Case Number 18-3325

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEXUS GAS TRANSMISSION, LLC
Plaintiff/Appellee

v.

CITY OF GREEN, OHIO, et al.
Defendants

JUDY JANE HAMRICK; JOHN SELZER; ELAINE SELZER
Defendants-Appellants.

On appeal from the United States District Court
For the Northern District of Ohio
Case No. 5:17-cv-02062-JRA

BRIEF OF *AMICUS CURIAE* GOLDMAN & BRAUNSTEIN, LLP ON BEHALF OF OHIO LANDOWNERS IN SUPPORT OF APPELLANTS AND IN FAVOR OF REVERSAL OF THE DISTRICT COURT'S ORDER

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit
Case Number: 18-3325
Case Name: *Nexus Gas Transmission LLC v. City of Green et al.*

Name of Counsel: Matthew L. Strayer, Michael Braunstein, and Clinton P. Stahler

Pursuant to Fed. R. App. P. 29(a)(4)(A), *amicus curiae* Goldman & Braunstein, LLP, on behalf of existing and future landowner clients with an interest in the precedent set by the Court's decision, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   None in addition to those listed by the parties.

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INTEREST OF THE *AMICUS CURIAE*

Goldman & Braunstein, LLP ("G&B") files this *amicus curiae* brief on behalf of Ohio landowners whose properties are being or will be targeted for condemnation by private pipeline companies under the Natural Gas Act ("NGA"), including existing and future clients of the law firm. G&B is one of the leading Ohio law firms representing landowners in eminent domain matters and has represented more than 350 Ohio landowners on federal pipeline projects over the last four years, including eighty-two landowners on the Nexus project. As shale gas continues to be produced in large volume from Ohio wells, hundreds more Ohio landowners are likely to be affected by federal pipeline projects in the coming years—including several existing G&B clients on the Columbia Gas Transmission Buckeye XPress project in southern Ohio. The Court's decision in this case will have a long-lasting impact not only on Appellants but on all Ohio landowners whose property is targeted for condemnation by pipeline companies. G&B respectfully submits this *amicus curiae* brief to protect existing and future clients and Ohio landowners at large.

FED. R. APP. P. 29(a)(4)(E) STATEMENT

No party's counsel authored this brief in whole or in part. No party, party's counsel, or third person not including the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

The District Court lacked authority to grant immediate possession through a Rule 65 preliminary injunction. Such a finding was directly contrary to the express intent of Congress. Despite that Congress granted a right of immediate possession to other classes of condemners, neither the NGA nor Fed. R. Civ. P. 71.1 confer a right of possession before just compensation is paid. Congress made it unmistakably clear that it intended to restrict the transfer of possession until just compensation has been paid except in takings by the government. *See* 42 U.S.C. § 4651(4).

Moreover, a district court's grant of immediate possession to a pipeline company without statutory authority impermissibly uses an equitable remedy to create or enlarge a substantive right. Possession is a distinct, substantive property right. The Supreme Court of the United States has called the right to exclude others "[t]he hallmark of a protected property interest" and "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 673 (1999). The right to condemn under the NGA, however, is not a property right; it is a right only to utilize the condemnation procedures provided in Rule 71.1. The right of possession therefore can only be transferred by legislative enactment.

Even if immediate possession was generally authorized (it is not), this Court's precedent, supported by Supreme Court authority, holds that principles of federalism

mandate following the Ohio Constitution and denying the transfer of possession until just compensation is determined and paid. *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192 (6th Cir. 1992). The NGA itself disclaims the need for a national uniform law of immediate possession and the objectives of that statute will not be frustrated if the Court follows Ohio law.

Principles of equity also disfavor granting immediate possession. Congress has provided an adequate remedy at law if a pipeline company cannot agree with the owner on the compensation to be paid—"straight condemnation" under Rule 71.1.

The balance of harms also weighs against a preliminary injunction granting immediate possession. The monetary harm often claimed by pipeline companies for missing construction deadlines and in-service dates is self-inflicted and would be avoided if companies stopped entering contracts with deadlines that are impossible to meet without securing injunctive relief. Moreover, preliminary injunctions facilitate the companies' rush to construct pipelines in a hurry that has been cited as a cause of environmental spills and ruptures of recently constructed pipelines. It is in the best interests of affected landowners and the general public to make the companies slow down. Moreover, granting immediate possession accomplishes no more than shifting all of the bargaining power in these transactions to the pipeline companies and increases the demoralization costs to owners. As Nobel Prize-winning economist Ronald Coase theorized, bargaining would produce a more

efficient outcome if the district courts did not tip the scales in favor of the companies.

For each of these reasons, this Court should reverse the District Court's decision and hold that a district court may not use a Rule 65 preliminary injunction to transfer possession before just compensation has been determined and paid.

ARGUMENT

I. Granting a Pipeline Company Immediate Possession, *i.e.*, Quick Take, Through Rule 65 Injunctive Relief Contravenes the Express Intent of Congress and Impermissibly Creates or Enlarges a Substantive Right.

The NGA and Rule 71.1 do not authorize immediate possession. *E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 821-22 (4th Cir. 2004); *Columbia Gas Transmission, LLC v. 171.54 Acres of Land*, No. 2:17-cv-70, 2017 U.S. Dist. LEXIS 30667, at *19 (S.D. Ohio Mar. 3, 2017); *Tex. Eastern Transmission, LP v. 3.2 Acres Permanent Easement*, No. 2:14-cv-2650, 2015 U.S. Dist. LEXIS 3252, at *17 (S.D. Ohio Jan. 12, 2015). Rather, the District Court granted Nexus immediate possession through a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure. In doing so, the District Court endowed Nexus, a private corporation, with broader powers than Congress has conferred and impermissibly created or enlarged a substantive right. Moreover, the District Court's holding was directly contrary to congressional intent. Congress has expressed an intent to restrict the transfer of possession until a pipeline company pays just compensation. Accordingly, the District Court lacked authority to grant immediate possession.

A. Congress Expressly Intended to Restrict the Transfer of Possession in Takings Under the NGA Until Just Compensation Is Paid.

"Immediate possession" is not a new concept; it also goes by "quick take" and has long been specifically provided for in statutes and constitutional provisions. *See, e.g.*, Declaration of Takings Act ("DTA"), 40 U.S.C. § 3114(a); OHIO CONST. art. I, § 19. Quick take is restricted to takings by the government. *See* 40 U.S.C. § 3114(a)-(b) (limiting federal quick-take authority to takings "brought by and in the name of the United States"); *Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770, 774 (9th Cir. 2008) (explaining that Congress granted quick-take authority only in limited statutes and "only for use by the federal government").

The NGA and Rule 71.1 govern only "straight condemnations," where title and possession do not transfer until after just compensation is paid. *Columbia Gas Transmission, LLC v. Booth*, No. 1:16-CV-1418, 2016 U.S. Dist. LEXIS 177353, at *22 (N.D. Ohio Dec. 22, 2016). "The authority to take immediate possession of the property cannot be implied in the mere grant of the right to eminent domain" because statutes conferring eminent domain authority must be "strictly construed to exclude those rights not expressly granted." *Northern Border Pipeline Co. v. 127.79 Acres of Land*, 520 F. Supp. 170, 172 (D.N.D. 1981) (citing Nichols, The Law of Eminent Domain, Vol. I, § 3.213(2) (3d Ed. 1980); *see also Transwestern*, 550 F.3d at 774.

Congress intended to limit the right of immediate possession to the federal government and to restrict the transfer of possession to private corporations like

pipeline companies until just compensation is paid. That intent is clearly expressed through statutes, rules, the Advisory Committee Notes, and the legislative history.

First and foremost, Congress explicitly said so in the United States Code:

> No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 3114(a) to (d) of title 40, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

42 U.S.C. § 4651(4) (emphasis added).[1]

This provision makes it clear that Congress intended to restrict private corporations from taking possession until just compensation is paid. A landowner may be required to surrender possession before receiving just compensation ***only*** when a condemning authority makes a deposit with the court in accordance with 40 U.S.C. § 3114. But, that section limits the right to make a deposit and take possession to takings "brought by and in the name of the United States." 40 U.S.C. § 3114(a)-(b); *E. Tenn. Natural Gas*, 361 F.3d at 822. In all other circumstances, possession shall not transfer to the condemner until just compensation is paid.

Moreover, Rule 71.1(j)(1) provides that, as a condition to the exercise of

[1] This statute applies to Nexus as a company that has received a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission qualifies as a "Federal agency." *See* 42 U.S.C. § 4601(1).

eminent domain authority, "[t]he plaintiff must deposit with the court any money required by law . . . and may make a deposit when allowed by statute." Fed. R. Civ. P. 71.1(j)(l) (emphasis added); *see also* Notes of Advisory Committee Original Report, Fed. R. Civ. P. 71.1, Note to Subdivisions (j) (explaining that Fed. R. Civ. P. 71.1(j)(l) governs the procedure when a statute permits the government to take possession upon making a deposit with the court). Unlike the government, no statute exists to allow pipeline companies to take possession upon making a deposit. Rule 71.1 thus indicates that there must be statutory authority for immediate possession.

Legislative history also shows that Congress intended to restrict the transfer of possession until just compensation is paid. When the Advisory Committee drafted Rule 71.1 in 1951, it considered that the DTA conferred a right of immediate possession only on the government and the NGA did not give gas companies such a right. *E. Tenn. Natural Gas*, 361 F.3d at 822. The Committee declined to provide for immediate possession in Rule 71.1 because, in the Committee's words, the quick-take procedures (or lack thereof) in statutes like the DTA and NGA were "giving no trouble." *Id.* (citing Advisory Committee Supplemental Report, Fed. R. Civ. P. 71A, 11 F.R.D. 222, 228 (Mar. 1951)); *see also United States v. Parcel of Land*, 100 F. Supp. 498, 503-04 (D.D.C. 1951) (discussing Advisory Committee Notes). Thus, the Committee intended to leave in place a system that gave the government a right of immediate possession but not pipeline companies.

Congress knows how to grant a right of immediate possession when it intends to do so as it has granted such a right in statutes other than the NGA. *See, e.g.*, DTA, 40 U.S.C. § 3114(a) (conferring a right of immediate possession in takings "brought by and in the name of the United States"); *Parcel of Land*, 100 F. Supp. at 501 (discussing other statutes that confer a right of immediate possession and holding that a court "cannot possibly infer that the Congress intended by implication to authorize the advance taking of such possession in the absence of express authority to do so"). Congress's expressions in one statute aid in the construction of another statute on the same subject. *Bd. of Edn. v. Memphis City Bd. of Edn.*, No. 11-2101, 2011 U.S. Dist. LEXIS 87803, at *95 (W.D. Tenn. Aug. 8, 2011); *In re Winch*, 226 B.R. 591, 593 (S.D. Ohio Bankr. 1998). Under the *expressio unius* principle, "when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Edn.*, 615 F.3d 622, 630 (6th Cir. 2010)). Congress's express grant of a right of immediate possession in other statutes shows its intent to restrict the transfer of possession in condemnations under the NGA until just compensation is paid.

The District Court's grant of immediate possession was contrary to the express intent of Congress and the drafters of Rule 71.1. Therefore, this Court must reverse the District Court's decision and hold that possession of real property to be condemned under the NGA may not be transferred until just compensation is paid.

B. Granting Immediate Possession Impermissibly Uses Rule 65 to Create a New Substantive Right or Enlarge the Right to Condemn.

Injunctive relief cannot be used to create new substantive rights or enlarge existing rights. *See* 28 U.S.C. § 2072; *Transwestern*, 550 F.3d at 776; *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 323, 332 (1999). Possession is a distinct, substantive property right. *Wilkins v. Daniel*, 913 F. Supp. 2d 517, 541 (S.D. Ohio 2012) (quoting *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 673 (1999); *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991)) ("'[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property' is the 'right to sole and exclusive possession—the right to *exclude* strangers, or for that matter friends, but especially the Government.'") Conversely, a pipeline company's right to condemn under the NGA is not itself a property right but a right only to utilize the condemnation procedures set forth in Rule 71.1. Therefore, using Rule 65 to transfer the property right of possession without legislative authorization impermissibly uses injunctive relief to create or enlarge a substantive right.

Immediate possession is a substantive right that must be conferred by statute; it cannot be created through the Federal Rules. *Northern Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469, 471 (7th Cir. 1998) ("*Northern Border II*"). Indeed, the leading treatise on eminent domain explains that condemnation authority "lies dormant until legislative action is had pointing out the occasions, modes,

agencies and conditions for its exercise." *See Parcel of Land*, 100 F. Supp. at 504 (citing 1 Nichols on Eminent Domain, 3d Ed., 203, § 3.2). It necessarily follows that a court may not direct the taking of possession unless authorized by statute. *Id.*

A pipeline company cannot take immediate possession because it cannot establish that it had "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." *Northern Border II*, 144 F.3d at 47 (emphasis in original).[2] In *Northern Border II*, the Seventh Circuit rejected a pipeline company's claim to immediate possession, holding that the company could not prevail because it did not have an ownership interest in the property that "was fully vested even before initiation of the lawsuit." 144 F.3d at 472. The court distinguished a pipeline company's request for immediate possession from circumstances where a court may use Rule 65 to transfer possession of property, such as when the movant has a

[2] Nexus is likely to point out that district courts in the Seventh Circuit have attempted to distinguish *Northern Border II* on the basis that the company in that case sought immediate possession before the district court issued an order establishing its right to condemn. *See N. Border Pipeline Co. v. 64.111 Acres of Land*, 125 F. Supp. 2d 299, 301 (N.D. Ill. 2000); *Guardian Pipeline, L.L.C. v. 950.80 Acres of Land*, 210 F. Supp. 2d 976, 979 (N.D. Ill. 2002). However, that distinction is inapposite and does not fit with the reasoning in *Northern Border II*. The Seventh Circuit's denial of injunctive relief was based upon the company's lack of a statutory or contractual right to possess the land that pre-existed the filing of the condemnation action. A district court's order recognizing a company's right to condemn does not create a statutory or contractual right to possession; it merely recognizes that the company may utilize the condemnation procedures in the NGA and Rule 71.1.

contractual right to ownership or a statutory right to possession, holding that "[the company] cannot gain immediate possession of the property through a preliminary injunction because it did not present an argument grounded in substantive law establishing a preexisting entitlement to the property." *Id.* (emphasis added).

The District Court's opinion was silent on its authority to grant immediate possession, but its citation of *E. Tenn. Natural Gas* indicates that it relied upon that case as the source of its authority. The Fourth Circuit's decision in *E. Tenn. Natural Gas Co.* did not have a sound legal foundation and should be rejected. The court agreed with *Northern Border II* that Rule 65 cannot be used to create a substantive right, but it mistakenly reasoned based upon *Seymour v. Freer*, 75 U.S. 202, 213-14 (1868) that an order recognizing the company's right to condemn "gave [the company] an interest in the landowners' property that could be protected in equity." 361 F.3d at 823. *Seymour*, a case having nothing to do with eminent domain, is inapposite and had never previously been cited for this proposition in its 150-year history. Indeed, consistent with *Northern Border II*, the Court in *Seymour* held that an equitable remedy may be used to enforce a substantive right based solely upon a contract that preexisted the lawsuit. *Northern Border II* is better reasoned.

Northern Border II, a condemnation case, is consistent with condemnation law. *E. Tenn. Natural Gas*, on the other hand, turned condemnation law on its head by relying upon an ancient contract case that did not support its holding. The right

to condemn under the NGA is not a property right; it is a right to utilize the condemnation procedures in Rule 71.1. The NGA and Rule 71.1 govern only "straight condemnations," where title and possession do not transfer until after just compensation is paid. *Booth*, 2016 U.S. Dist. LEXIS 177353, at *22. Even *E. Tenn. Natural Gas* recognized that, unlike condemnations by the government under the DTA, where title passes upon the making of a deposit and transfer of possession before just compensation is paid, title (and its concomitant property rights, which include possession) do not pass in a taking under the NGA until just compensation has been paid. *See* 361 F.3d at 825. A pipeline company has no property right to an owner's land that can be enforced in equity until title passes at the end of the condemnation process. Until then, it has only the right to utilize the condemnation process under Rule 71.1, which is a limited right that does not include the transfer of possession before just compensation is determined and paid. Accordingly, using a Rule 65 injunction to grant immediate possession impermissibly creates a new substantive right or impermissibly enlarges the existing right to condemn.[3]

[3] Nexus is likely to argue that the weight of district court decisions approve granting immediate possession. It is true that if this Court does nothing more than count district court cases, it could conclude that pipeline companies are eligible for immediate possession. But, such a cursory analysis would not be legally sound.

The District of North Dakota was the first to grant immediate possession. It did so in the face of contrary authority and without any "direct authority in support" of its holding. *Northern Border Pipeline Co. v. 127.79 Acres of Land*, 520 F. Supp. 170, 173 (D.N.D. 1981) ("*Northern Border I*"). The court recognized that the NGA does not authorize immediate possession and concluded that "the authority to take

II. Supreme Court and Sixth Circuit Precedent Mandate that this Court Follow Ohio Constitutional Law and Deny Immediate Possession.

Following Supreme Court precedent, this Court has previously held that "where a private party brings a federal cause of action implicating areas of traditionally state concern" such as the property rights implicated in a condemnation action, federal courts should follow state law unless adopting the state law would "frustrate specific objectives of the federal programs." *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 962 F.2d 1192, 1196-98 (6th Cir. 1992) (citing *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991)). The federal court should weigh: (1) the need for a nationally uniform body of law; (2) whether adopting the state law would frustrate the statute's objectives; and (3) whether

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immediate possession of the property cannot be implied in the mere grant to the plaintiff of the right to eminent domain" because "statutes conferring the right of eminent domain are strictly construed to exclude those rights not expressly granted." 520 F. Supp. at 172 (citing Nichols, The Law of Eminent Domain, Vol. 1 § 3.213(2) (3d Ed. 1980)). Nonetheless, the court contradicted itself by granting immediate possession anyway, finding that "the circumstances of this case warrant the exercise of inherent powers" because the company might not be able to meet its deadlines or maintain its budget if the legislative scheme were strictly followed. *Id.* at 173.

After *Northern Border I*, district courts created a body of case law simply by citing one another. *See, e.g., Kern River Transmission Co. v. Clark County*, 757 F. Supp. 1110, 1117 (D. Nev. 1990) ; *USG Pipeline Co. v. 1.74 Acres*, 1 F. Supp. 2d 816 (E.D. Tenn. 1998); *Tenn. Gas Pipeline Co. v. New England Power, C.T.L.*, 6 F. Supp.2d 102, 104 (D. Mass. 1998); *Humphries v. Williams Natural Gas Co.*, 48 F. Supp. 2d 1276, 1280-81 (D. Kan. 1999). *E. Tenn. Natural Gas Co.* also relied upon this erroneous line of cases and attempted to provide additional justification, but, as demonstrated above, the Fourth Circuit's decision was based upon flawed reasoning and inapposite authority. The Court should reject this line of district court cases.

applying a federal rule would upset commercial relationships that rely upon state law. *Id.* (citing *United States v. Kimbell Foods*, 440 U.S. 715, 728-29 (1979)).

This Court concluded in *Columbia Gas* that condemnations under the NGA involve federal causes of action that implicate an area of law, *i.e.*, property rights, which are traditionally a state concern. The Ohio Constitution provides in its Bill of Rights that "[p]rivate property shall ever be held inviolate" and expressly denies private corporations the right to take possession of property to be condemned until just compensation has been paid. *See, e.g.*, OHIO CONST. art. XIII, § 5; OHIO CONST. art. I, § 19; *Worthington v. Carskadon*, 249 N.E.2d 38 (Ohio 1969).[4] Ohio law thus creates a substantive right for landowners to maintain possession of their property until the condemnation process is complete. Under *Columbia Gas* and the Supreme Court precedent upon which it relied, this Court must analyze: (1) whether there is a need for a nationally uniform body of law on immediate possession; (2) whether adopting Ohio law would frustrate the NGA's objectives; and (3) whether applying a federal rule would upset commercial relationships that rely upon state law. Because each of these factors weighs against the District Court's use of Rule 65 to grant immediate possession, the Court should adopt Ohio law and reverse.

[4] *See also Village of Octa v. Octa Retail, LLC*, No. CA2007-04-015, 2008-Ohio-4505, ¶ 8 (Ohio Ct. App. Sept. 8, 2008); *City of Elyria v. Hildreth*, No. C.A. 2433, 1976 Ohio App. LEXIS 6389, at *3-4 (Ohio Ct. App. Aug. 11, 1976); *Yoder v. Columbus & S. Ohio Elec. Co.*, 316 N.E.2d 477, 479 (Ohio Ct. App. 1974).

Congress's omission of a right of immediate possession in the NGA and Rule 71.1 demonstrates there is no need for a nationally uniform law on immediate possession and the NGA's objectives would not be frustrated if the Court reverses the District Court's grant of injunctive relief. The NGA itself expressly disclaims the need for a uniform federal standard by providing that condemnations under the NGA may be brought in state court, where they would be subject to the Ohio Constitution, and that federal courts should look to state law for practice and procedure. *See* 15 U.S.C. § 717f(h); *see also Columbia Gas*, 962 F.2d at 1198 (citing *Georgia Power Co. v. 138.30 Acres of Land*, 617 F.2d 1112 (5th Cir. 1980) (en banc)). There is no need for a nationally uniform law on immediate possession and the NGA's objectives would not be frustrated if the Court denies CGT's motion.

Moreover, there is no question Ohio landowners rely upon the Ohio Constitution's protections in the purchase and sale of property. Each factor in *Columbia Gas* favors the adoption of Ohio law, and the Court should reverse the District Court's grant of immediate possession where Ohio law denies such a right.

III. Principles of Equity Disfavor Granting Immediate Possession.

In addition to the legal reasons that a district court lacks authority to grant immediate possession, there is no equitable reason for doing so.

A. Pipeline Companies Have an Adequate Remedy at Law.

Rule 65 requires a clear showing of irreparable harm as an absolute

prerequisite to injunctive relief. Appellant's Br. at 11-12, ECF Doc. #20, PageID 17-18; *see also Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 104-05 (6th Cir. 1982). Irreparable harm is an injury for which there is no adequate remedy at law. *In re Sportfame of Ohio, Inc.*, 40 B.R. 47, 52 (N.D. Ohio Bankr. 1984) (citing *Ohio Coal Co. v. Conway*, 279 U.S. 813 (1929)). Congress provided an adequate remedy at law under the NGA when pipeline companies are unable to agree with an owner on the purchase price—the right to utilize the condemnation procedures under Rule 71.1. Thus, there is no clear showing of irreparable harm.

B. The Balance of Harms Weighs Against Immediate Possession.

More importantly, the balance of harms that must be considered in any request for injunctive relief disfavors using Rule 65 to prematurely transfer possession of an owner's inviolate property rights. *See CLT Logistics v. River West Brands*, 777 F. Supp. 2d 1052, 1073 (E.D. Mich. 2011). The real harm to landowners in such cases are the demoralization costs associated with the premature taking of their property by a private, profit-making enterprise without authorization from Congress.

In one of the most influential articles on eminent domain ever published,[5] Harvard law professor Frank Michelman wrote that overcoming the demoralization

[5] *See* William A. Fischel, The Rest of Michelman 1967 (Dartmouth College Dept. of Econ., Dec. 3, 2009), *available at* https://www.dartmouth.edu/~wfischel/Papers/the_rest_of_michelman.pdf ("Frank Michelman's 1967 article . . . is the most influential article on the takings issue and one of the most-cited articles in law.").

costs associated with forced takings of property is one of the principal justifications for the constitutional requirement of "just compensation." *See* Frank Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. 1165, 1214-57 (Apr. 1967). Demoralization costs include not only the loss of property itself but also the fear of "being systematically imposed upon" by "the force of a majority" that is "self-determining and purposive." *Id.* at 1217. Michelman concluded that "the purpose of compensation is to prevent a special kind of suffering on the part of people who have grounds for feeling themselves the victims of unprincipled exploitation." *Id.* at 1230. The same is true for unfair procedures employed to effectuate a taking.

As Congress and the Ohio Constitution recognize, transferring possession before paying just compensation only makes sense in takings for government projects funded by the taxpayers, backed by the public treasury, and which will provide a direct public benefit to the local community. Premature takings without congressional authorization are not warranted when the benefactor is not the public at large but a massive, wealthy (sometimes foreign) pipeline company—the benefit to which is further enriching itself at the landowners' expense. Driven by larger profits, some companies have been emboldened by the district courts' use of Rule 65 to grant immediate possession and have engaged in behavior that exacerbates the problem. (*See, e.g.*, Memorandum Contra to Plaintiff's Motion for Order

Confirming Condemnation Authority and Awarding Immediate Possession of the Easements, 28-42, *Rover Pipeline LLC v. 10.055 Acres of Land*, N.D. Ohio Case No. 5:17-CV-00239, ECF Doc. #258, PageID 4387-4401 (filed Feb. 19, 2017).)

The demoralization costs are especially severe in Ohio, given the number of federal eminent domain actions by private pipeline companies, and given that the state constitution protects landowners by requiring private corporations to pay just compensation before taking possession. In addition, numerous landowners are impacted multiple times as pipelines and other utilities often collocate within the same corridor. G&B has represented many owners whose land has been impacted by multiple pipelines installed side-by-side, either simultaneously or within few years of one another. It is difficult for such owners to comprehend how they can have a constitutional right to receive just compensation before one company begins construction on their land while another company can start months or even years before compensating them simply because the latter is federally regulated and the former is state regulated. From the perspective of these landowners, their constitutional rights are being violated. *See Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that the violation of a person's constitutional rights mandates a finding of irreparable injury).

Conversely, the companies' costs in not obtaining immediate possession are avoidable—and the companies are the best able to avoid them. The District Court

held that Nexus's increased cost of construction is an irreparable injury that justified granting injunctive relief. (Order at 2-3.) Similarly, the two most common irreparable injuries claimed by pipeline companies are failing to meet contractual obligations to their buyers and the danger of missing construction deadlines. Of course, this alleged harm could be avoided simply by not entering into contractual agreements with buyers and contractors that are impossible to meet unless the company is granted immediate possession through a Rule 65 injunction. A party seeking an injunction cannot meet the irreparability requirement based on harm it inflicted upon itself. *Med-Care Diabetic & Med. Supplies, Inc. v. Strategic Health Alliance II, Inc.*, No 2:14-cv-082, 2014 U.S. Dist. LEXIS 10881, at *16 (S.D. Ohio Jan. 29, 2014) (Smith, J.) (citing *Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003)); *Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Rd. Holdings, L.L.C.*, 717 F. Supp. 2d 724, 740 (E.D. Mich. 2010) (quoting 11A Wright & Miller, Federal Practice & Procedure Civ. § 2948.1 (2d ed.)); *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003).

The pattern of companies entering into contracts with deadlines that are impossible to meet without injunctive relief will continue as long as courts continue to grant it. The most effective and efficient way to prevent this self-inflicted alleged harm and the significant demoralization costs associated with immediate possession is by denying companies' requests for injunctive relief and requiring them to plan

their projects in accordance with the condemnation procedures Congress gave them in the NGA and Rule 71.1. That is a much better long-term solution and will also eliminate the judicial burden created by the rush to court that follows each time a company receives a FERC certificate. In addition to Nexus, federal courts in Ohio were burdened by companies' requests for injunctions from this self-inflicted harm in relation to at least three other projects in the last two years. Those projects—Leach Xpress and Columbia B-Systems in the Southern District of Ohio and Rover in both the Southern and Northern Districts—involved hundreds of landowners and other interested parties and placed an enormous strain on the courts.[6] Pipeline companies are responsible for the burden created by such requests, not the landowners who are only interested in protecting their property rights.

The companies' rush to put the pipelines in the ground, which a district court's grant of immediate possession facilitates, also may result in potentially devastating

[6] *See, e.g.*, Dockets in *Texas Eastern Transmission, LP v. 3.2 Acres Permanent Easement et al.*, U.S. District Court for the Southern District of Ohio Case No. 2:14-cv-02650; *Columbia Gas Transmission, LLC v. 171.54 Acres of Land*, U.S. District Court for the Southern District of Ohio Case No. 2:17-cv-00070; *Rover Pipeline LLC v. 5.46 Acres of Land*, U.S. District Court for the Southern District of Ohio Case No. 2:17-cv-00105; *Rover Pipeline LLC v. 5.9754 Acres of Land*, U.S. District Court for the Northern District of Ohio Case No. 3:17-cv-00225; *Rover Pipeline LLC v. 10.055 Acres of Land*, U.S. District Court for the Northern District of Ohio Case No. 5:17-cv-00239; *Nexus Gas Transmission, LLC v. City of Green, et al.*, U.S. District Court for the Northern District of Ohio Case No. 5:17-cv-02062; *Columbia Gas Transmission, LLC v. 35.635 Acres of Land*, U.S. District Court for the Southern District of Ohio Case No. 2:17-cv-01048.

consequences for landowners. Indeed, the hastiness with which the pipelines have been constructed has been cited for environmental spills and even ruptures of recently built pipelines. *See* Marcellus Drilling News, OEPA & Rover at Odds Over Storm Water Runoff, "Fine" Now $714K (May 22, 2017), *available at* https://marcellusdrilling.com/2017/05/oepa-rover-at-odds-over-storm-water-runoff-fine-now-714k/ (industry-leaning publication acknowledging that "[e]arly on Rover appeared to rush too much, resulting in numerous drilling mud spills in locations where Rover was drilling underground to avoid creeks and rivers and other structures," including a two-million-gallon spill near the Tuscarawas River in Stark County, Ohio); Desmog, TransCanada's New 'Best-In-Class' Gas Pipeline Explodes in West Virginia, Causing Fiery Blast (June 7, 2018), *available at* https://www.desmogblog.com/2018/06/07/new-transcanada-leach-xpress-pipeline-explodes-west-virginia (reporting that the "quickly built" CGT/TransCanada Leach XPress pipeline put into service January 1, 2018 exploded in June 2018). It is in the best interests of the landowners whose properties will be burdened by these pipelines for decades to come and the general public to make the companies slow down.

From a law and economics perspective, the parties will achieve the most efficient result without a district court's grant of immediate possession. As Nobel Prize-winning economist Ronald Coase theorized, bargaining produces the most efficient use of property by allocating it to the party that values it the most. *See*

Coltman v. Commissioner, 980 F.2d 1134, 1136-37 (7th Cir. 1992). When district courts grant immediate possession, the only effect is to allocate all of the bargaining power to the pipeline companies. If district courts would deny immediate possession and make companies follow the procedures set by Congress, the parties would determine the value of the easement in a free and fair negotiation. The company would be required to evaluate whether there is more value in moving quickly by accepting the landowner's demand or waiting a few months to start construction after presenting its evidence of value at a compensation hearing. On the other side, the landowner still must bargain under the shadow of eminent domain; he cannot overplay his hand as he knows the property will eventually be taken through the condemnation process. Granting immediate possession relieves companies from having to make that decision and gives all the bargaining power to the companies. Thus, granting immediate possession results in a less efficient outcome.

CONCLUSION

Congress has not granted pipeline companies a right of immediate possession. This Court should not add to the rights conferred by Congress by affirming the District Court's grant of a preliminary injunction under Rule 65, especially where Congress has expressed a clear intent to restrict the transfer of possession until just compensation is paid. The balance of harms also disfavors immediate possession. This *amicus curiae* urges the Court to reverse the District Court's decision.

Respectfully submitted,

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I hereby certify that on the 9th day of July, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF electronic system. The parties were served electronically by the Court's CM/ECF electronic system.

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