could only be assessed by mid-2027 at the earliest." App. 30a.

D. The no-hunting orders

PSEG told the district court that the surveys would not take "days, upon days, upon days, upon days." D. Ct. Dkt. No. 251, at 18. But PSEG's notices for one Petitioner's land covered every day from September 29 to October 31, 2025, for what its land agent said was only a single day of surveying. D. Ct. Dkt. No. 308-2, at 4, 10-11.

PSEG moved to "clarify" the injunction to bar hunting on noticed survey days, subject to a provision that "authorizes Property Owners to request permission to hunt." D. Ct. Dkt. No. 321, at 1 (quoting D. Ct. Dkt. No. 302, at 5). Petitioners, who include a rod and gun club and a family that hunts its land for food, opposed the motion. D. Ct. Dkt. No. 308; D. Ct. Dkt. No. 308-2, at 3.

The district court granted the motion. On noticed survey periods, which can run several weeks during hunting season, Petitioners may hunt on their own land only with PSEG's written agreement, and only if the land "would ordinarily be used for hunting." D. Ct. Dkt. No. 329, at 1-3.

E. The Fourth Circuit's decision

Petitioners appealed, arguing first that the injunction was mandatory because it "grants the relief sought by PSEG in its complaint." App. 17a. The Fourth Circuit reviewed for abuse of discretion and affirmed. App. 15a, 35a. It did not decide whether the injunction preserved the status quo. Instead, it said that, in deciding whether an injunction is mandatory, whether it "affords final relief is not the relevant inquiry." *Id.* at 18a. And it held that "the circumstances are sufficiently demanding for the award of mandatory relief." *Ibid.* (quoting *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004)).

On likelihood of success, the Fourth Circuit applied Maryland law, and since the Supreme Court of Maryland had not resolved this question, it had to predict how that court would rule. App. 16a, 18a. The court noted that the State "inherently possess[es] the power of eminent domain," but that it was "less clear when an applicant to become a federal public utility, like PSEG, gains that power." App. 11a.

It held that § 12-111(a) requires the power now: "PSEG must presently possess the power of eminent domain in order to invoke the right of access . . . ." App. 22a. The court reasoned that requiring a Certificate before entry would make the statutory scheme "unworkable," because the field studies are

required for the Certificate application itself. *Ibid.* It recognized that the Program has its own statutory power to enter private land for these studies, but it said the Program had "implicitly declined to exercise" that power by directing PSEG to conduct them. App. 25a (discussing Md. Code Ann., Nat. Res. § 3-305(f)(1)). It failed to address whether PSEG could have hired the Program to conduct the surveys.

The court then held that the district court "did not abuse its discretion in finding that PSEG likely gained the power of eminent domain for purposes of access under Section 12-111(a) before the issuance of a [Certificate]." App. 23a. In the court's view, PSEG likely gained that power "when [the Program] directed it to complete the necessary field studies." *Ibid.* PSEG, the court said, "need not show a certainty of success." App. 26a (internal quotation marks omitted). The court acknowledged that the right to exclude is "one of the most treasured" rights of property ownership, but it viewed the injunction as a "narrow" intrusion. App. 34a (quoting *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021)).

Judge Richardson concurred in the judgment. In his view, § 7-207(b)(3) "likely supplies the needed delegation," and the Certificate requirement governs only when the power may be used. App. 46a-51a (Richardson, J., concurring in the judgment). He rejected the district court's alternative theory that PSEG was acting "on behalf of" the Program. App. 41a-42a n.2 (Richardson, J., concurring in the judgment). The majority agreed on that point, but it said the Program's direction "demonstrates that Maryland has delegated eminent domain power to PSEG for the purpose of access under Section 12-111(a)." App. 24a n.3.

The injunction remains in force and the case is still pending in the district court. In September 2026, PSEG reported that nine archaeological surveys remained on the properties in this case and that every other type of survey was done. D. Ct. Dkt. No. 362, at 2. It added that its review of the survey data with Maryland agencies "may require additional surveys on certain properties." *Id.* at 3.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit Added to the Existing Lower Court Divide About When a Court May Grant Entry or Possession by Preliminary Injunction

The courts of appeals agree on the rule: a preliminary injunction is appropriately used to protect a substantive right the movant already possesses, but it cannot create one. In cases where a party seeks entry to private property on the theory it has, or may later be delegated, the power of eminent domain, the lower courts disagree about *when* a condemnor's right arises. The Seventh Circuit allows possession-by-injunction only where the party seeking access has a "preexisting entitlement" to the land. *N. Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469, 471-72 (7th Cir. 1998). There, the court concluded that even though the pipeline company seeking access was delegated the power of eminent domain, that delegation did not include the power to enter the property until the condemnation process had concluded. By contrast, six other circuits allow possession once an order of condemnation, or a partial summary judgment on the right to condemn, is entered. These courts reason that possessing the

power of eminent domain alone gives the condemnor a substantive right that equity may then protect. *E.g.*, *Sage*, 361 F.3d at 823-28; *Transwestern Pipeline Co. v. 17.19 Acres of Prop.*, 550 F.3d 770, 776-78 (9th Cir. 2008).

Here, the Fourth Circuit stretched that reasoning well beyond these limitations. It affirmed an injunction that put PSEG on Petitioners' land, over their objection, merely on a finding that PSEG "likely" has the power of eminent domain. App. 23a. PSEG's claimed right of entry depends on that finding, so the injunction rests only on a prediction. No other circuit has allowed that when the relief cannot be undone.

A. The Seventh Circuit requires a preexisting entitlement to the land, which a condemnor does not have until the condemnation process ends

In *Northern Border*, a pipeline company held a certificate from the Federal Energy Regulatory Commission ("FERC"), that carried the federal power of eminent domain. 144 F.3d at 470-71. The company filed a condemnation action and moved for immediate possession. *Id.* at 471. The Seventh Circuit accepted that the company's claim was "likely to prevail on the merits," and noted that "no one disputes the validity of the FERC certificate." *Ibid.* Even so, it held that the district court "had no authority to enter a preliminary injunction awarding immediate possession." *Id.* at 472.

The court explained that a preliminary injunction "may issue only when the moving party has a substantive entitlement to the relief sought." *Id.* at 471. And it treated the company's entitlement as one that would "arise at the conclusion of the normal

eminent domain process," not one it had "right now." *Ibid*. This Court agrees: in an ordinary condemnation, title and the right to possession pass when the condemnor pays the award. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 4, 11-12 (1984); *Danforth v. United States*, 308 U.S. 271, 284-85 (1939). Until it pays, the condemnor holds only "an option to buy the property at the adjudicated price," and it may decline that option and dismiss the case. *Kirby*, 467 U.S. at 4. Under the Seventh Circuit's rule, this case is clearer still. If a condemnor likely to win with an undisputed power could not get possession by injunction before the process ended, a party whose power is itself disputed cannot get entry by injunction.

B. Six circuits allow entry only after an order of condemnation gives the condemnor a substantive right to the land

The Third, Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits hold that the condemnor gets a substantive right to the land earlier, when a court enters an order of condemnation or a partial summary judgment on the right to condemn. The Fourth Circuit has explained that such orders "gave [the company] an interest in the landowners' property that could be protected in equity." *Sage*, 361 F.3d at 823. Similarly, the Ninth Circuit held that the company's substantive right to condemn "accrues only through the issuance of an order of condemnation." *Transwestern*, 550 F.3d at 776. And the Third Circuit allowed possession because the company "properly sought and obtained the substantive right to the property before seeking equitable relief." *Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres*, 907 F.3d 725, 729 (3d Cir. 2018); *see also Columbia Gas*

Transmission, LLC v. 1.01 Acres, 768 F.3d 300, 314-16 (3d Cir. 2014); *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 214 (4th Cir. 2019); *Nexus Gas Transmission, LLC v. City of Green*, 757 F. App'x 489, 492 n.2 (6th Cir. 2018); *All. Pipeline L.P. v. 4.360 Acres of Land*, 746 F.3d 362, 368-69 (8th Cir. 2014); *Transcon. Gas Pipe Line Co. v. 6.04 Acres*, 910 F.3d 1130, 1152-54 (11th Cir. 2018).

The Fourth and Ninth Circuits have read *Northern Border* as a case in which the company had no order on its right to condemn. *Sage*, 361 F.3d at 827-28; *Transwestern*, 550 F.3d at 777. But the Seventh Circuit's reasoning reaches further. It required a preexisting entitlement, and it accepted that the company's entitlement would arise only at the end of the eminent domain process. *N. Border*, 144 F.3d at 471-72. An order on a motion to dismiss or summary judgment comes well before that point. *See Transwestern Pipeline Co. v. 9.32 Acres*, 544 F. Supp. 2d 939, 945-47 (D. Ariz. 2008) (calling *Northern Border* and *Sage* "incompatible with one another" and following *Northern Border*), *aff'd on other grounds sub nom. Transwestern Pipeline Co. v. 17.19 Acres of Prop.*, 550 F.3d 770 (9th Cir. 2008).

These circuits rest on the same premise as the Seventh. A court's equitable power "may not be used to create new substantive rights." *Sage*, 361 F.3d at 823. Rule 65 "cannot itself create a substantive right to condemn where such a right is otherwise lacking." *6.04 Acres*, 910 F.3d at 1153. And "likelihood of success on the merits" does not "subsume the entire preliminary injunction analysis and allow parties to obtain relief before bearing the burden of proof in their claim." *Transwestern*, 550 F.3d at 776. The Ninth Circuit applied the same line in both directions. A

company without an order of condemnation "has no substantive right of possession" and cannot get possession by injunction, while a company with one can. *Id.* at 772, 777-78.

Each time these circuits allowed possession, the condemnor already held that substantive right when the injunction issued. The courts required it even where no one could dispute the company's power to condemn. Each company held a federal certificate that the landowners could not challenge in the condemnation court. *See id.* at 778 n.9. In *Sage*, the landowners conceded the right on appeal. The court still pointed first to the order that gave it the right, its "determination on the merits that it has a right to condemn." 361 F.3d at 829-30.

Sage, the leading case for this rule, took the premise from this Court's cases. *Id.* at 823 (citing *Hedges v. Dixon Cnty.*, 150 U.S. 182, 192 (1893); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206-07 (1988)). *Sage* explained that because title does not pass until the condemnor pays, a motion for early possession "triggers a threshold requirement": "[t]he district court must determine that the company has the right to condemn the property in question." *Id.* at 825. The company thus received possession only "after it engaged in five months of intensive litigation that analyzed and determined its right to take." *Ibid.* And *Sage* read *Northern Border* the same way: "Without having that right in substantive law determined, the company could not invoke equity." *Id.* at 828.

C. The Fourth Circuit allowed entry on a finding that PSEG "likely" has the power of eminent domain

This case goes further than any other circuit has dared. The panel held that PSEG must "presently possess" the power of eminent domain to invoke the right of access under § 12-111. App. 22a. PSEG's substantive right of entry thus depends on the power, and whether PSEG has it was the contested question. The district court called PSEG's right a "preexisting legal entitlement." App. 122a. But that entitlement exists only if the power does, and the panel framed the question as "[w]hether PSEG likely possesses this right of access." App. 10a. It affirmed because the district court "did not abuse its discretion in finding that PSEG likely gained the power of eminent domain for purposes of access." App. 23a. In the panel's view, PSEG "need not show a certainty of success." App. 26a (internal quotation marks omitted). The district court in *Sage* decided on the merits the company's right to take first and possession second. 361 F.3d at 820. Here, the district court decided both without discovery. App. 53a-54a, 81a, 115a.

A finding that PSEG likely has the power is a prediction that PSEG has or will have a substantive right. But a court cannot give PSEG that right. Only the legislature can.

Findings and conclusions of law made at the preliminary stage "are not binding at trial on the merits," and treating them as final "improperly equates 'likelihood of success' with 'success.'" *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394-95 (1981). Yet the prediction here gave PSEG the entry it sued for. The district court called that relief "largely congruent"

with the final relief PSEG seeks. App. 104a. The surveys cannot be undone, and while the injunction lasts, Petitioners cannot exclude PSEG. The injunction gives PSEG the full benefit of a right it does not yet have.

Eminent domain is already one-sided by nature. Its exercise "is against common right" and "subverts the usual attributes of the ownership of property." *W. Union Tel. Co. v. Pa. R.R. Co.*, 195 U.S. 540, 569 (1904). The panel's rule tilts the scale even further. Petitioners lose one of those attributes, the right to exclude, before any court has decided that PSEG holds the power at all.

The panel relied on *Sage* to hold that "the circumstances are sufficiently demanding for the award of mandatory relief." App. 18a (quoting *Sage*, 361 F.3d at 830). But the first reason *Sage* gave for that conclusion was that the company's right to take the easements was "indisputably clear, as the district court determined." 361 F.3d at 830. In *6.56 Acres*, the Fourth Circuit again allowed mandatory relief because the company had "done more than establish a likelihood of success on the merits; it already ha[d] succeeded on the merits," which made the case "the rare preliminary-injunction case in which success on the merits is guaranteed." 915 F.3d at 216 & n.8. Here the panel held only that success was "likely." App. 26a. That failure should be insurmountable.

The majority and the concurrence disagreed about the source of the power PSEG claims. The statute that lets transmission developers condemn ties that power to the Certificate, and none has issued. App. 8a. The majority found it likely that PSEG gained the power earlier, "for purposes of access," when a state

program directed it to conduct field studies. App. 23a-24a & n.3. That phrase appears in neither § 12-111 nor § 7-207, and the majority described the source as "the [Program's] delegation of this power to PSEG." *Id.* at 24a.

The concurrence started from a different premise: entities other than the State hold the power "only when the General Assembly confers it." It concluded that § 7-207 itself "likely supplies the needed delegation" and that PSEG "appears to hold" the power. App. 43a, 46a, 50a (Richardson, J., concurring in the judgment). On that premise, the Program, part of the executive branch, could not have made the delegation the majority found—only the General Assembly could have. Both opinions resolved the doubt in PSEG's favor, although Maryland law reads statutes like § 12-111 strictly. *See Mackie v. Mayor & Comm'rs of Elkton*, 290 A.2d 500, 504 (Md. 1972) (reading the predecessor of § 12-111 narrowly because statutes "in derogation of the common law" "must be strictly construed"). Petitioners do not ask this Court to decide that question of Maryland law. It is enough that both opinions found only that PSEG likely has the power.

The other circuits' rule rests on the limits of equity and Rule 65, which apply whether a right comes from a federal statute or a state one. *See Sage*, 361 F.3d at 823; *Transwestern*, 550 F.3d at 776. Courts have applied the same rule to survey entry. *See Tenn. Gas Pipeline Co. v. Garrison*, No. 3:10-CV-1845, 2010 WL 3632152, at *2-3 (M.D. Pa. Sep. 10, 2010) (denying a survey injunction because a federal certificate, without condemnation, gave the pipeline company no right to enter). In *Nexus*, a Sixth Circuit pipeline case, the district court granted access for surveys and other

preliminary work in the same order that established the company's right to condemn. 757 F. App'x at 491 & n.1.

D. Both existing approaches require a right that exists when the injunction issues, and PSEG has only a prediction

The Court need not decide *when* a condemnor's right arises to resolve this case. Whether it arises with an order on the right to condemn or at the end of the eminent domain process, both sides of the existing divide agree that the right itself must exist when the injunction issues. *E.g.*, *N. Border*, 144 F.3d at 471-72; *Sage*, 361 F.3d at 823; *6.04 Acres*, 910 F.3d at 1153. This panel instead allowed entry on a finding that PSEG likely has the power on which its right of entry depends.

In *Nexus*, the Sixth Circuit said its case appeared to present "a question not of *whether* Nexus has the statutory right to condemn Landowners' property, but only of *when* it may exercise that right." 757 F. App'x at 493. It added that the distinction "may be significant in other cases." *Ibid.* This is such a case.

This Court has received earlier petitions that challenged possession by injunction. *Joyce v. E. Tenn. Nat. Gas Co.*, 543 U.S. 978 (2004); *Goforth v. E. Tenn. Nat. Gas Co.*, 543 U.S. 978 (2004); *Goldenberg v. Transcon. Gas Pipe Line Co.*, 587 U.S. 971 (2019); *Like v. Transcon. Gas Pipe Line Co.*, 587 U.S. 1035 (2019); *Givens v. Mountain Valley Pipeline, LLC*, 589 U.S. 1009 (2019). In each, a court had determined the condemnor's right to condemn by the time the condemnor received possession. Those petitions asked whether equity may protect a right already

determined on the merits. This petition asks whether equity may act on a prediction about that right.

The other circuits require the right to exist before a court has power to act. *See Sage*, 361 F.3d at 828 ("Because the district court had the authority to grant immediate possession . . . ."); *6.04 Acres*, 910 F.3d at 1152 (preliminary injunction granting immediate access is "permissible so long as the pipeline company's right to condemn the property has been finally determined"). The Fourth Circuit itself has said that the company in *Northern Border*, which lacked "a district court order finding that it was entitled to the land," had "no equitable right to seek a preliminary injunction granting immediate possession." *6.56 Acres*, 915 F.3d at 215 n.6. The panel treated a likelihood of the right as the first of the four preliminary-injunction factors. App. 18a. That is a third rule. It conflicts with the rule of every other circuit to address the question, *see* Sup. Ct. R. 10(a), and with the Fourth Circuit's own decisions in *Sage* and *6.56 Acres*.

II. The Decision Below Conflicts with This Court's Decisions on What a Preliminary Injunction May Do

A preliminary injunction preserves a right the movant already has. *See Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314-15, 319-21 (1999). It does so by preserving the status quo, *see Camenisch*, 451 U.S. at 395, but here, the injunction disrupts the status quo. It overrode Petitioners' right to exclude and gave PSEG the entry it sued for on a prediction that PSEG has the power of eminent domain. That result conflicts with this Court's decisions. *See* Sup. Ct. R. 10(c).

A. This Court's cases limit preliminary injunctions to protecting rights that exist

Rule 65 is a rule of procedure. The Rules Enabling Act says that the Federal Rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). A rule of procedure governs "the judicial process for enforcing rights and duties recognized by substantive law." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). This Court reads each rule so that it does not change a substantive right. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503-04 (2001) (declining to read Rule 41(b) in a way that "would arguably violate" § 2072(b)). So Rule 65 lets a court protect rights that exist. It does not let a court create new ones.

Equity cannot create a right either. Rule 65 does not change "the substantive prerequisites for obtaining an equitable remedy," which "depend on traditional principles of equity jurisdiction." *Grupo Mexicano*, 527 U.S. at 318-19 (quoting 11A Wright & Miller, *Federal Practice and Procedure* § 2941, at 31 (2d ed. 1995)). *Grupo Mexicano* shows how strict those principles are. The plaintiffs there sued on unpaid notes and asked the district court to freeze the defendant's assets until judgment. The district court found it "almost certain" that they would win. *Id.* at 312. This Court still held that the district court "had no authority to issue a preliminary injunction" freezing the assets. *Id.* at 333. Traditional equity required a judgment establishing the debt before a court would interfere with the debtor's property. *Id.* at 319-21; *see also Wiggins v. Armstrong*, 2 Johns. Ch. 144, 145-46 (N.Y. Ch. 1816) (Kent, C.) ("until the creditor has established his title, he has no right to

interfere"), *quoted in Grupo Mexicano*, 527 U.S. at 320. The Court doubted that it is "merely a question of procedure" whether general-creditor claimants may freeze a person's unencumbered assets "before their claims have been vindicated by judgment." That question, it said, "goes to the substantive rights of all property owners." 527 U.S. at 322-23. The Court called the prior-judgment rule a "fundamental protection," *id.* at 330, and said the debate over the power belongs "where such issues belong in our democracy: in the Congress," *id.* at 333. Who may enter land under a delegated power of eminent domain is likewise a choice for the legislature.

The Court applied the same historical limits on equitable relief last year. A federal court's equitable power "is not freewheeling," and a remedy "must have a founding-era antecedent." *Trump v. CASA, Inc.*, 606 U.S. 831, 841, 847 (2025). If freezing assets before judgment goes to the substantive rights of property owners, so does putting a private party on an owner's land before judgment. Doing so overrides the right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Cedar Point*, 594 U.S. at 150 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

Equity's practice in disputes over land shows where the line falls. When two parties claimed the same land, a court of equity could protect the land while the dispute was pending. It would stop the party in possession from mining ore or cutting timber "to preserve the property from destruction pending legal proceedings for the determination of the title." *Erhardt v. Boaro*, 113 U.S. 537, 539 (1885). But equity did not decide for a claimant out of possession. That

question was reserved for a court of law, where both sides had a right to a jury. *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891). So a claimant with a remedy at law had no "occasion for resort to a court of equity, either to establish his right to the land or to put him in possession thereof." *Id.* at 150. Equity kept the land intact until a court of law decided who had the right to it. It did not put the claimant on the land first.

A preliminary injunction does the same job today. Its purpose "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Camenisch*, 451 U.S. at 395. The Ninth Circuit held that a pipeline company without an order of condemnation could not get possession by injunction, though it said the company could likely get one that kept the land as it was. *Transwestern*, 550 F.3d at 776 & n.8. The injunction here did the opposite.

B. The injunction gave PSEG the entry it sued for on a prediction, and the entry cannot be undone

The Supreme Court of Maryland has not decided whether PSEG holds the power of eminent domain, so the courts below had to predict how it would rule. *See* App. 18a; *id.* at 36a (Richardson, J., concurring in the judgment). The district court's two rulings that PSEG "qualifies," on the pleadings and in granting the injunction, are interlocutory. The panel affirmed only the finding that PSEG "likely gained" the power. App. 23a. A preliminary injunction does "not conclusively resolve the rights of parties on the merits," even though it has "at least something to do with the merits." *Lackey v. Stinnie*, 604 U.S. 192, 201-02 (2025). The Court said so in reversing the en banc

Fourth Circuit, which had relied on "*Winter*'s stringent merits requirement" to hold that some preliminary injunctions make a plaintiff a prevailing party. *Id.* at 201 (quoting *Stinnie v. Holcomb*, 77 F.4th 200, 209 (4th Cir. 2023) (en banc)). No final judgment establishes that PSEG holds the power of eminent domain.

Yet the injunction gave PSEG the entry it sued for, and the surveys cannot be undone. This Court has said that "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Camenisch*, 451 U.S. at 395 (citing, *e.g.*, *Gellman v. Maryland*, 538 F.2d 603 (4th Cir. 1976)). There were other ways to reach a binding answer first. The district court could have advanced the trial on the merits and consolidated it with the hearing. Fed. R. Civ. P. 65(a)(2); *Camenisch*, 451 U.S. at 395. PSEG could have moved for summary judgment. And the federal courts could have certified the unsettled state-law question to the Supreme Court of Maryland. Md. Code Ann., Cts. & Jud. Proc. § 12-603. None of that happened. PSEG asked only for a preliminary injunction, and that was enough to get the entry it sued for.

Holding PSEG to a binding answer would not leave the statutory scheme "unworkable." App. 22a. The Program has its own power to enter private land to conduct these studies, and to seek a court order if an owner refuses. Md. Code Ann., Nat. Res. § 3-305(f)(1)-(2); *see* App. 25a. And if the General Assembly wants developers like PSEG to have precondemnation entry power before a Certificate issues, it can say so. It simply has not. Maryland's highest court left the same kind of problem to the legislature when a town needed information that the survey statute did not let

it gather: "It seems reasonable to suppose that the Legislature will devise a mechanism which will be adequate, equitable and valid." *Mackie*, 290 A.2d at 506.

A binding answer matters because a preliminary injunction rests "in part on a prediction of the likelihood of success on the merits." *Lackey*, 604 U.S. at 207. Predictions can be wrong. A court sometimes "reaches a different conclusion upon full consideration of the merits." *Id.* at 201 (describing *Sole v. Wyner*, 551 U.S. 74, 79-81 (2007), where a preliminary injunction let protesters hold their event before they lost on the merits). Preliminary injunctions are decided in "haste," on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Camenisch*, 451 U.S. at 395. In an ordinary case, the final judgment corrects a wrong prediction. Here no judgment can, because the entry will already have happened. If the prediction is wrong, the injunction gave PSEG a right that the law does not give it, and nothing can restore Petitioners' right to exclude for the time PSEG spent on their land. This Court's cases do not give a court that power. *See Grupo Mexicano*, 527 U.S. at 333.

Northern Border's software example shows why the kind of relief matters. There the Seventh Circuit said a court may order disputed software delivered to a claimant on a prediction of "what future proceedings would reveal about the *ex ante* state of affairs between the parties." 144 F.3d at 471-72. If the claimant later loses, a court can order the software returned. The software claimant's right, "if it existed at all, was fully vested even before initiation of the lawsuit," so the court had predicted only what later proceedings would show about rights the parties already had. *Ibid.* A

delegated power of eminent domain is the kind of right that, under *Sage*, a court must determine on the merits before equity acts. No later order can undo PSEG's entry. The injunction gave PSEG the entry a judgment would give, and anything tried later will be about compensating Petitioners for loss.

And that compensation may never come. PSEG has the benefit of the power of eminent domain without its burdens. It has no Certificate, so it cannot condemn, and it pays nothing for the entry itself. If the Commission denies PSEG the Certificate, or PSEG abandons the project, no condemnation action will follow. According to the panel, a loss in value "during the period prior to a formal condemnation" is recoverable only "in the condemnation action." App. 32a (quoting *Reichs Ford Rd. Joint Venture v. State Rds. Comm'n*, 880 A.2d 307, 319 (Md. 2005)). That would leave Petitioners with a claim for physical damage under § 12-111(c) and the $100,000 bond. Had the Program entered under its own statute, Maryland would be "responsible for any other damages that may be incurred as a result of entry." Md. Code Ann., Nat. Res. § 3-305(f)(3). A private company, by contrast, "has neither sovereign authority nor the backing of the U.S. Treasury to assure adequate provision of payment." *Transwestern*, 550 F.3d at 775. PSEG, for its part, has FERC approval to recover all costs prudently incurred since that approval if the project is abandoned for reasons beyond its control. D. Ct. Dkt. No. 92-2, at 8 (FERC order of Aug. 29, 2024). Any recovery by Petitioners, however, remains speculative.

The bond does not change this. A bond pays for a wrongful injunction, but it does not undo the injunction or give a court a power it lacks. The

plaintiffs in *Grupo Mexicano* posted a bond too. 527 U.S. at 313. Justice Ginsburg's dissent pointed to the bond requirement as a safeguard. *Id.* at 340-41 (Ginsburg, J., concurring in part and dissenting in part). This Court still held that the district court had no power to issue the injunction. 527 U.S. at 333.

C. This petition does not challenge the *Winter* test, which does not decide whether a court has the power to grant this kind of relief

A request for a preliminary injunction raises two questions: whether the court has the power to grant the kind of relief requested, and whether it should grant that relief in the case at hand. The four factors in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), answer the second question, and courts must apply them unless Congress clearly says otherwise. *Starbucks Corp. v. McKinney*, 602 U.S. 339, 346 (2024). The panel applied them and found "the circumstances . . . sufficiently demanding for the award of mandatory relief." App. 18a, 34a (quoting *Sage*, 361 F.3d at 830).

But a court reaches the *Winter* factors only after it decides that it has the power to grant the relief. A finding that the circumstances are "sufficiently demanding" goes to whether to grant relief, so it cannot supply the power. In *Grupo Mexicano*, the district court found irreparable harm and near-certain success. 527 U.S. at 312. The defendant challenged neither finding on appeal, and four Justices thought the relief "a modest measure." *Id.* at 334 n.1, 337 (Ginsburg, J., concurring in part and dissenting in part). The Court still held that the district court had no power to grant it. *Id.* at 333. *Sage* also decided

whether the district court had the power to grant possession before it weighed the factors. 361 F.3d at 828. *Starbucks* rests on traditional equitable principles, which limit both the relief a court may grant and the showing a movant must make. Likelihood of success can justify relief that keeps the parties where they are. It cannot give a court the power to award a party substantially all the relief it sued for before judgment.

III. The Question Is Important and Recurring, and Orders Like This One Escape Review

The decision below already governs PSEG's suits against hundreds of landowners. This case alone involves over 100 landowners. App. 9a, 53a. PSEG has sued more than 300 landowners along the route in several separate lawsuits. *See* Nathanael Miller, *Court upholds eminent domain for MPRP in Maryland*, WYPR (Aug. 20, 2026), https://tinyurl.com/3k2zeckh; Memorandum Opinion at 1-2, *PSEG Renewable Transmission LLC v. Richard Smith Snader Testamentary Tr.*, No. 26-cv-793-ABA (D. Md. Aug. 20, 2026), Dkt. No. 61 (labeling that case "PSEG 7" and noting earlier preliminary injunctions "in other nearly identical cases"). Two weeks after the decision below, the district court relied on it to grant another preliminary injunction, this one against a county that holds conservation easements on properties PSEG wants to survey, and it adopted the panel's analysis of the remaining factors. *Snader*, slip op. at 1-2, 9, 14-15. And because the decision below is published, it binds every district court in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

This question will keep arising because of how regional transmission lines are now awarded. FERC's Order No. 1000 ended the incumbent utility's federal right of first refusal for lines selected in a regional plan for cost allocation, so grid operators now take proposals from other developers too. *See* Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils., Order No. 1000, 136 FERC ¶ 61,051, at P 7 (2011), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014). That is how PSEG, a "nonincumbent transmission developer," won this project. D. Ct. Dkt. No. 92-2, at 3-4, 12 (FERC order of Aug. 29, 2024); App. 6a-7a. The developer chosen must then get the line approved, and regulators often require field surveys along the route first, as federal rules do for interstate gas pipelines. *See* 18 C.F.R. § 380.12(d)(4) (2025). Every state has a statute that lets a body with eminent domain authority enter private land to conduct preliminary surveys. *See Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 582 & n.2 (2017) (collecting statutes). Those statutes are exceptions to the owner's right to exclude, and many, like Maryland's, depend on the entrant's eminent domain authority. So when the winner is new to the state, as PSEG is to Maryland, its power of eminent domain may still be unsettled when it needs to survey, and each award like that can raise the question again. *See* App. 5a, 25a.

The panel itself said it is "less clear when an applicant to become a federal public utility, like PSEG, gains that power." *Id.* at 11a. A developer of an interstate transmission line "must normally obtain siting permission and eminent domain authority from every state through which the line will pass," so the

question can arise in each of those states. *Ill. Landowners All., NFP v. Ill. Com. Comm'n*, 2017 IL 121302, ¶ 16; *see id.* ¶ 53 (holding that a developer of an interstate transmission line was not a public utility under state law). When the power has been contested, courts have required the developer to establish that it holds the substantive right. *See Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 195-96, 202 (Tex. 2012) (reversing a judgment that let a carbon dioxide pipeline company enter to survey, and holding that once a landowner challenges the company's status, "the burden falls upon the pipeline company to establish its common-carrier bona fides"); *Summit Carbon Sols., LLC v. Kasischke*, 14 N.W.3d 119 (Iowa 2024) (affirming survey access ordered after a bench trial and a ruling that the developer was a "pipeline company" entitled to entry). The panel here allowed entry on a finding that PSEG "likely" holds the power. App. 23a. That rule matters most where the power is least certain, because a court must predict only when state law leaves the question open.

A developer from another state can usually bring these suits in federal court. PSEG sued on diversity. App. 5a, 16a. As the Eighth Circuit has noted, "there is no federal law that deals specifically with entries to survey property," so nothing displaces state law in a survey suit. *All. Pipeline*, 746 F.3d at 367. Here Maryland law governed only PSEG's likelihood of success on its claim to a right of entry under § 12-111. Federal standards governed the other three factors. App. 16a-17a. The limits on what Rule 65 and a federal court's equitable power may do are the same in every state. So the answer to the question presented will govern survey suits under every state's

statute whenever the developer can sue in federal court. Under the panel's rule, each of those developers can get its entry before judgment, and no later judgment can undo it. *See* Part II.B, *supra*.

Nor is the panel's rule limited to survey entry. The no-hunting orders described above enforce an entry that overrides Petitioners' right to exclude, and they rest on a prediction. On the panel's reasoning, a court may put a private party onto another's land, before judgment and in a way no later ruling can reverse, on a finding that the party likely holds a power that a statute requires. Nothing in the opinion explains why the same reasoning would not reach possession. The circuits that allow possession by injunction still require the condemnor's substantive right to exist when the injunction issues, and even then the owner loses possession before any trial on just compensation, which an ordinary condemnation does not allow. *See* Part I, *supra*. If the panel is right, the owner could lose possession on nothing more than a prediction.

Orders like this one are often carried out before an appeal can be heard. Petitioners asked both courts to stay the injunction, and both refused. App. 15a. In *Nexus*, the Sixth Circuit dismissed an appeal from an injunction granting early access for surveys and other preliminary work as moot, because the company had finished the work before the appeal reached the court. 757 F. App'x at 491 n.1. This case, by contrast, has a published opinion and an order still in force. And unlike the five earlier petitions on possession by injunction, it comes before any court has adjudicated the developer's right. *See* Part I.D, *supra*. Few cases will reach this Court in that posture. If the Court waits for another one, the panel's rule will govern survey suits throughout the Fourth Circuit in the

meantime, and a developer that moves quickly can finish its entries before any appeal ends, so the rule will rarely be reviewed.

IV. This Case Is a Good Vehicle for Deciding This Question

A. The federal question decides this case, no matter what Maryland law means

Petitioners do not ask the Court to review the panel's rulings on Maryland law. The Court can take both of them as they stand: PSEG must "presently possess" the power of eminent domain, and it "likely gained" that power. App. 22a-23a. Those rulings mean only that PSEG probably holds or will hold the power of condemnation. No court has established on the merits that Maryland delegated that power to PSEG.

What a federal court can do with such a finding is a question of federal law and one for this Court.[1] Rule 65 and the limits of federal equity confine a preliminary injunction to protecting rights that already exist. *See* Part II.A, *supra*. The question presented asks whether a court may nonetheless use a preliminary injunction to let a private party exercise eminent domain powers before any court has

[1] The facts are undisputed and come from the two opinions below. The question presented is one of law only, so the deferential standard of review is no obstacle. A district court "by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996); *see* App. 15a. Nor is the interlocutory posture an obstacle. The injunction gives PSEG the entry it sued for, so no later judgment will bring the question back. And this Court grants review of preliminary injunctions to settle the rules that govern them. *See Starbucks*, 602 U.S. at 345; *Grupo Mexicano*, 527 U.S. at 310, 312-13.

adjudicated that it has been delegated that authority. The Court need not construe § 12-111 or § 7-207 to decide the case. Maryland's highest court could answer the state-law question later, by certification or otherwise, but by then PSEG would already have completed the surveys.

B. Petitioners pressed the claim below, and both courts passed on it

The panel described Petitioners' argument as a contention that the injunction is mandatory because it "grants the relief sought by PSEG in its complaint," and it replied that, for that purpose, whether the injunction "affords final relief is not the relevant inquiry." App. 17a-18a. Petitioners had argued that the district court erred by granting "the ultimate relief PSEG sought" in a preliminary injunction, which "should not work to give a party essentially the full relief he seeks on the merits." Appellants' C.A. Br. 11-12 (quoting *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 n.13 (D.C. Cir. 1969) (per curiam)). They also argued that the Fourth Circuit's own cases allowed immediate possession "only after first determining" that the condemnor had the right to condemn. *Id.* at 43. The district court pressed PSEG on the point at the hearing, asking how it should "think about the fact that you're seeking essentially the final relief in the form of a preliminary injunction[.]" D. Ct. Dkt. No. 251, at 27-28. It then granted the injunction while acknowledging that it largely matched the final relief PSEG sought. App. 104a.

Petitioners also objected to deciding the case on a preliminary record. Their first issue on appeal challenged the injunction as relief granted "without the benefit of a complete factual record." Appellants'

C.A. Br. 1. They moved to defer PSEG's motion until the court ruled on their motion to dismiss, and they asked for three to four months of discovery followed by "a merits hearing, an evidentiary proceeding in the fall." D. Ct. Dkt. No. 93; D. Ct. Dkt. No. 251, at 115-16; *see* Appellee's C.A. Br. 44. The court refused to postpone, granted the injunction without discovery, and denied the motion to defer as moot. App. 81a, 115a.

C. The question is live

The amended injunction requires Petitioners to admit PSEG until the Commission rules on PSEG's application, which is not expected before mid-to-late 2027. App. 30a, 127a. Until then, the injunction overrides Petitioners' right to exclude PSEG from their land, and PSEG has said its review of the survey data "may require additional surveys." D. Ct. Dkt. No. 362, at 3. The case comes here directly from the preliminary injunction, and no trial or final judgment has replaced it. *See Columbia Gas Transmission, LLC v. 76 Acres*, 701 F. App'x 221, 231 n.6 (4th Cir. 2017) (noting that the appeal in *Sage* "proceeded directly from the district court's issuance of a preliminary injunction granting immediate possession" and that, "[b]ecause no trial for just compensation had yet taken place, the issue was not moot"). If the injunction expires before the Court rules, Petitioners' potential claim on the $100,000 injunction bond that PSEG posted, D. Ct. Dkt. No. 275, will keep the case alive, because their challenge to the district court's power to grant this relief does not depend on the merits of PSEG's claim. *See Grupo Mexicano*, 527 U.S. at 314-17; *cf. Liner v. Jafco, Inc.*, 375 U.S. 301, 305-06 (1964).

CONCLUSION

A preliminary injunction is meant to hold the parties in place until a court decides their rights, and cannot confer powers which the party seeking the injunction does not have. Yet the court below has given PSEG the benefit of the delegated power of eminent domain and a say in when Petitioners may hunt on their own land, before Maryland has delegated the power. No future determination can undo PSEG's physical entry onto Petitioners' properties, and the damage is done. Only this Court can resolve the three-way divide and say whether Rule 65 allows the lower courts to create new rights that violate landowners' right to exclude, "one of the most treasured" rights of property ownership. *Cedar Point*, 594 U.S. at 149.

This Court should grant the petition.

Respectfully submitted,

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