

No. 18-1206

**In The
Supreme Court of the United States**

—◆—
LYNDA LIKE, et al.,

Petitioners,

v.

TRANSCONTINENTAL GAS PIPE
LINE COMPANY, LLC,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

—◆—
REPLY BRIEF FOR PETITIONERS

JEREMY HOPKINS
CRANFILL SUMNER &
HARTZOG LLP
5420 Wade Park Blvd.,
Ste. 300
Raleigh, NC 27607

CAROLYN ELEFANT
LAW OFFICES OF
CAROLYN ELEFANT
8th Floor
1440 G St. N.W.
Washington, DC 20005

DANA BERLINER
ROBERT MCNAMARA*
SAMUEL GEDGE
INSTITUTE FOR JUSTICE
901 North Glebe Rd.
Ste. 900
Arlington, VA 22203
Tel: (703) 682-9320
rmcnamara@ij.org

MICHAEL N. ONUFRAK
SIOBHAN K. COLE
WHITE AND WILLIAMS LLP
1650 Market St., Ste. 1800
Philadelphia, PA 19103

* *Counsel of Record*

Counsel for Petitioners

TABLE OF CONTENTS

	Page
ARGUMENT	3
I. The decision below contravenes this Court’s precedent and the system of federal eminent domain created by Congress.....	3
II. The question presented is of nationwide importance	7
CONCLUSION.....	10

TABLE OF AUTHORITIES

	Page
CASES	
<i>Danforth v. United States</i> , 308 U.S. 271 (1939)	3
<i>Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund</i> , 527 U.S. 308 (1999)	4
<i>Kirby Forest Indus., Inc. v. United States</i> , 467 U.S. 1 (1984)	3, 4, 5, 6, 7
<i>Mountain Valley Pipeline, LLC v. 6.56 Acres</i> , 915 F.3d 197 (4th Cir. 2019).....	6
<i>N. Border Pipeline Co. v. 86.72 Acres</i> , 144 F.3d 469 (7th Cir. 1998).....	3, 4
<i>Star Athletica, L.L.C. v. Varsity Brands, Inc.</i> , 137 S. Ct. 1002 (2017)	6
<i>Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres</i> , 910 F.3d 1130 (11th Cir. 2018), <i>cert. denied sub nom. Goldenberg v. Transcon. Gas Pipe Line Co., LLC</i> , No. 18-1174, 2019 WL 1116465 (U.S. Apr. 29, 2019).....	2
<i>United States v. Bouchard</i> , 64 F.2d 482 (2d Cir. 1933)	3
<i>United States v. Carmack</i> , 329 U.S. 230 (1946).....	6
<i>United States v. Dow</i> , 357 U.S. 17 (1958)	8
<i>Washington Metro. Area Transit Auth. v. One Parcel of Land</i> , 706 F.2d 1312 (4th Cir. 1983)	7

TABLE OF AUTHORITIES—Continued

	Page
CODES AND STATUTORY PROVISIONS	
40 U.S.C. § 3114(b).....	7, 9
42 U.S.C. § 4651(4).....	8
OTHER AUTHORITIES	
Henry E. Mills et al., <i>Mills on the Law of Eminent Domain</i> § 105 (1888).....	7
<i>More property owners along pipeline notified of possible liens</i> , ABC27 News (Apr. 19, 2019), https://tinyurl.com/y37otd4y	9

REPLY BRIEF FOR PETITIONERS

Like a growing number of federal courts, the Third Circuit held that when Congress delegates the power to condemn property under the Natural Gas Act to private companies, it also tacitly delegates to those companies the right to preliminary injunctions giving them immediate possession of that property. The argument in favor of these injunctions is that the right to immediately possess someone else's land is not "substantive": A condemnor would have the legal right to purchase the land at the end of the case, and so it makes no difference to enter an order giving it the land now, before compensation has been determined or paid. The result is that landowners like petitioners lose the right to use, occupy, and exclude others from their land while waiting months or years to see any compensation for their losses. Property owners nationwide are routinely losing these substantive rights without compensation—and in violation of this Court's precedents governing eminent domain.

There is no dispute that Congress could constitutionally authorize this state of affairs if it wished. *See* Pet. 26; Br. in Opp. 16. The question presented is whether Congress did so here. Transcontinental's opposition brief confirms both the narrowness of this question and its importance. The company does not dispute that this case is a suitable vehicle for addressing the scope of its eminent domain power under the Natural Gas Act. *See* Pet. 27–30. The company does not dispute that land-transfers by preliminary injunction are near-ubiquitous in Natural Gas Act cases like this one. *See*

Pet. 25. And tellingly, the company identifies no other context in which federal condemnors operate in this way. For every other entity exercising Congress's eminent domain power, payment precedes possession.

Transcontinental's primary argument for denying certiorari is that courts in the Third Circuit are far from alone in applying the Natural Gas Act this way. Yet that only underscores the need for this Court's review. Using preliminary injunctions to divest people of their property cannot be squared with the statute Congress enacted or with bedrock principles of eminent domain law. Even so, six circuits have blessed a system in which pipeline companies seize now and pay later. *See, e.g., Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres*, 910 F.3d 1130, 1152 (11th Cir. 2018), *cert. denied sub nom. Goldenberg v. Transcon. Gas Pipe Line Co., LLC*, No. 18-1174, 2019 WL 1116465 (U.S. Apr. 29, 2019); *see generally* Pet. 21–24. Even district courts in the one circuit to have repudiated this practice, the Seventh, have embraced that majority view. Pet. 22 n.4. These decisions conflict with the basic structure of eminent domain, which grants condemnors the power to buy land by force—not occupy it by federal injunction. The decisions let pipeline companies exercise a formidable power that Congress has not given them. And for landowners in the path of pipeline projects, the decisions create grave burdens to which no other federal condemnee is subjected. Because only this Court can correct the circuit courts' mistaken course, the petition should be granted.



ARGUMENT

I. The decision below contravenes this Court’s precedent and the system of federal eminent domain created by Congress.

The heart of Transcontinental’s argument in opposition is that the ruling below conflicts neither with this Court’s precedents nor with the Seventh Circuit’s decision in *Northern Border Pipeline Company v. 86.72 Acres*, 144 F.3d 469 (7th Cir. 1998). Repeating the Third Circuit’s error, the company contends that the preliminary injunctions granted here are no different in scope from the relief that would be available after final judgment in the condemnation actions. *E.g.*, Br. in Opp. 20.

That is incorrect. As described in the petition, the final judgment in a condemnation action is not an order transferring property from *A* to *B*; rather, it is an order authorizing *A* to purchase (or acknowledging that *A* has purchased) property from *B*. Pet. 15–16. While it is common to refer to condemnations as “takings,” a straight-condemnation action does not let the condemnor “take” anything. Instead, the action creates an “option to buy the property at the adjudicated price.” *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 4 (1984). It “is an offer subject to acceptance by the condemnor.” *Danforth v. United States*, 308 U.S. 271, 284 (1939); accord *United States v. Bouchard*, 64 F.2d 482, 485 (2d Cir. 1933) (L. Hand, J.).

Transcontinental’s only response to *Kirby Forest* is to say that (1) as a constitutional matter, compensation need not be contemporaneous with a taking and (2) nothing in *Kirby Forest* suggests that the Court meant

to describe “an exhaustive list of acceptable [condemnation] procedures.” Br. in Opp. 15–16.

True enough. But even if *Kirby Forest* does not describe an exhaustive list of all acceptable condemnation procedures, it addresses the one at issue here: straight condemnation. To be sure, *Congress’s* power of eminent domain includes the more disruptive power to simply seize land and figure out compensation later. See *Kirby Forest Indus., Inc.*, 467 U.S. at 10. But Transcontinental freely admits that the Natural Gas Act grants it no such power. Br. in Opp. 15. The company has only the power to *condemn*—that is, to *purchase*—land through straight condemnation, not to take it ahead of time.

This distinction is fatal to Transcontinental’s efforts to reconcile the judgment here with the cases cited in the petition. If *taking immediate possession* of land is substantively different from *purchasing* that land, then the preliminary injunctions in this case give Transcontinental a substantive property interest in petitioners’ property—exactly what this Court held beyond the federal courts’ power in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund*, 527 U.S. 308 (1999). If a “straight condemnation” action creates only an “option to buy” property at the end of the suit, *Kirby Forest Indus., Inc.*, 467 U.S. at 4, then a finding that a condemnor has the legal right to condemn property cannot create the sort of “preexisting entitlement to the property” that the Seventh Circuit held a prerequisite to a preliminary injunction that transfers property from *A* to *B*. *N. Border Pipeline Co.*, 144 F.3d at 472; Pet. 19–24. Simply put, buying land at an

adjudicated price is different from taking immediate possession of it without contemporaneous payment, and the preliminary injunctions entered in this case wrongly conflate the former power with the latter.

Transcontinental nonetheless contends that the district court’s determination that the company “was entitled to exercise the power of eminent domain” itself created a pre-judgment interest in petitioners’ property. Br. in Opp. 19. And that pre-judgment “property right,” the company argues, can be enforced through the federal courts’ “equitable power to grant possession” by preliminary injunction. Br. in Opp. 14, 21. Again, however, that view conflicts directly with this Court’s holding in *Kirby Forest*. There, the Court repudiated the notion that exercising the power to file a straight-condemnation suit vests any pre-judgment property right in the condemnor. Far from giving the condemnor an immediate “substantive right to the property,” Pet. App. 5, the pendency of such a suit does not “impair[]” the landowner’s “interests . . . in any constitutionally significant way,” *Kirby Forest Indus., Inc.*, 467 U.S. at 16. Until just compensation is adjudicated and the condemnor exercises its option to buy, the private owner remains “free to make whatever use it please[s] of its property.” *Id.* at 15. Put differently, there are no short-cuts in straight condemnation. Until “the termination of condemnation proceedings”—until, that is, the condemnor “tender[s] payment and acquire[s] title in the usual course”—the landowner preserves all of her property rights and the condemnor holds none. *See id.* at 12, 16; *see also id.* at 15 (“[P]etitioner is unable to point to any statutory provision that would have authorized the Government to restrict petitioner’s

usage of the property prior to payment of the award.”). By invoking equity to “hasten[]” Transcontinental’s entry onto petitioners’ land, Pet. App. 20, the Third Circuit thus parted ways with this Court’s precedent at a foundational level.

The Third Circuit is of course not alone in departing from *Kirby Forest*: Transcontinental is correct that preliminary injunctions like these are increasingly common in Natural Gas Act condemnations and that Congress has not amended the Natural Gas Act to prevent them. *Cf.* Br. in Opp. 24 (quoting *Mountain Valley Pipeline, LLC v. 6.56 Acres*, 915 F.3d 197, 214 (4th Cir. 2019) (“What the landowners’ argument overlook[ed], we explained, was the preliminary injunction remedy provided in the Federal Rules of Civil Procedure that were adopted with the tacit approval of Congress.”) (quotation marks omitted)). But “[c]ongressional inaction lacks persuasive significance’ in most circumstances,” *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017), and that is doubly true in the eminent domain context. Congress cannot tacitly delegate the sovereign power of eminent domain; that delegation—particularly delegation to a private party—must be express. *See United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946) (noting that delegations of the eminent domain power to private parties should be read differently from delegations to agents of the sovereign itself); *see also* Pet. 13-14. Here, the Natural Gas Act does not delegate to pipeline companies the power to occupy other people’s land before paying them. That means the companies have no such power. This Court should grant review and reaffirm what it

has already held: Straight-condemnation actions give a condemnor property rights only after it purchases the property—not at the moment it decides to exercise its power to sue.

II. The question presented is of nationwide importance.

As described in the petition (at 25–27) and by the supporting *amici*, the question presented is important and recurring. Eminent domain is “harsh in its nature,” is “liable to gross perversion,” and “encroaches upon the rights of the individual.” Henry E. Mills et al., *Mills on the Law of Eminent Domain* § 105, at 258 (1888). For that reason, Congress has struck a deliberate balance between condemnor and condemnee. Although the Fifth Amendment does not require that just compensation be paid at the time the Government takes possession of land, *see* Pet. 26, Congress has nonetheless declared by statute that payment should precede possession in federal condemnation suits. Entities exercising straight condemnation take “title and right to possession” only after exercising their option to “tender[] payment to the private owner.” *Kirby Forest Indus., Inc.*, 467 U.S. at 4. And while some entities can also take possession at the beginning of a condemnation suit—if Congress has authorized it—there too, estimated compensation must first be paid to the landowner. 40 U.S.C. § 3114(b); *accord* *Washington Metro. Area Transit Auth. v. One Parcel of Land*, 706 F.2d 1312, 1319–20 (4th Cir. 1983). Cases like this one are alone in systematically stripping people of their property

rights without at the same time obliging the federal condemnor to pay for the property taken.

Transcontinental minimizes this departure from federal eminent domain law by saying that people in petitioners' shoes will get paid "eventual[ly]." Br. in Opp. 3. But promising only "eventual payment" (Br. in Opp. 3) papers over the immediate burdens that follow from immediate possession. Intruding on private property harms the owners' rights from the moment the intrusion takes place. That is why, under the Fifth Amendment, "just compensation" is calculated from the time of entry, not the time of final judgment. *United States v. Dow*, 357 U.S. 17, 22 (1958). That is also why Congress has provided by statute that the federal Government should make property owners whole no later than the date they first enter onto the owners' property. 42 U.S.C. § 4651(4).

Moreover, this case vividly illustrates the harms of a system of possession-by-injunction. Petitioners are subject to a federal order giving Transcontinental immediate access to their land. They are subject to arrest and imprisonment at the hands of the U.S. Marshals Service if they "interfere[]" with Transcontinental's use of their property. *See, e.g.*, Pet. App. 65. They have lost significant rights, and they have not yet received any compensation to make them whole. Pet. 24–26. Nor are these injuries the only ones that follow from allowing construction to proceed via possession-by-injunction instead of possession-by-title. As *amici* note, unpaid contractors who built the pipeline at issue here have threatened or placed mechanics' liens on the pipeline itself—even though Transcontinental has (as yet) no property interest in the land it has obtained by

injunction. Br. of Owners' Counsel of America et al. as *Amici Curiae* Supporting Petitioners, at 9–10; see also *More property owners along pipeline notified of possible liens*, ABC27 News (Apr. 19, 2019), <https://tinyurl.com/y37otd4y>.

This mismatch between possession and payment could not be further from what Congress envisioned. As authorized by Congress, federal condemnations proceed in an orderly fashion: Title transfers on a date certain and property owners receive compensation no later than that date. As authorized by the courts in this case, by contrast, the easements over petitioners' property will transfer at an unknown future date—after the court adjudicates just compensation and if and when Transcontinental opts to pay that sum. Yet Transcontinental began digging up petitioners' land nearly two years ago—a backwards process that imposes burdens on property owners and creates confusion over basic questions of property ownership.

Natural Gas Act condemnees alone are exposed to these burdens. Indeed, landowners are better off when the federal Government itself is the one seeking immediate access to their land. There, at least, a federal statute explicitly entitles them to estimated compensation on the front end. 40 U.S.C. § 3114(b). If petitioners' land was to be taken for a military base, or a federal office building, or a highway, they would have received estimated compensation nearly two years ago. But because the condemnor is a pipeline company, petitioners can expect only to be paid “eventual[ly].” Br. in Opp. 3. They are subjected to this unjust burden not because Congress has given pipeline companies the unique

power to take now and pay later, but because the lower courts have repeatedly held that the timing of possession is not a substantive property right. But the losses suffered by petitioners—which include loss of the right to use, enjoy, and exclude others from their land—are plenty substantive. The lower courts’ mistaken conclusion to the contrary disrupts the balance between condemnors and condemnees across the Nation, and it warrants this Court’s review.

◆

CONCLUSION

For the foregoing reasons and those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

JEREMY HOPKINS
CRANFILL SUMNER &
HARTZOG LLP
5420 Wade Park Blvd.,
Ste. 300
Raleigh, NC 27607

CAROLYN ELEFANT
LAW OFFICES OF
CAROLYN ELEFANT
8th Floor
1440 G St. N.W.
Washington, DC 20005

DANA BERLINER
ROBERT MCNAMARA*
SAMUEL GEDGE
INSTITUTE FOR JUSTICE
901 North Glebe Rd.
Ste. 900
Arlington, VA 22203
Tel: (703) 682-9320
rmcnamara@ij.org

MICHAEL N. ONUFRAK
SIOBHAN K. COLE
WHITE AND WILLIAMS LLP
1650 Market St., Ste. 1800
Philadelphia, PA 19103

* *Counsel of Record*

Counsel for Petitioners