NOS. 18-1159(L), 18-1165, 18-1175, 18-1181, 18-1187, 18-1242, 18-1300 (CONSOLIDATED)

# In the United States Court of Appeals for the Fourth Circuit

Mountain Valley Pipeline, LLC,

*Plaintiff-Appellee,*

v.

6.56 Acres of Land, Owned by Sandra Townes Powell, *et al.*,
Teresa D. Erickson, POA for Gerald Wayne Corder, *et al.*,
0.335 Acres of Land, Owned by George Lee Jones, *et al.*,
0.01 Acres of Land, Owned by Benny L. Huffman, *et al.*,
0.09 Acres of Land, Owned by Gary Hollopter, *et al.*,
0.09 Acres of Land, Owned by Larry Bernard Cunningham, *et al.*,
Cheryl Boone, *et al.*,

*Defendants-Appellants.*

## APPELLANTS' PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

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**Statutes and Rules**

## RULE 35(B) STATEMENT SUPPORTING REHEARING EN BANC AND LOCAL RULE 40(B) STATEMENT OF PURPOSE

The panel decision conflicts with decisions of the United States Supreme Court, including:

- *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 3-5 (1984) (holding that it is for Congress to authorize quick-takes and that, absent such authorization, possession occurs after the trial on compensation);

- *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946) (holding "statutes which grant to . . . public utilities a right to exercise the power of eminent domain [are] grants of limited powers");

- *Sweet v. Rechel*, 159 U.S. 380, 407 (1895) (holding it is "competent for the legislature" to authorize pretrial takings of possession); and

- *Green v. Biddle*, 21 U.S. 1, 41 (1823) (holding "[t]he doctrine of acquiescence cannot apply to the exercise" of a "sovereign power").

The panel decision follows *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004), but both *Sage* and the panel decision conflict with the Court's earlier decision relying on specific statutory authorization for quick-take condemnations in *Washington Metropolitan Area Transit Authority v. One Parcel of Land ("WMATA")*, 706 F.2d 1312 (4th Cir. 1983). Consideration by the full Court is necessary to align this circuit's decisions with Supreme Court precedent and to secure the uniformity of the Court's decisions.

This appeal involves questions of exceptional importance, including whether courts may award nongovernmental condemnors immediate possession of property when Congress has not authorized such pretrial takings by statute. The appeal raises constitutional separation-of-powers issues and the proper interpretation of the Natural Gas Act ("NGA") and the Rules Enabling Act as applied to Rule 65(a). These questions are the subject of an active split of authority among the federal courts of appeals.

Pursuant to Local Rule 40(a), counsel state that, in their judgment, the panel opinion overlooks the separation-of-powers problems inherent in the district courts' quick-take injunctions, conflicts with Supreme Court precedents listed above, and conflicts with the Court's previous decision in *WMATA*. This appeal also involves questions of exceptional importance: constitutional separation of powers, landowner property rights in eminent-domain proceedings, the interpretation of the NGA, and the Rules Enabling Act's limits on the injunctive power of the federal courts.

## STATEMENT OF FACTS

This case involves preliminary injunctions issued from three courts in this circuit that awarded immediate possession of land to a pipeline company even though Congress did not authorize use of the quick-take power.

Plaintiff-Appellee Mountain Valley Pipeline, LLC ("MVP") sued landowners in three judicial districts to condemn a 50-foot-wide easement along its pipeline route. Op.17. Within days of initiating each proceeding, MVP moved for partial summary judgment on whether it had the power of condemnation. *Id.* MVP simultaneously sought preliminary injunctions granting it immediate possession of all the properties during the condemnation proceedings. *Id.*

The district courts held hearings to consider MVP's request for immediate possession. The district courts heard evidence that the Landowners would suffer injuries if MVP were awarded immediate possession that they would not have suffered if MVP had been required to wait until after trial to take possession of the land. These damages included lost business, farm, and rental income as well as other damages that are noncompensable in normal condemnation proceedings.

The district courts found MVP was entitled to exercise the power of eminent domain and granted partial summary judgment. Because the courts concluded MVP was permitted to exercise the power of eminent domain, the district courts also awarded immediate possession, explaining that they were constrained to follow this Court's decision in *Sage*.

This consolidated appeal ensued. "[B]ound to follow *Sage*," the appellate panel condoned the district courts' use of Rule 65 to give MVP the power of quick-take condemnation. Op.26. If the panel declines to reconsider its decision, then rehearing en banc is necessary to overrule *Sage* and reconsider the panel decision for the reasons that follow.

## ARGUMENT

### I. The panel opinion misinterprets the Landowners' arguments, which raise issues worthy of en banc review.

The panel opinion misinterprets the landowners' arguments and, bound by *Sage*, ignores others. In particular, the opinion never addresses the landowners' constitutional separation-of-powers argument—with the words "separation" and "powers" appearing nowhere in the opinion. The panel's analysis instead miscasts the landowners' arguments as dealing only with matters of statutory interpretation—and, even then, fails to deal with Supreme Court precedent and basic property-law concepts that undermine the panel's reasoning.

Before explaining the panel's opinion and what it missed in the landowners' arguments, it is important to address the elephant in the room. The faulty reasoning in *Sage* prevents a clear-eyed analysis in cases like these. As explained below (Part II), it is impossible to square *Sage* with constitutional

separation-of-powers limits, with Supreme Court decisions requiring a restrictive reading of the powers granted to private condemnors under eminent-domain statutes, or with the Rules Enabling Act's express limits on the use of injunctive power. There was simply no reasoned way for the panel to engage in that analysis—or to address the landowners' actual arguments—and still obey *Sage*, which the panel felt "bound to follow." Op.26. Against that backdrop, we turn to the panel opinion.

The panel opinion asserts "at the outset" that the landowners concede that the Constitution does not prohibit condemnations in which possession comes before compensation. Op.23. It then cites *Cherokee Nation*[1] as proof that compensation can come after a condemnor takes possession. Op.23. The panel then casts the landowners' argument as dealing merely with statutory interpretation under the NGA. *Id.* The panel opinion explains that the Court in *Sage* rejected that statutory argument in holding that a Rule 65(a) preliminary injunction, a device adopted "'with the tacit approval of Congress,'" is a proper ground for awarding quick-takes to private pipeline companies. *Id.* at 23-24 (quoting *Sage*, 361 F.3d at 824). The panel opinion concludes: "This case is on all fours with *Sage*." *Id.* at 25.

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

That analysis misinterprets—or ignores—the landowners' position in several critical ways:

The landowners have always asserted a constitutional argument—but not the constitutional argument that the panel opinion addresses. The landowners' constitutional argument is that quick-take injunctions violate constitutional separation of powers unless Congress has conferred the quick-take power on the condemnor. Op.Br.47-57. Congress alone holds the keys to prescribe the methods and mode of condemnation, including the exercise of the extraordinary quick-take power. Congress has not granted the extraordinary quick-take power to private pipeline companies under the NGA or any other statute. Absent statutory authorization, federal courts lack the power to grant immediate possession to private pipeline companies in takings cases. *See* Part II.A, below.

Rather than undermining the landowners' constitutional argument, *Cherokee Nation* fully supports it. To be clear, the landowners have never argued that the Constitution forbids quick-take condemnations. Rather, the constitutional principle is that Congress—not the judiciary—is the branch that must authorize such preemptive takings. *Cherokee Nation* confirms this. There, the condemnor was allowed to take possession of property during the pendency

of the appeal after paying the judicially-determined amount of just compensation—precisely because an express act of Congress authorized possession on appeal. 135 U.S. at 651-53.

The constitutional question is not *whether* quick-takes may be done; the question is about *who* must authorize them. The answer is always the same: the legislature. *Sweet v. Rechel*, 159 U.S. 380, 407 (1895) ("[I]t was competent *for the legislature* . . . to authorize the city to take the fee in the lands . . . prior to making compensation.") (emphasis added); *see also Kirby Forest*, 467 U.S. at 3-5 (holding that Congress has the power to authorize quick-takes).

The same is true of other legislative powers. The Constitution does not prohibit declarations of war, the establishment of post offices, or the raising of taxes. But the Constitution does say which branch is responsible for exercising those powers. They belong to Congress, not the judiciary.

Rule 65 does not change that constitutional balance. "Tacit approval" of Rule 65 injunctions under the Rules Enabling Act, without a separate authorization from Congress, does not give federal courts permission to exercise Congress' war, taxing, and spending powers—or eminent domain. *Green v. Biddle*, 21 U.S. 1, 41 (1823) ("The doctrine of acquiescence cannot apply to the exercise of such . . . a sovereign power."). Yet *Sage* and the panel

opinion rely on such faulty reasoning to justify judicial usurpation of Congress's power over the exercise of quick-take. *See* Op.23-25. That is the separation-of-powers problem.

The panel could have—and should have—avoided reaching the landowners' separation-of-powers argument if there was any other way to avoid the constitutional question. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

Here, the landowners offered two statutory "off ramps" to allow the Court to avoid running headlong into the constitutional morass. The panel opinion did not fully consider or appreciate either option.

First, the panel rejected the landowners' statutory argument that the lack of a quick-take provision in the NGA—congressional silence—is Congress's way of saying "no" to quick-takes for interstate pipelines. Following *Sage*, the panel not only failed to deal with the separation-of-powers argument outlined above but also failed to address Supreme Court precedent mandating the "silence-means-no" approach offered by the landowners.

Supporting the "silence-means-no" reading of the NGA, the Supreme Court has consistently held that grants of eminent-domain power to private entities must be construed narrowly to exclude all sovereign powers not "expressed or necessarily implied." *Carmack*, 329 U.S. at 243 n.13; *see also W. Union Tel. Co. v. Penn. R. Co.*, 195 U.S. 540, 569 (1904) (holding eminent domain authority granted to nongovernmental condemnors must "be given in express terms or by necessary implication"); *City of Cincinnati v. Vester*, 281 U.S. 439, 448 (1930) (holding delegations of the takings power are strictly construed in the landowner's favor). The panel opinion does not address—much less reconcile—that line of Supreme Court cases. *See* Part II.B, below.

The panel also should have considered whether granting immediate possession—pursuant to Rule 65—created, enlarged, or modified the parties' substantive rights in violation of the Rules Enabling Act. But as with the landowners' other arguments, the panel opinion did not deal squarely with that issue, either. *See* Part II.C, below.

Ultimately, it is for the en banc Court to revisit *Sage* and, in doing so, address several questions of exceptional importance on which this Court's precedent conflicts with the Constitution, with decisions of the Supreme Court, and with the decision of another federal court of appeals.

## II. This proceeding involves several questions of exceptional importance.

### A. The panel opinion conflicts with the Constitution.

The district courts' injunctions pose constitutional separation-of-powers problems because, as explained above, Congress has never authorized private pipeline companies to exercise the extraordinary quick-take power. Substantial authority supports the landowners' position.

"Congress and Congress alone" has the power to set the methods of condemnation. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304, 321 (1987); *see also Secombe v. Milwaukee & St. P. R. Co.*, 90 U.S. 108, 118 (1874) ("[T]he mode of exercising the right of eminent domain . . . is within the discretion of the legislature."). Without Congress's blessing, the judiciary lacks the authority to create new methods or modes of condemnation. *See id.*

Congress has approved only three methods of condemnation: (1) quick-take condemnation, (2) direct condemnation, and (3) "ordinary" (or "straight") condemnation. *Kirby Forest*, 467 U.S. at 3-5.

The first two methods—quick-take and direct condemnation—are extraordinary. *Id.* If Congress authorizes neither of those methods, then the courts must apply the default method: "straight" or "ordinary"

condemnation. *Id.* In a straight condemnation, the condemnor obtains the option to take the land after paying the price determined at trial. *Id.*

MVP's takings are not a direct condemnation by Congress, nor has Congress granted MVP the extraordinary power of quick-take. The straight, ordinary power of condemnation should have applied, giving MVP the option to take property only *after* the trials on compensation.

By granting pipeline companies immediate possession by injunction, the judiciary instead created a fourth method of condemnation. The judiciary had no power to grant the extraordinary quick-take power in the absence of express congressional authorization. *Sage* disregarded that rule. The present cases, in which the panel was "bound to follow *Sage*" (Op.26), thus present a constitutional separation-of-powers issue of exceptional importance.

### B. The panel opinion also conflicts with decisions of the Supreme Court.

Like *Sage* before it, the panel opinion conflicts with two lines of Supreme Court cases that should have governed the outcome here.

First, there is a substantive difference between the power to condemn property generally and the power to take immediate possession of that property—and the power to take immediate possession requires explicit legislative authorization. *See, e.g.*, *Kirby Forest*, 467 U.S. at 3-5 (explaining that

Congress grants quick-take power by statute); *United States v. Dow*, 357 U.S. 17, 21 (1958) (distinguishing 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"); *Sweet*, 159 U.S. at 407 (holding it was "for the legislature" to authorize a taking made "prior to making compensation"); *see also Cherokee Nation*, 135 U.S. at 659 (permitting possession before final resolution of appeal of compensation award where an act of Congress explicitly authorized possession on appeal).[2] Applying this line of Supreme Court precedent, Congress did not grant private pipeline companies the power of immediate possession, and it was not the Court's place to give what Congress had withheld. These cases confirm the landowners' constitutional argument.

Second, courts must construe delegations of private eminent-domain power as conveying only the powers specifically granted by statute. The Supreme Court has long distinguished between laws authorizing government officials to exercise "the sovereign's power of eminent domain on behalf of the

[2] State law likewise recognizes that quick-take condemnations require legislative or constitutional authorization. *See, e.g.*, MD. CONST. art. III, §§40A-40C (recognizing the Maryland legislature's authority to grant the power of immediate condemnation to certain entities); VA. CODE §§25.1-300-25.1-318 (2003) (defining conditions under which a condemnor can exercise quick-take power); W. VA. CODE §§54-2-14a (1981) (granting quick-take power to the state or any political subdivision).

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." *Carmack*, 329 U.S. at 243 & n.13. The first type of law "carries with it the sovereign's full powers except as are excluded expressly or by implication." *Id.* But the second kind of law—delegations of eminent-domain power to nongovernmental entities—is strictly construed: such laws "do not include sovereign powers greater than those expressed or necessarily implied." *Id.*; *see also W. Union*, 195 U.S. at 569 (holding eminent domain authority must "be given in express terms or by necessary implication").

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. These cases confirm the landowners' statutory argument that the NGA's silence on the issue of quick-take means "no." Following *Sage*, the panel opinion begins with the opposite presumption: that courts have inherent equitable power to grant pipeline companies immediate possession unless expressly forbidden by Congress.

It is for the en banc Court to restore the proper presumptions and, in doing so, realign the Court's jurisprudence with Supreme Court decisions and

thereby avoid the separation-of-powers problem posed by the district courts' injunctions.

### C. The case presents a question of exceptional importance on which the courts of appeals are split.

The panel also could have avoided colliding with the separation-of-powers problem by properly applying the Rules Enabling Act and recognizing the limits of equitable power.

A federal court cannot invoke the federal rules or its own equitable power to create, enlarge, or modify substantive rights. 28 U.S.C. §2072(b); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406-07 (2010); *N. Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469, 471 (7th Cir. 1998).

Yet that is exactly what the quick-take injunctions do here. They give MVP a present right to take the landowners' properties now when MVP's only substantive right under *Kirby Forest* would have been a future right to exercise the option to purchase the properties after trial. *N. Border*, 144 F.3d at 471.

As any first-year law student learns, timing is tied to substance when dealing with property rights. Someone with a lease starting in October has no substantive right to possession today. The holder of an option contract to buy property in the future is not entitled to an injunction allowing her to take immediate possession. Nor does a remainderman holding a future interest have

a substantive right to expel the life tenant. The substantive law of property—with its life estates, remainders, determinable fees, and other future interests—is concerned very much with the timing of possession.

Federal law likewise 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).

Ignoring these basic property-law principles, the panel decision failed to enforce the limits of the Rules Enabling Act and of equity jurisdiction. The district courts' orders clearly "enlarge" MVP's substantive rights, giving possession now rather than after trial. On the flip side, the orders clearly "abridge" and "modify" the landowners' previous substantive rights to exclusive ownership of their land through the time of trial. *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").

On the limits of the Court's Rule 65 injunctive power, the panel opinion and other courts following *Sage* conflict directly with the Seventh Circuit's decision in *Northern Border*. There, the Seventh Circuit rejected the pipeline company's argument that the district court had the power to issue a preliminary injunction granting the company immediate possession. *Northern Border*, 144 F.3d at 471. 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 basis for preliminary injunctive relief. *Id.* (emphasis in original).

The panel opinion distinguishes *Northern Border* on the grounds that, unlike here, there had not yet been an adjudication of the company's right to take. Op.25 n.6. But nothing in the Seventh Circuit's reasoning in *Northern Border* hinges on whether the company had the legal right to take. The *Northern Border* opinion openly affirmed it: "no 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.

The Seventh Circuit's analysis relied solely on the timing of possession: if the pipeline company had a "pre-existing entitlement to the property," then it could have gained immediate possession through a preliminary injunction. *Id.*

at 472. But because the company had only an "entitlement that will arise at the conclusion of the normal eminent domain process," a preliminary injunction was legally barred. *Id.* at 471. *Northern Border*'s holding is simply irreconcilable with the holding of the panel opinion here.

And this split of authority matters. Landowners in this case are not one-of-a-kind. There will be many more condemnations for the large number of new gas pipelines being built. *See* Office of Inspector General, Department of Energy, *Audit Report: The Federal Energy Regulatory Commission's Natural Gas Certification Process* (May 24, 2018), *at* https://www.energy.gov/sites/prod/files/2018/05/f52/DOE-OIG-18-33.pdf (last visited Feb. 18, 2019). And early takings will continue to cause landowners significant damages that are likely not compensable as part of the condemnation process. For example, as several owners testified, allowing the pipeline company to take possession now (rather than after trial) will cause lost farm and business income that is likely unrecoverable as part of a just compensation award. *Cf. United States v. Gen. Motors Corp.*, 323 U.S. 373, 379–80 (1945).

Congress may choose to impose such hardships if it sees fit—but it has not chosen to do so here. The question of whether federal courts can impose

immediate possession without legislative authorization merits rehearing en banc.

## III. Rehearing is necessary to maintain uniformity in the Court's own decisions.

Before *Sage,* this Court honored the rule that a quick-take statute is required to authorize immediate possession in federal takings cases. In *Washington Metropolitan Area Transit Authority v. One Parcel of Land ("WMATA")*, the Court relied on the existence of a quick-take statute—40 U.S.C. §258a—to justify awarding the condemnor immediate possession of the land it sought to take. 706 F.2d 1312, 1319 & n.15 (4th Cir. 1983). *Sage*'s analysis dispenses with *WMATA*'s approach that a taker seeking immediate possession point to a congressional delegation of quick-take authority. *See* 361 F.3d at 823.

Rehearing en banc would allow the Court to resolve this inconsistency by returning the analysis to the right inquiry: whether the party seeking quick-take can point to an act of Congress authorizing it.

## CONCLUSION

It is tempting to let pragmatic considerations guide the outcome of this case. The panel highlighted that most landowners have already been paid compensation, that the pipeline is already under construction, and that only a few landowners still assert claims. Op.13, 16. But such pragmatic

considerations—which are largely consequences of MVP's choices about how to build its pipeline—cannot and should not trump constitutional rights and principles, nor should they determine the proper interpretation of federal statutes.

As a matter of legal reasoning and institutional competency, the federal courts should have no role in the quick-take business other than to bless what Congress has explicitly authorized. Granting the quick-take power to private pipeline companies would be deeply unpopular even if Congress had authorized it. Congress has not done so. The judiciary should have been the last branch of government—not the first—to give away the landowners' property rights.

The landowners ask the Court to grant rehearing en banc, to overrule the panel's decision, and to restore Congress's place as the sole branch of government with the power to authorize quick-take condemnations.

Dated: February 19, 2019 Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify the following:

1. This petition complies with the type-volume limitations of Federal Rules of Appellate Procedure 35 and 40(b)(1) because this petition contains 3,819 words, excluding the parts of the petition exempted by Rule 32(f).

2. This petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in roman Equity Text A font, 14-point font for the body of the brief and 13-point font for footnotes.

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## CERTIFICATE OF SERVICE

I hereby certify that, on February 19, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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