UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 17-3075, 17-3076, 17-3115 & 17-3116

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Plaintiff/Appellee,

v.

PERMANENT EASEMENTS FOR 2.14 ACRES,

Defendants/Appellants.

[FULL CAPTIONS INSIDE]

On Appeal from the U.S. District Court for the Eastern District of Pennsylvania
(Schmehl, J.)
Civil Action Nos. 5-17-cv-00715 and 5-17-cv-00734

PETITION FOR PANEL REHEARING OR REHEARING EN BANC ON BEHALF OF ALL APPELLANTS

Dana Berliner
Robert McNamara
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
rmcnamara@ij.org

Counsel for Defendants/Appellants

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, *Plaintiff/Appellee* v. PERMANENT EASEMENT FOR 2.14 ACRES AND TEMPORARY EASEMENTS FOR 3.59 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 1201606900000 HILLTOP HOLLOW LIMITED PARTNERSHIP HILLTOP HOLLOW PARTNERSHIP, LLC GENERAL PARTNER OF HILLTOP HOLLOW LIMITED PARTNERSHIP LANCASTER FARMLAND TRUST AND ALL UNKNOWN OWNERS, *Defendant/Appellants.*	No. 17-3075 District Court No. 5:17-cv-00715-JLS

Jeremy Hopkins, Esquire
Cranfill Sumner & Hartzog LLP
5420 Wade Park Blvd., Suite 300
Raleigh, NC 27607
(919) 863-8819

Michael N. Onufrak, Esquire
Siobhan K. Cole, Esquire
White And Williams LLP
1650 Market Street, Suite 1800
Philadelphia, PA 19103
(215) 864-7174/6891

Counsel for Defendants/Appellants, Hilltop Hollow Limited Partnership, Hilltop Hollow Partnership, LLC, and Stephen D. Hoffman

:
:
:
:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, *Plaintiff/Appellee*, v. PERMANENT EASEMENT FOR 2.02 ACRES AND TEMPORARY EASEMENTS FOR 2.76 ACRES IN MANOR TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 41300300500000 STEPHEN D. HOFFMAN AND ALL UNKNOWN OWNERS, *Defendants/Appellants*.	)	No. 17-3076 District Court No. 5:17-cv-00723-JLS

Jeremy Hopkins, Esquire
Cranfill Sumner & Hartzog LLP
5420 Wade Park Blvd., Suite 300
Raleigh, NC 27607
(919) 863-8819

Michael N. Onufrak, Esquire
Siobhan K. Cole, Esquire
White And Williams LLP
1650 Market Street, Suite 1800
Philadelphia, PA 19103
(215) 864-7174/6891

Counsel for Defendants/Appellants, Hilltop Hollow Limited Partnership, Hilltop Hollow Partnership, LLC, and Stephen D. Hoffman

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:
:
:
:
:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, *Plaintiff/Appellee*, v. PERMANENT EASEMENT FOR 1.33 ACRES AND TEMPORARY EASEMENTS FOR 2.28 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 1202476100000 LYNDA LIKE A/K/A LINDA LIKE AND ALL UNKNOWN OWNERS, *Defendants/Appellants*.	)	No. 17-3115 District Court No. 5:17-cv-00722-JLS

Carolyn Elefant
LAW OFFICES OF
CAROLYN ELEFANT, PLLC
1440 G Street, NW, 8th Floor
Washington D.C. 20005
(202) 297-6100
carolyn@carolynelefant.com
Counsel for Appellants
Mohn and Like

:
:
:
:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, *Plaintiff/Appellee*, v. PERMANENT EASEMENT FOR 0.94 ACRES AND TEMPORARY EASEMENTS FOR 1.61 ACRES IN CONESTOGA TOWNSHIP, LANCASTER COUNTY, PENNSYLVANIA, TAX PARCEL NUMBER 1203589400000, BLAIR B. MOHN AND MEGAN E. MOHN AND ALL UNKNOWN OWNERS, *Defendants/Appellants*.	)	No. 17-3116 District Court No. 5:17-cv-00722-JLS

Carolyn Elefant
LAW OFFICES OF
CAROLYN ELEFANT, PLLC
1440 G Street, NW, 8th Floor
Washington D.C. 20005
(202) 297-6100
carolyn@carolynelefant.com
Counsel for Appellants
Mohn and Like

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STATEMENT REGARDING NECESSITY OF EN BANC REHEARING

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, i.e. the panel's decision is contrary to the decision of the Supreme Court in *United States v. Carmack*, 329 U.S. 230, 243 n.13, 67 S. Ct. 252 (1946) ("[S]tatutes which grant to . . . public utilities a right to exercise the power of eminent domain . . . are . . . grants of limited powers."), AND, that this appeal involves a question of exceptional importance, i.e., whether courts may grant condemnors immediate possession of property under the Natural Gas Act—a question that is the subject of both significant ongoing litigation nationwide and an active split of authority among the Courts of Appeals.

INSTITUTE FOR JUSTICE

/s/ Robert McNamara
Robert McNamara
Counsel for Defendants/Appellants

INTRODUCTION

For purposes of this petition, everyone agrees that the Transcontinental Gas Pipeline Company has the legal authority to acquire Appellants' properties by eminent domain under the Natural Gas Act.[1] 15 U.S.C. § 717f(h). The only question is *when* a condemnor has a right to take possession of condemned land under that act. Is a condemnor limited to taking possession of the property after final judgment is entered in its condemnation action (as the Seventh Circuit has held, in keeping with the clear instructions of the United States Supreme Court)? Or, as the panel opinion in this case holds, can a district court simply grant a condemnor immediate possession of property via preliminary injunction, even though Congress has declined to delegate the power of immediate possession in the statute? Because the panel's opinion is contrary to Supreme Court precedent requiring the strict construction of delegations of the eminent domain power and because the question presented here is one of national importance (and the subject of a split of authority), this Court should rehear this case *en banc*.

[1] The panel opinion disposes of four appeals—numbers 17-3075, 17-3076, 17-3115, and 17-3116, all of which sought review of a preliminary injunction issued below. All of the Defendants/Appellants in those separate appeals join in this combined petition for rehearing, though they continue to be represented by separate counsel in ongoing proceedings related to the underlying condemnation and reserve the right to contest Transcontinental's right to take their property in those proceedings. *Cf.* Panel Opinion (attached hereto as Exhibit A) at 16.

STATEMENT OF FACTS

The Transcontinental Gas Pipe Line Company, LLC, filed the condemnation actions at issue in this appeal on February 15, 2017. Panel Opinion at 10–11. On February 20 (as to the actions to condemn rights-of-way over the properties of the Hilltop, Hoffman, and Mohn appellants) and February 22 (as to the action to condemn rights-of-way over the property of Appellant Like), Transcontinental filed motions for partial summary judgment and requested an injunction providing it with immediate access to the Hilltop and Hoffman properties in order to conduct a survey. *Id.* at 11. On April 6, 2017, the district court denied the request for an injunction because it had not yet determined the merits of the underlying condemnation actions. *Id.*

After the conclusion of summary-judgment briefing, Transcontinental moved for a preliminary injunction granting it immediate possession of the condemned properties. *Id.* at 11–12. On August 23, 2017, the district court granted Transcontinental's motions for partial summary judgment, finding that it was legally authorized to condemn the properties at issue, and then granted the motion for preliminary injunction, granting Transcontinental immediate possession of the rights of way while the condemnation litigation continued. *Id.* at 12–15. While Transcontinental was required to post a bond securing the payment of just compensation at the end of litigation, the landowners were not entitled to (and have

not received) any compensation for the property taken from them. *Id.* at 19 n.60.

The landowners filed this appeal, arguing that the preliminary injunction was invalid as a matter of law because the Natural Gas Act delegates to companies like Transcontinental only the ordinary power of eminent domain—not the more drastic power to take immediate possession of condemned property.

The panel rejected the landowners' arguments. While the panel agreed that the Natural Gas Act does not delegate "quick take" authority to Transcontinental (*id.* at 18), it nonetheless held that the district court's inherent equitable powers authorized it to grant Transcontinental immediate possession of the properties. For the reasons stated below, that conclusion warrants rehearing en banc.

ARGUMENT

The panel opinion warrants rehearing *en banc* for two reasons. First, the panel opinion conflicts directly with the Supreme Court's clear instructions regarding how courts should treat eminent domain—including specifically how courts should construe delegations of the eminent-domain power to private entities like Transcontinental. Second, the panel's opinion addresses an issue of exceptional importance: the extent to which the Natural Gas Act authorizes companies to take immediate possession of condemned properties before final judgment in a condemnation action. That question is the subject of ongoing litigation in other jurisdictions, and it is also the subject of a split of authority in

which the Seventh Circuit has directly disagreed with the holding adopted by the panel's opinion.

I. The Panel Opinion Conflicts With Supreme Court Precedent.

The panel opinion holds that district courts have the inherent power to grant preliminary injunctions giving immediate possession to pipeline companies exercising the power of eminent domain under the Natural Gas Act. This is error.

The Supreme Court has articulated two clear principles that govern here: (1) private delegations of the eminent-domain power must be construed to convey only the powers specifically granted and (2) there is a substantive difference between the power to condemn property generally and the power to take immediate possession of that property. The panel opinion contravenes both principles, and it should therefore be reheard en banc.

First, the Supreme Court has long distinguished between laws that authorize government officials to exercise "the sovereign's power of eminent domain on behalf of the sovereign itself" and "statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves." *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946). The first type of law "carries with it the sovereign's full powers except such as are excluded expressly or by implication." *Id.* But the second kind of law is more strictly construed; these

laws "do not include sovereign powers greater than those expressed or necessarily implied."[2] *Id.*

In other words, courts must begin the inquiry by presuming that a private entity does *not* have a particular sort of eminent domain power unless a statute expressly authorizes the exercise of that power. But the panel opinion begins with the opposite presumption: that the courts have the inherent equitable power to grant a condemnor immediate possession of condemned property unless expressly forbidden by Congress. Panel Opinion at 17 ("Put another way, did Congress intend to forbid immediate access to the necessary rights of way when it granted only standard condemnation powers to natural gas companies.").

The failure to strictly construe the Natural Gas Act against the condemnor leads directly to the panel opinion's second departure from Supreme Court precedent—its holding that a grant of immediate possession of condemned property is not a "substantive" expansion of Transcontinental's rights. *Id.* at 20–21. To the contrary, the Supreme Court has repeatedly emphasized that the traditional power of eminent domain is substantively distinct from the power to take

[2] This longstanding doctrine is in keeping with the law of nearly every American jurisdiction, almost all of which have expressly held that laws delegating the power to condemn property must be strictly construed against a condemnor. *See* 1A *Nichols on Eminent Domain* § 3.03(6)(b) (Matthew Bender, 3d ed. 2018) ("Even when the power of eminent domain has been expressly granted, the grant must be construed strictly against the grantee."); *accord* Dana Berliner, *Strict Construction in Eminent Domain Statutes*, 34 No. 5 Prac. Real Est. Law 25 (2018) (collecting cases nationwide).

immediate possession of property. Standard condemnation powers give the condemnor the *option to purchase* condemned land at a judicially determined price. *Kirby Forest Indus. v. United States*, 467 U.S. 1, 4 (1984) ("The practical effect of final judgment [in a standard condemnation action] . . . is to give the Government an option to buy the property at the adjudicated price.").

The panel opinion's mentions *Kirby Forest* only in the context of explaining that the Constitution does not require compensation to be paid before property is condemned. Panel Opinion at 23–25. But the relevance of *Kirby Forest* is not that it requires compensation to be paid before property is acquired. Instead, the relevance of *Kirby Forest* is that there are, as relevant here, two ways of condemning property. One, what the panel opinion calls "standard condemnation," gives the condemnor the future right to acquire property after paying just compensation. The other, what is generally called (and called in the panel opinion) "quick take" or what the U.S. Code calls "[t]he right to take possession and title in advance of final judgment in condemnation proceedings,"[3] allows a condemnor to take immediate possession of land. Both powers, of course, are constitutionally permissible. But only one of those powers is actually delegated by the Natural Gas Act. *Cf. Sweet v. Rechel*, 159 U.S. 380, 407 (1895) ("[I]t was competent *for the*

[3] 40 U.S.C. § 3118.

legislature . . . to authorize the city to take the fee in the lands . . . prior to making compensation[.]" (emphasis added)).

In any event, *Kirby Forest* is hardly an outlier: This distinction between the ordinary eminent domain power and the power to obtain immediate possession is longstanding. In *United States v. Dow*, for example, the Court expressly distinguished between "statutes which require [the government] to pay over the judicially determined compensation before it can enter upon the land" and "statutes which enable it to take immediate possession upon order of court before the amount of just compensation has been ascertained." 357 U.S. 17, 21 (1958) (noting that the Second War Powers Act, pursuant to which the government had constructed the pipeline in question, was the second kind of statute).[4]

But the panel opinion does not hold that the Natural Gas Act is the second kind of statute. Instead, it holds that even under the first kind of statute, district courts retain the equitable power to grant immediate possession by issuing a preliminary injunction because the right to immediate (rather than future)

[4] In addition to the immediate-possession powers of the Declaration of Taking Act, 40 U.S.C. § 3114, Congress has made other specific delegations of the power to take immediate possession of condemned land. *See, e.g.*, 33 U.S.C. § 594 (providing power of immediate possession to the Secretary of the Army in certain circumstances); 10 U.S.C. § 2538 (providing for immediate possession of plants for arms manufacture in time of war). The Natural Gas Act contains no such delegation of the power of immediate possession.

possession of land is not a substantive right.[5] Panel Opinion at 20–21; 32. The panel opinion finds that the only substantive right at issue is the condemnor's right to take—and that the district court is therefore entitled to enforce that substantive right by preliminary injunction at any point after the right-to-take question is adjudicated. *Id.* at 2021; 32–33. In other words, once the condemnor establishes its legal right to condemn, "the only question [is] 'the timing of the possession,'" which is not a substantive right at all. *Id.* at 15.

This holding cannot be squared with the cases discussed above: The Supreme Court consistently treats the right to "take immediate possession"[6] as different from the right to condemn property generally *precisely because* the timing of possession makes a substantive difference. A future interest in property (which is what the Natural Gas Act authorizes) is substantively different from a present interest in property (which is what the preliminary injunction here grants to Transcontinental). That substantive difference can easily be seen in this case: Before the issuance of the preliminary injunction, the landowners here had the substantive right to exclude Transcontinental from their property until Transcontinental purchased an easement. After the issuance of the preliminary

[5] To the extent immediate possession is a different substantive right than the right of ordinary condemnation, of course, a court would be unable to use its equitable powers to grant that right to Transcontinental here. *See* 28 U.S.C. § 2072(b) (stating the federal rules of civil procedure, which include Rule 65, "shall not . . . enlarge or modify any substantive right").

[6] *Dow*, 357 U.S. at 21.

injunction, the landowners did not have that right. That is the loss of a substantive right. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (calling the "right to exclude others [ ] one of the most essential sticks in the bundle of rights that are commonly characterized as property); *accord Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.").

To be sure, the landowners (at least based on the district court's summary judgment ruling) were going to lose the right to exclude Transcontinental *eventually*, but timing makes a substantive difference. Indeed, much of the substantive law of property—with its life estates, remainders, and determinable fees—is concerned very much with the timing of possession. And federal law routinely recognizes the substantive differences between future and present possession in all manner of contexts. *See, e.g.*, *Fondren v. Commissioner*, 324 U.S. 18, 20 (1945) (holding that giving an interest in property without "the right presently to use, possess or enjoy the property" did not qualify as a gift under relevant regulation); *In re Brunson*, 498 B.R. 160, 163 (Bankr. W.D. Tex. 2013) (noting that bankruptcy law's homestead protection covers present possessory interests but not future interests).

Moreover, as a practical matter, it is simply inconceivable that, in any other context, a court would issue an injunction granting immediate possession of a property to someone who merely had a future interest in that property on the theory that it was simply adjusting the timing of the underlying substantive right. *Cf. French v. Johnson*, 375 B.R. 800, 808 (Bankr. N.D. Ohio 2007) (holding that, where the defendant had a future right to the return of a security deposit, the bankruptcy code did not "provid[e] the trustee a *substantive right for the immediate possession* of the security deposit" (emphasis added)). The holder of an option contract to buy property in the future is not entitled to an injunction allowing her to take possession of that property today. The remainderman of a life estate is not entitled to an injunction granting immediate possession of the property before the life-estate holder has died. And Transcontinental was not entitled to an injunction giving it immediate possession here.

In sum, the panel opinion both disregards the Supreme Court's instructions to narrowly construe private delegations of the eminent-domain power and elides the Supreme Court's consistent substantive distinction between the power to *condemn* property and the power to *take immediate possession* of property. It should therefore be reheard en banc.

II. This Case Presents A Question Of Exceptional Importance On Which The Courts Of Appeals Disagree.

Additionally, this case should be reheard because the panel opinion deepens an existing split of authority over pipeline companies' ability to gain immediate possession of condemned property under the Natural Gas Act. The panel opinion follows the Fourth Circuit's opinion in *Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004).[7] But *Sage*—and thus the panel opinion—conflicts directly with the Seventh Circuit's holding in *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469 (7th Cir. 1998).

In *Northern Border*, the condemning company had sought an injunction granting it immediate possession of condemned property before the conclusion of its condemnation action. 144 F.3d at 471. The district court denied the motion, finding that the company had no substantive right to immediate possession under the Natural Gas Act. *Id.* On appeal, "the company concede[d] that the Natural Gas Act does not create an entitlement to immediate possession of the land . . . [but] assert[ed] that the district court should have exercised its equitable power to enter a preliminary injunction ordering the defendants to grant the company immediate possession." *Id.*

[7] A currently pending case in the Fourth Circuit asks that court to reconsider *Sage*; oral argument was held in that case on September 25, 2018. *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, No. 18-1159 (4th Cir.).

The Seventh Circuit rejected that argument as a matter of law, saying that it "misapprehends the relief available in preliminary injunction proceedings." *Id.* Because the pipeline company did not have "a substantive entitlement to the defendants' land *right now*, rather than an entitlement that will arise at the conclusion of the normal eminent domain process," there was no legal basis for a preliminary injunction to issue. *Id.*

The panel opinion distinguishes *Northern Border* on the grounds that in *Northern Border*, unlike here, there had not been an adjudication of the company's right to take. Panel Opinion at 23. But nothing in the Seventh Circuit's reasoning in *Northern Border* hinges on whether the company had the legal right to take. Indeed, far from questioning the company's legal authority, the opinion openly affirmed it: "[N]o one disputes the validity of the FERC certificate conferring the eminent domain power, nor could they do so in this proceeding." 144 F.3d at 471–72. Instead, the Seventh Circuit's analysis is premised solely on the timing of possession: If the pipeline company had a "pre-existing entitlement to the property," it could have been entitled to a preliminary injunction, *id.* at 472, but because it had only the "entitlement that will arise at the conclusion of the normal eminent domain process," a preliminary injunction was legally barred. *Id.* at 471. The actual holding of *Northern Border* is simply irreconcilable with the holding of the panel opinion (or of the Fourth Circuit in *Sage*).

And this division of authority *matters* because the landowners in this case are hardly alone. As the Inspector General of the Department of Energy has noted, recent significant growth in the natural-gas industry has dramatically increased the number of and controversy over natural-gas pipelines like the one in this case. *See* Office of Inspector General, Department of Energy, *Audit Report: The Federal Energy Regulatory Commission's Natural Gas Certification Process* (May 24, 2018), *available at* https://www.energy.gov/sites/prod/files/2018/05/f52/DOE-OIG-18-33.pdf (last visited November 13, 2018). And, under the rule announced in the panel opinion, more condemnations for pipelines means more properties will be taken prior to the actual completion of the condemnation process.

Those takings will impose real hardships, as illustrated by this very case. As explained in the parties' initial briefing, allowing Transcontinental to take possession of its easements *now* results in damage to the landowners' business and farming interests *now*—damage that is likely not compensable as part of a just-compensation award. *Cf. United States v. Gen.Motors Corp.*, 323 U.S. 373, 379–80 (1945). And it means that the landowners lose a property interest without any compensation—unlike owners subject to normal "quick take" proceedings under the Declaration of Taking Act, who are entitled to immediate payment of estimated compensation. *Cf.* Panel Opinion at 18. As the panel opinion correctly notes, it is not necessarily unconstitutional to take property without contemporaneous

compensation, but there can be no question that it creates a hardship for landowners. Congress can choose to impose that hardship if it sees fit—but it has chosen not to do so here. The question of whether federal courts can impose it without legislative authorization merits rehearing en banc.

CONCLUSION

The panel opinion conflicts with the Supreme Court's clear instructions regarding the scope of the eminent domain power. And it conflicts with on-point precedent from the Seventh Circuit. To resolve these conflicts and to settle an issue of law that affects thousands of property owners nationwide, this case should therefore be reheard en banc.

Dated: November 13, 2018.

Respectfully submitted,

/s/ Robert McNamara

Dana Berliner
Robert McNamara
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, VA 22203
703-682-9320
rmcnamara@ij.org

Attorneys for All Defendants/Appellants

Carolyn Elefant
LAW OFFICES OF
CAROLYN ELEFANT, PLLC
1440 G Street, NW,8th Floor
Washington D.C. 20005
(202) 297-6100
carolyn@carolynelefant.com

Counsel for Appellants Mohn and Like

Jeremy Hopkins, Esquire
Cranfill Sumner & Hartzog LLP
5420 Wade Park Blvd., Suite 300
Raleigh, NC 27607
(919) 863-8819

Michael N. Onufrak, Esquire
Siobhan K. Cole, Esquire
White And Williams LLP
1650 Market Street, Suite 1800
Philadelphia, PA 19103
(215) 864-7174/6891

Counsel for Defendants/Appellants, Hilltop Hollow Limited Partnership, Hilltop Hollow Partnership, LLC and Stephen D. Hoffman

CERTIFICATE OF COMPLIANCE

I certify the following:

1. This petition complies with the type-volume limitation of Rule 40(b)(1) of the Federal Rules of Appellate Procedure because this petition contains 3,400 words, excluding the parts of the petition exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This petition complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

3. I certify that a virus detection program has been run on the electronic version of the petition and that no virus was detected. The virus protection program used was Bitdefender Endpoint Security Tools, version 6.6.6.84. I also certify that a copy of this petition was e-filed using the Court's CM/ECF electronic filing system.

INSTITUTE FOR JUSTICE

/s/ Robert McNamara
Robert McNamara
Counsel for Defendants/Appellants

CERTIFICATE OF BAR MEMBERSHIP

Under Local Rule 28.3(d), I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

INSTITUTE FOR JUSTICE

/s/ Robert McNamara
Robert McNamara
Counsel for Defendants/Appellants

CERTIFICATE OF FILING AND SERVICE

I, Robert McNamara, hereby certify pursuant to Fed. R. App. P. 25(d) that, on November 13, 2018, the foregoing Petition for Rehearing En Banc was filed through the CM/ECF system and served electronically on all parties:

Elizabeth U. Witmer
ewitmer@saul.com
Saul Ewing Arnstein & Lehr
1200 Liberty Ridge Drive
Suite 200
Wayne, PA 19087

Patrick F. Nugent
patrick.nugent@saul.com
Sean T. O'Neill
soneill@saul.com
Saul Ewing Arnstein & Lehr
1500 Market Street
Centre Square West, 38th Floor
Philadelphia, PA 19102

Attorneys for Plaintiff-Appellee Transcontinental Gas Pipeline Co., LLC

Carolyn Elefant
carolyn@carolynelefant.com
Law Offices of Carolyn Elefant
1440 G Street NW, 8th Floor
Washington, DC 20005

Mark L. Freed
mlf@curtinheefner.com
Curtin & Heefner
2005 South Easton Road
Suite 100
Doylestown, PA 18901

Attorneys for Defendants-Appellants Permanent Easements for 1.33 Acres and Temporary Easements for 2.28 Acres, Conestoga Township, Lancaster County, Pennsylvania, Tax Parcel Number 1202476100000, 4160 Main Street Conestoga, PA 17516, Lynda Like, All Unknown Owners, Permanent Easements for 0.94 Acres and Temporary Easements for1.61 Acres in Conestoga Township, Lancaster County, Pennsylvania, Tax Parcel Number 1203589400000, Sickman Mill Road; Blair B. Mohn and Megan E. Mohn

Mark E. Lovett, Esq.
markl@bcgl-law.com
Brubaker Conaughton Goss & Lucarelli
480 New Holland Avenue, Suite 6205
Lancaster, PA 17602
Attorney for Defendant Lancaster Farmland Trust

Siobhan K. Cole
coles@whiteandwilliams.com
Michael N. Onufrak
onufrakm@whiteandwilliams.com
White & Williams
1650 Market Street
One Liberty Place
Suite 1800
Philadelphia, PA 19103

Jeremy Hopkins
jhopkins@cshlaw.com
Cranfill Sumner & Hartzog LLP
5420 Wade Park Boulevard
Suite 300
Raleigh, NC 27607

Attorneys for Defendants-Appellants for Hilltop Hollow Limited Partnership, Hilltop Hollow Partnership, LLC and Stephen D. Hoffman

INSTITUTE FOR JUSTICE

/s/ Robert McNamara
Robert McNamara
Counsel for Defendants/Appellants