Nos. 18-1159(L), 18-1165, 18-1175, 18-1181, 18-1187, 18-1241, 18-1242, and 18-1300 (Consolidated)

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.*,

Defendants-Appellants.

Appeals from the United States District Courts for the Western District of Virginia, Case No. 7:17-cv-00492-EKD, the Southern District of West Virginia, Case No. 2:17-cv-04214-JTC, and the Northern District of West Virginia, Case No. 1:17-cv-211-IMK

BRIEF OF PLAINTIFF-APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-1159 Caption: Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, etc., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Mountain Valley Pipeline, LLC
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:
See attached.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

See attached.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Wade W. Massie Date: 2/15/18

Counsel for: Mountain Valley Pipeline, LLC

CERTIFICATE OF SERVICE

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I certify that on 2/15/18 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Wade W. Massie
(signature)

2/15/18
(date)

Pursuant to 26.1 of the Federal Rules of Appellate Procedure, Mountain Valley Pipeline, LLC makes the following disclosure:

a. MVP Holdco, LLC, is a member of Mountain Valley Pipeline, LLC that owns more than 10% of the interest in Mountain Valley Pipeline, LLC, and is a subsidiary of EQT Midstream Partners, L.P. EQT Midstream Partners, LP is a publicly traded limited partnership, more than 10% of which is owned by EQT GP Holdings, LP, another publicly traded limited partnership, which is owned by at least 10% by EQT Gathering Holdings, LLC, an indirect subsidiary of EQT Corporation, a publicly traded company.

b. US Marcellus Gas Infrastructure, LLC, is a member of Mountain Valley Pipeline, LLC that owns more than 10% of the interest in Mountain Valley Pipeline, LLC, and is an indirect subsidiary of NextEra Energy, Inc., a publicly traded company.

c. Con Edison Gas Midstream, LLC, is a member of Mountain Valley Pipeline, LLC that owns more than 10% of the interest in Mountain Valley Pipeline, LLC, and is a subsidiary of Consolidation Edison, Inc., a publicly traded company.

d. WGL Midstream, Inc. is a member of Mountain Valley Pipeline, LLC that owns 10% of the interest in Mountain Valley Pipeline, LLC, and is a subsidiary of WGL Holdings, Inc., a publicly traded company.

e. Vega NPI IV, LLC, a subsidiary of Vega Energy Partners, Ltd., a privately held company, owns less than 10% of the interest in Mountain Valley Pipeline, LLC, but may also have a financial interest in the outcome of this litigation.

f. RGC Midstream, LLC, a subsidiary of RGC Resources, Inc., a publicly traded company, owns less than 10% of the interest in Mountain Valley Pipeline, LLC, but may also have a financial interest in the outcome of this litigation.

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No. 18-1165 Caption: Mountain Valley Pipeline, LLC v. Teresa D. Erickson

Pursuant to FRAP 26.1 and Local Rule 26.1,

Mountain Valley Pipeline, LLC
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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See Attachment A.

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Nicolle R. Snyder Bagnell Date: 02/16/2018

Counsel for: Mountain Valley Pipeline, LLC

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I certify that on 02/16/2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

See Attachment B.

/s/ Nicolle R. Snyder Bagnell
(signature)

02/16/2018
(date)

Attachment A

Pursuant to 26.1 of the Federal Rules of Appellate Procedure, Mountain Valley Pipeline, LLC makes the following disclosure:

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ATTACHMENT B

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon the following via U.S. First Class Mail:

Charles D. Simmons Estate Sharon G. Simmons P.O. Box 65 Lester, WV 25865-0065	Trustees Under the Will of A. L. Morrison William B. Morrison and Robert J. Morrison 383 Townhill Road Grantsville, WV 26147
Bryan Charles Simmons 11 Red Fox Trail Euharlee, GA 30145	Andrew A. Fairbanks 1095 N. Turner Road Youngstown, OH 44515
Joshua Simmons 1741 Barkers Ridge Stephenson, WV 25928	

Dated: February 16, 2018 By: /s/ Nicolle R. Snyder Bagnell

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Wade W. Massie Date: 2/15/18

Counsel for: Mountain Valley Pipeline, LLC

CERTIFICATE OF SERVICE

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I certify that on 2/15/18 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Wade W. Massie 2/15/18
(signature) (date)

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No. 18-1300 Caption: Mountain Valley Pipeline, LLC v. Cheryl L. Boone, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Mountain Valley Pipeline, LLC
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Nicolle R. Snyder Bagnell Date: 03/20/2018

Counsel for: Mountain Valley Pipeline, LLC

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I certify that on 03/20/2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Nicolle R. Snyder Bagnell
(signature)

03/20/2018
(date)

Attachment A

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I. PRELIMINARY STATEMENT

In late 2017, after years of deliberation, the Federal Energy Regulatory Commission (FERC)—authorized by Congress to regulate and approve natural gas pipeline projects—issued a certificate approving Appellee Mountain Valley Pipeline LLC's (MVP's) proposed natural gas pipeline through West Virginia and Virginia, finding that the pipeline was "required by the public convenience and necessity." Although it negotiated agreements with many landowners in the pipeline's path for easements and rights-of-way, MVP could not come to agreement with others. It therefore brought the underlying three actions against those landowners (Landowners), invoking its right under the federal Natural Gas Act (NGA) to condemn the necessary easements and rights-of-ways and seeking injunctions granting immediate possession of the subject properties.

Three district courts—consistent with this Court's decision in *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004), and following days of evidentiary hearings—granted MVP partial summary judgment on its condemnation claims, issued immediate-possession injunctions, and, through a combination of deposits and surety bonds of five to six times the estimated value of the easements, guaranteed the payment of just compensation to each Landowner. The Landowners then appealed to this Court which, in the interim, denied Landowners' requests to stay the district courts' injunctions.

While the Landowners couch many of their arguments on appeal as challenges to the injunctive analysis below, at bottom, their appeals boil down to a disagreement with the FERC certificate and—avowedly—a frontal attack on this Court's binding decision in *Sage*, which it asks this Court to reconsider through the extraordinary procedure of an initial hearing en banc. FERC's findings in approving MVP's pipeline are well-reasoned and supported, however, and cannot be challenged in these appeals; *Sage* indisputably binds this Court (and it was, and is, correctly decided); and initial en banc hearings are rare and disfavored.

For its part, *Sage*—which has been followed by dozens of circuit and district courts—confirms the correctness of what the district courts did here: grant immediate possession where the pipeline company (1) obtains partial summary judgment establishing its right to condemn and (2) proves the factors authorizing a preliminary injunction under Federal Rule of Civil Procedure 65. The record confirms the correctness of both the district courts' summary judgment rulings—which Landowners do not challenge—and the injunctions themselves.

The Landowners challenge the three district courts' findings underlying their injunctions, but to no avail. They claim that MVP's unrecoverable economic and non-economic harms are not irreparable, but this Court has held otherwise. They also challenge the district courts' specific findings of irreparable harm, but they do not even try to show clear error as required by this Court, and they cannot

overcome the mountain of evidence supporting those findings. And they assert that the district courts' approach improperly renders immediate-possession injunctions "automatic" any time FERC issues a certificate, but that again ignores *Sage*, the voluminous evidence the district courts considered and the thoroughness of their rulings, and FERC's own extensive process and explicit finding that MVP's pipeline is "required by the public convenience and necessity."

In the end, under the Landowners' view, a district court can never authorize possession until just compensation is determined and paid following trials on the merits, however long those trials may take. That is contrary to *Sage* and the numerous cases that follow it, contrary to FERC's certificate of approval, and contrary to the public interest—both in West Virginia and Virginia and well beyond those states' borders. This Court should reject the Landowners' unsupported contentions and affirm the rulings below.

II. STATEMENT OF THE ISSUES

1. *Sage* allows district courts to issue preliminary injunctions granting immediate possession to gas companies that have established their right to condemn property under the NGA. In each of these cases, the district court granted partial summary judgment to MVP and found that MVP satisfied the requirements for a preliminary injunction. The issue is whether the district courts abused their discretion in granting the injunctions allowing immediate possession.

2. *Sage* is controlling precedent. Recognizing this, Landowners state that they intend to file a petition for initial hearing en banc. MVP will oppose the petition. *Sage* correctly determined that injunctive relief is available under Rule 65 and does not violate the separation-of-powers doctrine. Unless the Court decides to reconsider *Sage* en banc, there is no issue as to the case's applicability.

III. COUNTERSTATEMENT OF THE CASE

A. Under The NGA, Natural Gas Pipeline Construction Must Be Approved By FERC, Which Conducts A Comprehensive Assessment Of Environmental And Public-Interest Factors.

The NGA authorizes the holder of a certificate of public convenience and necessity issued by FERC to condemn property rights necessary to construct, operate, and maintain a pipeline or pipelines for the transportation of natural gas. 15 U.S.C. § 717f(h). This process begins with an application to FERC, which conducts a thorough review of environmental issues as well as market demand and the public need for the planned pipeline. *See* 15 U.S.C. § 717f(d); 18 C.F.R. pt. 157; *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000). Following that review, to satisfy the requirements of the National Environmental Policy Act, FERC evaluates environmental impacts and issues an environmental impact statement. 42 U.S.C. §§ 4321 *et seq.*; *see also* 18 C.F.R. pt. 380 (FERC's implementing regulations). Then, upon determining that an applicant

is willing and able to comply with the NGA and FERC regulations, and that the construction of the project "is or will be required by the present or future public convenience and necessity," FERC issues a "certificate" approving the planned project. *See* 15 U.S.C. § 717f(e).

The NGA provides for review of a FERC certificate. 15 U.S.C. § 717r. The aggrieved party must first seek rehearing before FERC. *Id.* § 717r(a). If rehearing is denied, the party may petition for review in a court of appeals, which has "exclusive" jurisdiction to affirm, modify, or set aside a FERC order. *Id.* § 717r(b). Rehearing does not automatically stay a certificate, but an aggrieved party can seek a stay from both FERC and the court of appeals. *Id.* § 717r(c).

B. After Years Of Review, FERC Approves MVP's Planned Pipeline In West Virginia and Virginia.

MVP's Project involves the construction of a 303.5-mile natural gas pipeline, three compressor stations, and associated facilities along a route from Wetzel County, West Virginia, to Pittsylvania County, Virginia. JA938; JA1711-JA1712; JA2408; JA2749-JA2750. The pipeline will transport 2 billion cubic feet of natural gas per day[1] and will connect to pipelines that supply the Eastern Seaboard, Texas, Louisiana, and Florida. JA940-JA942; JA2749-JA2750. The Project is fully subscribed under long-term contracts with shippers that have

[1] To put that in perspective, during the winter months, nationwide gas demand in the United States exceeds 78 billion cubic feet per day. JA942.

committed to keep the pipeline transporting gas at full capacity for a period of 20 years and will help meet the growing demand for gas in the Northeast, Mid-Atlantic, and Southeast regions of the country. JA946; JA2763, JA2773-JA2774.

Prior to applying for a FERC certificate, MVP engaged in FERC's environmental review process for nearly a year. FERC Docket No. PF15-3, No. 20141027-5136 (Oct. 27, 2014). MVP submitted detailed environmental resources reports and responded to numerous comments from FERC, other governmental entities, and the public. *Id.* at No. 20141027-5073. In April 2015, FERC issued a notice of intent to prepare an environmental impact statement ("EIS"), which informed affected landowners that their property could be condemned if FERC approved the Project and that they had a right to comment and intervene. *Id.* at No. 20150417-3022, 1-3, 8.

In October 2015, MVP filed its certificate application. FERC Docket No. CP16-10, No. 20151023-5035. In addition to transportation agreements and extensive engineering, design, cost, rate, tariff, financing, and other required information, MVP's application included comprehensive environmental resource reports covering water use and quality; fish, wildlife, and vegetation; cultural resources; socioeconomics; geological resources; soils; land use, recreation, and aesthetics; air quality and noise; alternatives; reliability and safety; and engineering and design material. *Id.*

On November 5, 2015, FERC issued a notice of MVP's application, *id.* at No. 20151105-3025, notice of which MVP provided to all affected landowners, explaining the certificate process. 18 C.F.R. § 157.6(d); JA2755-JA2756. The notice was also published in the Federal Register. 80 Fed. Reg. 70196 (Nov. 13, 2015).

In September 2016, FERC issued a draft EIS, which assessed the Project's "potential environmental effects" and concluded that any adverse environmental impacts would be reduced by MVP's and FERC's proposed mitigation measures. FERC Docket No. CP16-10, No. 20160916-3014, 1 (Sept. 16, 2016). The draft EIS was mailed to affected landowners and a notice of the draft was published in the Federal Register. *Id.* at 5; 81 Fed. Reg. 66268, at *66269 (Sept. 27, 2016). In response to the various notices that MVP provided, numerous landowners, including many of the Landowners here, intervened and filed objections and comments. JA2795-JA2798, JA2858-JA2868.

In June 2017, FERC issued its final EIS with final recommendations on proposed measures to mitigate the Project's environmental effects. FERC Docket No. CP16-10, No. 20170623-4000. FERC considered more than 400 oral comments made at 13 public comment sessions and more than 2,000 written comments. JA2795-JA2798. Among these were voluminous comments from Appalachian Mountain Advocates, counsel to certain Landowners in this appeal,

asserting that FERC had failed to fully evaluate "the impacts to water sources, wetlands, cultural resources, threatened and endangered species, and climate change implications." *See, e.g.*, FERC Docket No. CP16-10, No. 20161019-5061, 1 (Oct. 19, 2016).

In October 2017, after nearly three years of comprehensive review, FERC issued a certificate order of public convenience and necessity authorizing construction of the Project ("Certificate"). JA2747. FERC found that "the public at large will benefit from increased reliability of natural gas supplies" and that "upstream natural gas producers will benefit from the project by being able to access additional markets for their project." *Id.* It further concluded that the "benefits that the MVP Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and landowners or surrounding communities." JA2773-JA2774. FERC concluded that the Project is "required by the public convenience and necessity" and authorized MVP to construct and operate the Project upon satisfying certain environmental conditions. JA2774, JA2854, JA2870-JA2881.

C. The Landowners And Advocacy Groups Seek Rehearing And A Stay Of The Certificate With FERC And The D.C. Circuit.

Numerous landowners, including some of the parties to this appeal, applied to FERC for rehearing and a stay of the Certificate. *See, e.g.*, FERC Docket No. CP16-10, No. 20171113-5375 (Nov. 13, 2017). FERC issued a tolling order

allowing itself additional time to consider the rehearing requests. FERC Docket No. CP16-10, No. 20171213-3061 (Dec. 13, 2017). The rehearing requests remain pending and FERC has not issued any stay.

Various advocacy groups also petitioned the D.C. Circuit for review of the Certificate and a stay pending review. *In re Appalachian Voices*, No. 18-1006 (D.C. Cir. Jan. 8, 2018); *Blue Ridge Envtl. Defense League v. FERC*, No. 18-1002 (D.C. Cir. Jan. 3, 2018); *Appalachian Voices v. FERC*, No. 17-1271 (D.C. Cir. Dec. 22, 2017). On February 2, 2018, the D.C. Circuit denied all stay requests. Order, No. 17-1271 (consolidated with Nos. 18-1002, 18-1006), Doc. 1716262.

D. MVP Exercises Condemnation Power Under The NGA.

Upon issuance of the Certificate, the NGA authorized MVP to condemn the land necessary for the Project. 15 U.S.C. § 717f(h). To construct the Project, MVP needed to acquire easements for permanent and exclusive rights-of-way, access roads, temporary construction, and temporary workspace rights-of-way across properties along the pipeline's route. JA950; JA2417-JA2418; JA1718. The majority of the landowners granted MVP the rights it needed, but despite attempts at negotiation by MVP, some refused to come to an agreement. JA950; JA2417-JA2420; JA1718.

MVP therefore filed lawsuits against these Landowners in three district courts. JA462; JA1602; JA2284. Invoking the NGA, and in accordance with the

procedures this Court laid out in *Sage*, MVP filed motions for partial summary judgment on its right to condemn and sought preliminary injunctions for immediate access to the Landowners' properties. MVP requested access by February 1, 2018, to enable tree-clearing in accordance with environmental requirements and MVP's construction schedule. JA468-JA469; JA1615-1616; JA2288.

Construction is planned to occur simultaneously across nine 30-mile pipeline segments. JA467, JA951; JA1614; JA2303. MVP and its contractors will first fell and clear trees from properties that will be used for service facilities and access roads, as well as the properties with known endangered species or other environmental concerns. JA467; JA1614; JA2303. They will then work in a continuous, linear path, clearing and grading the rights-of-way, ditching the line, laying and welding the pipe, and covering and grading the surface over the pipeline. JA468; JA1614-JA1615; JA2303-JA2304. The Project is planned to be complete along all approximately 303 miles by winter 2018, with meters being placed into service in late 2018 in time for the winter heating season. *Id.*

E. After Weeks Of Discovery, Three District Courts Conduct Evidentiary Hearings And Consider Extensive Evidence Of The Harm To MVP If Immediate Possession Is Denied.

Following extensive document productions by MVP and depositions of MVP's Senior Vice-President of Engineering and Construction, Robert Cooper, evidentiary hearings were held in the three cases in January and February 2018.

JA1397; JA1978-1979; JA2696. At the hearings, MVP presented evidence to meet its burden of proof on its condemnation claim—showing the existence of a valid FERC Certificate, JA937; JA1708; JA2405-JA2406, the necessity of the FERC-approved pipeline route, JA946-JA947; JA1717; JA2417-JA2418, and that MVP was unable to acquire by negotiation the necessary rights to construct the Project along the approved route, JA950; JA1718; JA2418-JA2420. *See* 15 U.S.C. § 717f(h) (allowing FERC certificate holder to acquire necessary property rights it cannot acquire by agreement).

MVP further demonstrated that the requested injunctions serve the public interest, as evidenced in part by the Certificate, which contains FERC's findings that the Project: (i) meets a market demand, and that end users will benefit from it, JA276; (ii) "will make reliable natural gas service available to end use customers and the market," JA2770; and (iii) is "required by the public convenience and necessity," JA2773-JA2774. MVP also presented Cooper's testimony discussing the employment and tax benefits for Virginia, West Virginia, and their citizens, JA979, JA1766, JA2464-JA2465, as well as the broader public interest in having a greater supply of natural gas. JA1716-JA1717.

In line with the irreparable harm showing this Court found sufficient in *Sage*, Cooper also testified extensively on the nature and scope of harm MVP would sustain if the injunctions were denied. He first described the importance of

linear pipeline construction, stating that skipping parcels and returning later "breaks up" the construction process, disrupts time and resources, and increases burdens on surrounding landowners. JA962-JA963, JA988-JA989; JA1720-JA1726, JA1731-JA1732; JA2428-JA2429. Cooper testified that if tree-clearing was not completed by March 31, 2018 for properties with bat restrictions, MVP would be forced to proceed with winter construction in 2019, which would result in increased construction costs, delays, and environmental impacts. JA964-JA965; JA1745; JA2444-2445. Delaying tree-clearing likewise would prevent MVP from meeting the in-service date of December 2018 as set forth in MVP's precedent agreements. JA963-JA965, JA977-JA978; JA1753; JA2444-JA2446; JA2453. Any construction delays would impair MVP's ability to secure the required workforce, including welders, engineers, inspectors, and other skilled workers, which would only further delay timely completion. JA1110; JA1727-JA1730, JA1752-JA1753; JA2426-JA2428.

With regard specifically to economic harms with immediate possession, Cooper testified that pipeline revenues will be $40-50 million per month, JA966; JA1746, JA1749-1750; JA2446-JA2448, meaning a one-year delay could cause up to $600 million of lost revenue. Delay in receiving those revenues and the inability to use those funds now are critical to MVP. JA967-JA968; JA1750-JA1751; JA2447-JA2450.

Cooper also described the additional construction costs MVP would incur from a delayed start. JA969-JA971; JA1746-JA1747; JA1752; JA2450-JA2453. The contracts require additional payments for any delay in commencing work—including reservation fees for keeping the employees and equipment in place to do the work. JA969-JA971; JA1752-JA1753; JA2456-JA2457. If the start date is delayed until November 2018, MVP's total exposure for these costs would be $200 million. JA970-JA971; JA1746; JA2447.

Cooper went on to testify about a third category of delay costs—about $40-$45 million relating to the care of equipment, assuring materials stay in a usable condition, and paying staff. JA971-JA972, JA977; JA1747-JA1748; JA2446-2447, JA2456-245. Though some of these economic harms could be mitigated, there is no evidence they can be avoided altogether and there are harmful consequences to mitigation. JA1424-JA1427; JA2010, JA2016-JA2017; JA2718. And it is undisputed that these economic losses cannot be recovered from Landowners or anyone else. AOB12.

Finally, with regard to Landowner harm from the Project, the evidence showed that any such harm was the result of the Certificate, not of immediate possession. In fact, many of the Landowners conceded that any alleged harms from pipeline construction would occur regardless of when construction commenced. JA1315, JA1363; JA1937, JA1943-JA1944; JA2659. As one

Landowner acknowledged, "I don't think it's going to make any difference when they do it. The results [are] going to be the same." JA1315.

F. The Three District Courts Grant MVP's Summary Judgment Motions And Issue Injunctions Granting MVP Immediate Possession.

Following evidentiary hearings, Judges Dillon, Keeley, and Copenhaver issued opinions and orders granting MVP's motions for partial summary judgment and immediate access. JA1446, JA1448; JA2034-2035; JA2729.

In her 52-page opinion, Judge Dillon found that MVP would suffer substantial economic damages without immediate possession, noting that although the Landowners elicited testimony at the hearing that some of MVP's "claimed damage amounts might be lower and that these damages were a small percentage of the overall budget of $3.7 billion, they [did] not offer any evidence to dispute that these harms will occur to MVP." JA1423. She further determined that "MVP has shown it will suffer non-monetary harm from not being granted immediate possession[,]" relying in part on Cooper's testimony that skipping parcels "does not work" for pipeline construction. JA1422, JA1424-JA1425. At the same time, Judge Dillon found that any alleged harms to the Landowners from "pipeline construction and existence . . . are all harms that FERC considered and concluded were outweighed by the benefits of the Project" and noted that there was "[v]ery little evidence … identifying any harms from allowing MVP access now versus

some later date." JA1428-JA1429. She concluded that MVP established that timely completion of the Project is in the public interest and that the balance of equities favors MVP. JA1431-JA1432.

Judge Keeley reached the same conclusions, issuing a 64-page opinion finding that without the requested injunction, MVP would suffer irreparable economic and noneconomic harm that cannot be "discounted as 'self-inflicted' or capable of mitigation." JA2010. Like Judge Dillon, Judge Keeley determined that the Landowners' arguments regarding MVP's alleged ability to mitigate economic harms "relate only to the degree of irreparable economic harm; that MVP might be capable of mitigating its unrecoverable losses does not render them irrelevant." JA2016. She further found that MVP's decision to set its current construction schedule "was entirely reasonable under the circumstances" and that the Landowners' argument that MVP could still meet FERC's deadline if it commenced construction in November 2018, as opposed to February 2018, "fails to account for the fact that MVP will breach its contractual obligations if it does not commence construction in February 2018." JA2017. According to Judge Keeley, "[t]hat the FERC deadline is not yet looming . . . does not negate the reality that the MVP Project is and always has been time sensitive." JA2018.

Judge Keeley also concluded that completion of the Project would have the same impact on the Landowners' properties whether or not MVP was granted

possession immediately or not until after receipt of just compensation. JA2022. Like Judge Dillon, Judge Keeley found that, "[a]t bottom, it is the NGA and the FERC Certificate that are responsible for the Landowners' injuries, and delaying access until just compensation is paid will do nothing to alleviate those burdens." JA2022. She concluded that "delaying MVP's completion of the project will delay the introduction of the benefits identified by FERC." JA2026.

Judge Copenhaver followed suit, issuing a 39-page opinion finding that MVP had "shown that it will suffer irreparable harm absent relief" and that the Landowners were unable to "establish that the harms would not occur absent [injunctive] relief." JA2708, JA2718, JA2720. According to Judge Copenhaver, MVP's economic losses "cannot be recovered at the end of litigation." JA2719. He further reasoned that "any preliminary injunction issued here is merely coextensive to that which is approved by FERC, nothing more[,]" JA2720, and found that the balance of equities tipped in MVP's favor because any "early loss of use" was "blunted by [the landowners'] right to draw down the money" deposited by MVP. *Id.* And he specifically rejected the Landowners' arguments relating to other legal challenges, noting that "the NGA shows a clear congressional intent that certificates are not stayed absent specific instruction by FERC or a court of appeals." JA2719-JA2720.

These appeals followed.

IV. SUMMARY OF ARGUMENT

The three district courts properly exercised their discretion, in line with this Court's binding decision in *Sage* and grounded firmly in substantial record evidence, when they granted injunctions allowing MVP immediate possession of the Landowners' properties. In granting that relief, the three courts committed no error—much less clear error—in finding that, without the injunctions, MVP would be irreparably harmed. This Court should affirm.

The Landowners do not dispute the district courts' findings that MVP is likely to—and, in fact, did—succeed on the merits of its claims, and they offer minimal resistance to the findings on the balance-of-equities and public-interest injunction elements. Their principal challenges—to the district courts' irreparable-harm findings—lack support in the record, depart from the controlling law, and fall well short of showing clear error or an abuse of discretion.

The Landowners contest the district courts' findings of irreparable harm on multiple grounds, but they make no attempt to meet the controlling standard of review and show clear error. They claim that even unrecoverable economic loss is not irreparable harm, but this Court in *Sage* and numerous other precedents have held otherwise. They also claim that MVP's harms were "self-inflicted" because it undertook contractual and other preparatory steps to construction before FERC approval, but that ignores the substantial evidence and the factual findings below

demonstrating the clear need for those steps in order to ensure pipeline completion. They argue further that MVP's proof of the substantial economic and non-economic harms it would sustain without the injunctions—while it concededly does show some harm—does not show *enough* harm, but that, too, breaks sharply from this Court's precedent, and ignores the Landowners' own failure to offer any evidence to refute MVP's injuries.

Unable to point to any record or case law support for their challenges to the district courts' irreparable harm findings, the Landowners resort to distorting the district courts' rulings, claiming they rely so heavily on the FERC Certificate approving the Project as to render injunctive relief "automatic." It's hard to see how the Landowners can make this claim in light of the more than 150 pages of carefully reasoned, extensively sourced opinions the district courts issued—following discovery and days of evidentiary hearings—which detail the facts and law supporting their exercise of discretion. It's even harder given that those rulings, like the records before them, are on all fours with this Court's binding decision in *Sage*. And, since the FERC Certificate reflects the expert determination of the federal agency authorized by Congress to assess and approve natural gas pipelines like the Project, it was entirely appropriate for the district courts to rely in part on FERC's findings—just like this Court did in *Sage*.

Bound by *Sage* and hemmed in by the district courts' amply supported factual findings, the Landowners finally concede they think *Sage* is just wrong, but they know a panel of this Court is bound by it to affirm the rulings below, so they seek the extraordinary relief of an initial en banc hearing in an effort to have *Sage* overruled. But *Sage* was correct when the Court decided it, it is correct today, and it has been followed by dozens of decisions of other circuits and district courts from coast to coast—all of which Landowners ignore. And, contrary to the Landowners' linchpin assertion, the relief endorsed by *Sage* and granted by the three courts below—condemnation under the NGA and immediate possession under the courts' equitable injunctive power—is not an unconstitutional "quick-take." *Sage* controls, it is correct, and there is no reason to take the extraordinary step of hearing this case initially en banc.

V. ARGUMENT

A. Standards Of Review

A party seeking a preliminary injunction must show that it is likely to succeed on the merits, that it is likely to suffer irreparable harm without an injunction, that the balance of equities tips in its favor, and that an injunction serves the public interest. *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008); *see also Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346-47 (4th Cir. 2009), *judgment vacated on other grounds*, 559 U.S. 1089 (2010). District

courts must separately consider each *Winter* factor, *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017), paying particular attention to the public interest. *Winter*, 555 U.S. at 23; *Real Truth About Obama*, 575 F.3d at 347. "'[C]ourts of equity may go to greater lengths to give 'relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 602 (4th Cir. 2017) (*en banc*) (quoting *Sage*, 361 F.3d at 826), *judgment vacated on other grounds by Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353 (2017) (internal citation omitted).

Preliminary injunctions are reviewed for abuse of discretion. *Aggaro v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 366 (4th Cir. 2012). Under this standard, the Court does not consider whether it would have decided the matter differently in the first instance. *Quince Orchard Valley Citizens Ass'n v. Hodel,* 872 F.2d 75, 78 (4th Cir. 1989). Instead, factual findings are reviewed for clear error and legal conclusions are reviewed de novo. *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011). There is no abuse of discretion where the district court has applied the "correct preliminary injunction standard, made no clearly erroneous findings of material fact, and demonstrated a firm grasp of the legal principles . . . ." *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 192 (4th Cir. 2013). The Court may affirm the district court "based on any ground that appears

in the record" even if the district court "misapplied" *Winter*. *Pashby v. Delia*, 709 F.3d 307, 330 (4th Cir. 2013).

This Court specifically reviews findings "of irreparable harm for clear error." *Gilliam v. Foster*, 61 F.3d 1070, 1078 n.5 (4th Cir. 1995) (*en banc*) (citing *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) (same), *abrogated on other grounds by Winter*, 555 U.S. 7); *Signature Flight Support Corp. v. Landow Aviation Ltd. P'ship*, 442 F. App'x 776, 784 (4th Cir. 2011) (same). Under this standard, "'[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Walker v. Kelly*, 593 F.3d 319, 323-24 (4th Cir. 2010) (citation omitted). Thus, facts found by the district court are conclusive "unless they are plainly wrong." *Id.*

Defendants incorrectly assert that this Court reviews de novo "the district courts' application of equitable rules governing the preliminary injunction factors." AOB15. Defendants cite *Dewhurst*, but that is not what the case says. *Dewhurst* limits de novo review to "legal conclusions." 649 F.3d at 290.

B. The District Courts Properly Exercised Their Discretion In Granting The Preliminary Injunctions To MVP.

Following discovery and evidentiary hearings, each of the district courts issued lengthy opinions carefully analyzing the record and the controlling law, and

concluding that the four *Winter* factors supported the injunctive relief of immediate possession requested by MVP. Far from a reversible abuse of discretion or clear error, each of these rulings is grounded firmly in the facts and the law, and each should be affirmed.

1. The district courts correctly concluded that MVP was likely to—and did—succeed on the merits.

In order to prevail on the merits of its condemnation claim, MVP was required to—and did—show that it had a valid FERC Certificate, JA937; JA1708; JA2405-JA2406; that the Project route is necessary, JA946-JA947; JA1717; JA2417-JA2418; and that MVP was unable to acquire the necessary rights by agreement, JA950; JA1718; JA2418-JA2420. *See* 15 U.S.C. § 717f(h); *Columbia Gas Transmission Corp. v. An Easement to Construct, Operate, & Maintain a 24-Inch Gas Transmission Pipeline*, No. 3:07-CV-28, 2007 WL 2220530, at *3 (W.D. Va. July 31, 2007). Each of the district courts accordingly determined not only that MVP would succeed on the merits of its claims—they concluded that MVP did in fact succeed on the merits of its claims, and granted MVP partial summary judgment. The Landowners do not dispute these rulings on appeal.

2. The district courts correctly concluded that without the requested injunctions, MVP would be irreparably harmed.

The district courts also properly found that without the injunctive relief of immediate access to the Landowners' properties, MVP would suffer irreparable

harm. Here again, the district courts' findings are firmly supported by the record and the controlling law.

a. The legal standard for establishing irreparable harm.

Under this Court's precedent, the irreparable-harm showing necessary to support the grant of injunctive relief in these cases can be met in a number of ways. As this Court made clear in *Sage*, an entity that seeks to build a FERC-approved pipeline can show irreparable harm with evidence that it would sustain "significant financial harm" from a delay in construction caused by lack of access to properties along the pipeline route. 361 F.3d at 828. Specifically, the Court explained that since "[c]ertain portions of the [pipeline] project have to be completed before construction can begin on other portions[,]" construction delays on certain parcels would result in "significant financial harm both to [the pipeline company] and some of its putative customers." *Id.* at 828-29. The Court also found that such delays would "force[]" the pipeline company to breach its contracts to supply gas to electrical generation plants and local gas utilities by certain dates, which not only would result in financial penalties to the company, but would also "have negative impacts on its customers and the consumers they serve." *Id.* at 829. These harms, the Court held in *Sage*, satisfied the irreparable harm requirement.

Since *Sage*, numerous courts in NGA pipeline cases have applied these same principles in finding that unrecoverable economic losses resulting from delayed

pipeline construction amount to irreparable harm.[2] In so doing, many of these courts—echoing *Sage*—have emphasized the need for pipeline construction to proceed in linear fashion to avoid substantial increased costs.[3] Many courts in pipeline cases also have held that intangible, non-economic harms to a company's reputation and goodwill are irreparable for injunction purposes.[4]

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[2] *See, e.g.*, *Transcontinental Gas Pipe Line Co. v. Permanent Easement for 0.03 Acres*, No. 4:17-CV-00565, 2017 WL 3485752, at *3 (M.D. Pa. Aug. 15, 2017) (finding irreparable harm where company would "suffer substantial costs and loss of profits if it cannot begin the project as soon as possible"); *Columbia Gas Transmission, LLC v. 171.54 Acres*, No. 2:17-cv-70, 2017 WL 838214, at *8 (S.D. Ohio Mar. 3, 2017) (finding irreparable harm where pipeline "would be subjected to significant monthly revenue losses unless and until it both completes the Pipeline and replaces any volume lost"); *In re Transcontinental Gas Pipeline Co.*, No. 1:16-CV-02991, 2016 WL 8861714, at *9-10 (N.D. Ga. Nov. 10, 2016) (finding irreparable harm based in part on "substantial financial hardship" from delay); *Sabal Trail Transmission, LLC v. +/- 3.522 Acres*, No. 3:16-CV-266, 2016 WL 3188940, at *4 (M.D. Fla. June 8, 2016) (finding unrecoverable costs constitute irreparable harm); *Dominion Carolina Gas Transmission, LLC v. 1.169 Acres*, 218 F. Supp. 3d 476, 479 (D.S.C. 2016) (finding irreparable harm where "[f]urther delay also will cause financial harm to both DCGT and its customer").

[3] *See, e.g.*, *Columbia Gas*, 2017 WL 838214, at *7 (granting immediate access where "industry standards dictate linear construction of pipelines to minimize costs and maximize efficiency"); *Sabal Trail Transmission, LLC v. +/- 1.44 Acres*, No. 5:16-CV-164, 2016 WL 2991151, at *4 (M.D. Fla. May 24, 2016) (noting irreparable injury from non-linear construction, including "significant additional construction costs due to work suspensions, move-arounds, and/or specialty crew remobilization charges."); *Tennessee Gas Pipeline Co. v. 0.018 Acres*, No. CV 10-4465, 2010 WL 3883260, at *3 (D.N.J. Sept. 28, 2010) (finding irreparable harm where "working around one small property is likely to be very difficult and result in large additional construction costs. These costs would not be able to be recovered").

[4] *See, e.g.*, *Rover Pipeline LLC v. Rover Tract No. WV-DO-SHB-011.510-ROW-T*, No. 1:17–cv-18, 2017 WL 5589163, at *4 (N.D. W.Va. Mar. 7, 2017) (granting

All these cases—and *Sage*—are fully in line with this Court's and other courts' general injunction jurisprudence, which provides that (i) monetary loss can rise to the level of irreparable harm where, as here, compensation for that loss is not recoverable at a later date; *see Di Biase*, 872 F.3d at 230; *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App'x 251, 263 (4th Cir. 2017); *Multi-Channel TV Cable Co.*, 22 F.3d at 551 (same); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) (same); and (ii) harm to one's reputation or goodwill likewise can be irreparable for injunction purposes; *see Handsome Brook Farm*, 700 F. App'x at 263 (affirming preliminary injunction on basis that injury to reputation constituted irreparable harm and noting that "the possibility" of permanent loss of customers or goodwill may give rise to irreparable harm); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (affirming injunction where evidence showed "irreparable harm through loss of reputation, good will, and business opportunities").

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immediate possession where delays would harm company's business reputation); *Rover Pipeline v. Kanzigg*, No. 2:17-CV-105, 2017 WL 5448425, at *8 (S.D. Ohio Mar. 1, 2017) (loss of goodwill associated with inability to timely complete project constituted irreparable harm); *In re Transcontinental Gas Pipeline Co., LLC*, 2016 WL 8861714, at *9 (finding irreparable injury in form of "reputational damage from failing to meet deadlines"); *Texas E. Transmission, LP v. 3.2 Acres*, No. 2:14-CV-2650, 2015 WL 152680, at *6 (S.D. Ohio Jan. 12, 2015) ("[T]he inability to complete the Project would likely injure Texas Eastern's business reputation and goodwill.").

b. The record establishes a range of irreparable harms to MVP were immediate access not granted.

Applying these established legal standards to the record evidence in this case, all three district courts properly concluded that MVP established a likelihood of irreparable harm without an injunction.

Economic harm. The courts first determined that MVP—like the pipeline company in *Sage*—would sustain significant, and several different forms of, financial loss if its ability to access the Landowners' properties to begin pipeline construction were delayed. JA1422-JA1424; JA2014-JA2017; JA2716-2718. Judge Keeley found that MVP adduced substantial evidence of irreparable harm in the form of significant delayed revenues (up to $40-50 million per month of delay), contractual penalties (approximately $200 million for a one-year delay), "administrative and carrying costs" (of $40-45 million), and increased costs associated with being forced to construct the pipeline during the winter months. JA2015; *see also* JA1423; JA2716; *supra* at 12-13. Additionally, as Judge Copenhaver highlighted, modifying the schedule and delaying construction on certain parcels of property along the pipeline route would, as this Court acknowledged in *Sage*, result in unnecessary additional costs. JA2719. Each of the three district courts also found—and the Landowners do not dispute (AOB12)—that these significant financial losses would not be recoverable by MVP from any source. JA1424; JA2011; JA2719.

Together, these findings of substantial and unrecoverable financial loss, based on ample record evidence, plainly are not clear error; they are consistent with this Court's precedent and the overwhelming weight of authority in similar pipeline cases (*see supra* at 24-25 *nn. 2-4); and they alone support the district courts' findings of irreparable harm.

Non-economic harm. But these are not the only findings supporting irreparable harm—the district courts additionally found that without the requested injunctive relief, MVP also would suffer significant non-economic injury. JA1424-JA1425; JA2010; JA2717; *supra* at 14-16.

Here again, the record contains substantial evidence of non-economic injury MVP would suffer without immediate possession. *Supra* at 11-13; JA977-JA978 (A delay "has the ability to make it difficult for us in our negotiations when we resume with the other pipeline contractors to come back. They're certainly going to be much more wary of entering into the contracts, which may either make it difficult to find workers or make it difficult to find workers at similar costs"); JA1753 ("[I]t certainly puts us at a difficult light to go to shippers and encourage them to let us build another pipeline for them because it will be difficult for them to believe us when we say we can provide them a service by a certain time in the market because they were anticipating using this service and now they haven't been able to do that."); *see also* JA2453, JA2456.

Finally, there is unrebutted evidence that delays to MVP's construction schedule would impair its ability to secure the workforce needed to complete the Project. JA1110; JA1727-JA1730; JA2426-JA2428. This, too, reinforces the irreparable harm to MVP if immediate possession were denied. *See, e.g., Rockies Exp. Pipeline, LLC v. 4.895 Acres*, No. 2:08-cv-554, 2008 WL 4758688, *3 (S.D. Ohio Oct. 27, 2008) (recognizing problems such as loss of workers in determining whether immediate possession should be granted).

Given the extensive evidence, and in light of settled law in this Circuit and other jurisdictions, the three district courts' uniform findings of irreparable harm were correct, certainly not reversible clear error, and should be affirmed.

3. The District Courts Correctly Concluded That The Public Interest And Balance Of Equities Support Granting MVP Immediate Possession.

The three district courts also correctly determined that immediate possession of the Landowners' properties—necessary for completion of the Project—was in the public interest and properly balanced the equities. *Winter*, 555 U.S. at 20; JA1431-JA1432; JA2022, JA2026; JA2720.

At the outset, the district courts relied in part on the fact that FERC—weighing extensive evidence relating to the public interest, including any harm to the Landowners—had expressly determined that the Project was "required by the public convenience and necessity." JA2773. In reaching that determination,

FERC conducted a careful analysis over a three-year period in which it considered the potential impacts to the Landowners, as well as geologic resources, groundwater, rivers and streams, wetlands, wildlife, and cultural and historical resources. *Supra* at 6-8; JA2747; JA2795; JA2771; JA2807; JA2813; JA2816; JA2822; JA2845. FERC considered oral and written comments that included the same arguments made by the Landowners here and in the district courts. *Supra* at 7-8; JA1431; JA2024; JA2795-JA2798.

Given the FERC process and findings, the district courts were well within their discretion in resting their public-interest and balance-of-equities findings in part on the Certificate. That Certificate, as this Court acknowledged in *Sage*, is entitled to substantial weight in considering requests for immediate access. 361 F.3d at 830 (affirming injunction where, as here, "FERC conducted a careful analysis of the [project] and determined that the project will promote the[ ] congressional goals" under the NGA of ensuring consumer access to "natural gas at reasonable prices" and "serve the public interest"); *see also* JA2721 (noting that in "*Sage*, the Fourth Circuit determined that a [FERC] certificate is imbued with the public interest pursuant to the authority granted under the NGA"). FERC, as Judge Keeley noted, "possesses the expertise necessary to" determine whether a pipeline project "will benefit the public[,]" and its determination ought not be second-guessed. JA2026.

Nor would it have been a proper exercise of discretion for the district courts to reach a different conclusion on these factors based on the Landowners' claimed injuries from the Project—injuries FERC weighed in approving the Project. That, the district courts rightly found, would amount to an impermissible collateral attack on the Certificate, which is subject only to review pursuant to the particular procedures set forth by the NGA. JA1430-JA1431; JA2023-JA2024; JA2704-JA2706; *see also Williams Nat. Gas Co. v. Oklahoma City*, 890 F.2d 255, 264 (10th Cir. 1989) (district courts do not hear challenges to FERC certificates); *see also Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770, 778 n.9 (9th Cir. 2008) (same). Indeed, as the district courts acknowledged, the Landowners' claimed injuries were the result of the FERC Certificate itself, not the provision of immediate access to their properties. JA2022 (finding that, "[a]t bottom, it is the NGA and the FERC Certificate that are responsible for the Landowners' injuries, and delaying access until just compensation is paid will do nothing to alleviate those burdens"); JA1430-JA1431.

Other aspects of the record further reinforce the district courts' public-interest and balance-of-equities findings. The evidence showed a market demand for the gas to be transported by the pipeline. JA1717 (The precedent agreements "certainly demonstrate[] that there's an interest and a need in moving gas from where this pipeline begins to where it ends."); JA2416. The evidence further

demonstrated that the pipeline would benefit both gas-producing and gas-consuming regions of the country by providing an additional reliable supply of natural gas. JA2763-JA2764, JA2770, JA2774. And the evidence also revealed that the Project would create approximately 6,000 jobs during construction, JA979; JA1740, JA1742; JA2426-JA2427, and generate tens of millions of dollars of tax revenue for Virginia and West Virginia. JA979; JA1765-JA1766; JA2464.

On this record, the district courts properly determined that the public interest and the balance of equities favored the granting of injunctive relief, in keeping with the approach taken by this Court in *Sage*, 361 F.3d at 830 (noting the pipeline would serve public interest and help promote the local economy), as well as numerous other courts facing similar pipeline-project disputes. *See, e.g.*, *Transcontinental Gas Pipe Line Co. v. Permanent Easement for 2.14 Acres*, No. 17-cv-1725, 2017 WL 3624250, at *10 (E.D. Pa. Aug. 23, 2017) (finding immediate possession is in public interest); *Columbia Gas Transmission, LLC v. 171.54 Acres*, No. 2:17-CV-70, 2017 WL 838214, at *8-9 (S.D. Ohio Mar. 3, 2017) (same). In no way did the district courts abuse their discretion in so finding.

C. The Landowners' Attacks On The District Courts' Irreparable-Harm Findings Are Meritless.

The Landowners assert a series of challenges to the district courts' factually and legally sound irreparable-harm findings, but none has any merit, much less shows that the district courts committed reversible clear error. *See Gilliam*, 61 F.3d at 1078 n.5. Indeed, the Landowners fail to make *any* argument that the district court's irreparable-harm findings are clear error.

1. The Landowners' claim that unrecoverable economic loss is not irreparable harm contravenes controlling law.

Beyond their failure to argue clear error, Landowners' challenges to the irreparable-harm findings are wrong on the law and the facts. They first repeat their refrain—rejected by the three district courts—that unrecoverable economic loss cannot constitute irreparable harm unless it threatens the existence of the party seeking relief. AOB16-21. The Landowners' reading of their cited precedents misses well wide of the mark.

Landowners cite five of this Court's decisions for the generic proposition that economic losses ordinarily are not irreparable, but economic losses that are potentially ruinous can be. AOB16-17 (citing *Long v. Robinson*, 432 F.2d 977, 981 (4th Cir. 1970); *Di Biase*, 872 F.3d 230; *Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994); *Federal Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981); *SAS Institute,*

Inc. v. World Programming Ltd., 874 F.3d 370, 386-87 (4th Cir. 2017)). None of these cases addressed the unique circumstances of FERC-approved pipeline construction present here. *SAS Institute* did address whether *unrecoverable* economic losses can be irreparable, and expressly acknowledged that "preliminary injunctions are sometimes used to ensure that assets currently held by the defendant, *but likely to become unavailable* before damages can be collected, will remain available following trial." 874 F.3d at 386-87 (emphasis added).

The Landowners insist that under *Hughes*, economic loss is only irreparable where "(1) money damages would otherwise be available at judgment *and* (2) either the moving party or non-moving party may not survive to judgment absent an injunction." AOB17. But *Hughes* plainly doesn't establish this standard as the only way compensable economic loss could rise to the level of irreparable harm. In fact, its supposed two-part test is just another way of saying unrecoverable economic harm is irreparable—whether because, as in *Hughes*, the party from whom damages are sought will not be able to pay, 17 F.3d at 694; or because, as here, no such money-damage claim would lie in the first instance.

Without precedent from this Court to support them, the Landowners turn to two district court rulings from the District of Columbia, but neither aids the Landowners' cause. The first—*National Mining Association v. Jackson*, 768 F. Supp. 2d 34 (D.D.C. 2011)—actually held that "[i]f a plaintiff has shown that

financial losses are certain, imminent, *and unrecoverable*, then the imposition of a preliminary injunction is appropriate and necessary." *Id.* at 53 (emphasis added).

Moreover, *National Mining Association* and the Landowners' other cited case—*Air Transportation Association of America, Inc. v. Export-Import Bank of the U.S.*, 840 F. Supp. 2d 327 (D.D.C. 2012)—each involved government landowners with sovereign immunity against damage claims, and the district courts in those cases required that the unrecoverable economic losses be "significant" because otherwise "any damages against an agency with sovereign immunity—even as little as $1—would satisfy the standard." *Air Transp. Ass'n*, 840 F. Supp. 2d at 335. That, however, is not the rule in this Circuit. *See Rum Creek Coal Sales, Inc., v. Caperton*, 926 F.2d 353, 361 (4th Cir. 1991) (holding that the irreparable-harm requirement should be "*less strict*" when sovereign immunity limits available remedies), *abrogated on other grounds by Real Truth About Obama*, 575 F.3d at 346-47 (emphasis added). *See also O'Brien v. Appomattox Cty.*, 213 F. Supp. 2d 627, 632 (W.D. Va. 2002) (same), *aff'd*, 71 F. App'x 176 (4th Cir. 2003); *Synagro-WWT, Inc. v. Louisa Cty.*, No. 3:01-CV-00060, 2001 WL 868638, at *4 (W.D. Va. July 17, 2001) (finding irreparable harm where defendant was immune). In any event, MVP's unrecoverable economic losses are certainly "significant" and meet even the test of district courts in the District of Columbia.

The Landowners end this line of argument with the claim that the three "district courts' radical broadening of the *Hughes* exception" follows from a "misread[ing of] *Sage*[,]" AOB20-21, but this is wrong too. The Landowners say that the "real irreparable harm in *Sage*" was that "the pipeline developer would not meet a FERC-imposed in-service deadline[,]" AOB21, but that is just not true—*Sage* clearly and explicitly found that the developer would be irreparably harmed by "significant financial harm" from delay, including more than $5 million resulting from breaching its contractual obligations. 361 F.3d at 828-29.

The Landowners also assert that "reading *Sage* as allowing economic harm to constitute irreparable injury places it in conflict with other Fourth Circuit law[,]" AOB21, but that assertion—for the reasons discussed above, *supra* at 23-25—is plainly wrong too. In fact, this Court recently reaffirmed *Sage*, *Columbia Gas Transmission, LLC v. 76 Acres*, 701 F. App'x 221, 231 n.7 (4th Cir. 2017), and that decision—and the numerous cases that have followed *Sage* since *Winter* and *Real Truth About Obama*—likewise rebut the Landowners' contention that "*Sage* was decided under [a] much more lenient preliminary-injunction standard" requiring "even the slightest showing of irreparable harm," AOB20. *Sage* itself makes no mention of such a "lenient" standard; rather, it stressed that courts rarely should grant "mandatory" immediate-possession injunctions, yet still found irreparable harm under that very *strict* standard. 361 F.3d at 830.

2. The Landowners' claim that MVP's irreparable harm is self-inflicted ignores the record and the commercial realities of pipeline projects.

The Landowners separately claim—as they did unsuccessfully below—that MVP's claimed injuries from the lack of injunctive relief were self-inflicted and thus not irreparable. Specifically, the Landowners assert that MVP assumed the risk that it would suffer economic losses by entering into construction contracts "before it received either its FERC Certificate or access to all the properties along the route." AOB25. Again, Landowners misconceive the record, the district courts' findings, and the controlling law, and turn a blind eye to the commercial realities of pipeline construction projects.

The record confirms that the very nature of pipeline construction necessitates pipeline companies taking the preparatory steps the Landowners refer to as "self-inflicted" harms. At each of the three evidentiary hearings, Cooper testified that MVP entered into construction contracts to ensure that MVP secured the valuable skilled workers necessary to complete the project. JA1110; JA1739-JA1742; JA2438-JA2441. MVP demonstrated that these workers are a limited resource given other ongoing pipeline projects and that if MVP did not gain immediate access, it risked losing the valuable skilled workers that are necessary to efficiently and timely complete work on the project. JA1110; JA1752-JA1753; JA2427, JA2438-JA2441. Cooper stated explicitly that there was a "zero" percent

chance that the Project could be completed on schedule without those contractors lined up ahead of time. JA1109.

This unrebutted testimony, in turn, led Judge Keeley to conclude that MVP's construction schedule "was entirely reasonable under the circumstances" because "[t]he process by which natural-gas companies obtain approval and construct under the NGA necessitates forethought and a degree of speculation." JA2017-2018. Judge Keeley further found that MVP's "business decision to secure its primary contractor for the Project in advance of receiving FERC approval" ensured that "necessary skilled workers and general contractors would be available to work on the Project." JA2019. According to Judge Keeley, "MVP decided to accept the risk that FERC would not approve its Project, but FERC did approve the Project," and, as a result of MVP's careful planning, "MVP is adequately prepared for construction." *Id.* Thus, contrary to the Landowners' contention, MVP established that its actions were not undertaken "prematurely" and in anticipation "of a *pro forma* result," AOB25, but, rather, as a means of ensuring that the Project would be built in a timely and efficient manner using the best available resources and skilled workers. JA1109-JA1110; JA1740-JA1742; JA2438-JA2441.

Settled authority is in accord and rejects Landowners' "self-inflicted-harm" theory. *See Alliance Pipeline LP v. 4.360 Acres*, 746 F.3d 362, 369 (8th Cir. 2014) (rejecting landowners' contention that "some of the [economic] harm to [the

pipeline developer] could have been avoided had [it] waited" longer before entering into contracts); *In re Transcontinental Gas Pipeline Co.*, 2016 WL 8861714, at *9 (finding that "self-inflicted" contractual deadlines "do not preclude relief" because they "are not simply agreed to as a matter of bilateral contract"—they are "driven by customers' seasonal gas and heating requirements and are a pre-requisite to final FERC approval given the requirement of 'open season' bidding periods for gas supply contracts."); *Rockies Exp. Pipeline,* 2008 WL 4758688, *3 (finding that even though some of the harm claimed by the pipeline company was "self inflicted," "[a]n inability to proceed with planned construction and meet the existing deadlines will result in delayed construction and delayed or lost service to the public that might otherwise be avoided by immediate possession, risking increased costs and ancillary problems such as loss of workers").

The Landowners ignore these on-point authorities in favor of cases that state the general proposition that "self-inflicted" harms may not support injunctive relief. AOB25-26 (citing *Di Biase*, 872 F.3d at 235; *Long*, 432 F.2d at 981; *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002)). But none of those cases involved facts—or factual findings by district courts—that justify the assumption of "self-inflicted" harms like MVP's. Here, there was uncontroverted testimony that there was "zero" percent chance that the Project could be completed on schedule without contractors lined up by MVP ahead of time. JA1109. The

Landowners' cited cases involved no such unrebutted proof, and the fact that the Landowners neglect to articulate the underlying facts in their cases is telling.

If the Landowners' argument were accepted, pipeline developers could only obtain injunctive relief by neglecting the preparatory steps and agreements necessary to ensure timely completion of a project until after a FERC certificate is granted—and even then, Landowners would insist, developers would have to wait until the FERC Certificate is affirmed on any appeal challenging it. That would undercut the NGA/FERC pipeline-construction framework, directly contrary to Congress's intent. *See New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973) (holding that courts do not "interpret federal statutes to negate their own stated purposes."). The Landowners' self-inflicted-harm argument thus fails as a matter of fact and law and furnishes no ground for reversal—whether under the clear-error or any other standard of review.

3. The Landowners' claim that MVP's harms are not imminent conflicts with the record and settled law.

The Landowners then pivot to their arguments—also rejected by the three district courts—that the injunctions were impermissibly broad and based on non-imminent harm, and that possession of the properties should not have been given until November 15, 2018, if at all. AOB21-22. But there is no error here either.

Indeed, there is a fundamental flaw in the Landowners' key premise: that the substantial economic and non-economic losses MVP would sustain from a

delay in tree-clearing and construction until November 2018 are not irreparable. That, as shown above, is simply incorrect. *Supra* at 12-14. The record makes clear that had the district courts "tailored" their injunctions to delay access until November 2018—or denied the injunctions outright—MVP would have suffered significant loss of revenue, contractual penalties, and other financial injuries, in addition to the harm to its commercial reputation and goodwill by failing to comply with contractual deadlines. *Id.* Under *Sage* and other authorities, those are irreparable harms, and no "tailoring" of the injunctions would have avoided them.

For the same reason, the fact that MVP might be able to meet the Project-completion deadline set by FERC in the Certificate (and shipping-contract requirements) even if it were not given access to the Landowners' properties until November 2018 is beside the point—MVP still would be irreparably, and imminently, harmed in the meantime, in the manner and degree described above.

Ultimately, what the Landowners seek through their requested "tailoring" of the injunctions to take effect in November 2018 is the very relief they have already, and unsuccessfully, sought from this Court, the D.C. Circuit, and FERC: a stay of the injunctions or the Certificate and consequent delay of the Project. But they have furnished the Court with no new support for that relief now. This end-run should be rejected, especially given the public necessity of the Project, which enables "courts of equity [to] go to greater lengths to give 'relief in furtherance of

the public interest . . . .'" *Int'l Refugee Assistance Project*, 857 F.3d at 602 (quoting *Sage*, 361 F.3d at 826) (internal citation omitted).

4. The Landowners' claim that the record does not support the findings of irreparable harm misstates the evidence and the law and reveals no clear error.

The Landowners conclude with an attack on the sufficiency of the evidence supporting the district courts' irreparable-harm findings, AOB27-34, but this is just more distortion of the record and the controlling law, and the Landowners still cannot show—and do not claim to show—that the findings were clear error.

The Landowners broadly assert that Cooper's testimony showed only what MVP's "maximum losses" would be, not its "likely losses." AOB28. But this mixes apples and oranges—proof of "maximum losses" does not mean those losses are not "likely." In any event, even assuming that MVP might not suffer those "maximum losses," the district courts found—and the Landowners do not dispute—that it would at least sustain some significant losses, which were still more than adequate to support injunctive relief under *Sage* and this Court's precedents. *Supra* at 26; *see also United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 742 (8th Cir. 2002) (affirming irreparable-harm finding where defendants claimed that plaintiff failed to take steps that would have "decreased the threat of irreparable harm but by no means eliminated it altogether").

The Landowners also complain that Cooper's testimony shows "delayed revenue," not "lost revenue;" fails to substantiate lost profits because no evidence of costs is provided; and left the district courts to speculate about the "time value" of the delayed revenue. AOB28-29. This is just more misdirection. The Landowners do not dispute that MVP's revenues would be delayed, and specific testimony about the "time value" of that delayed revenue was not necessary for the district courts to find that the delayed revenue would do economic harm to MVP—simple logic was enough.

With respect to MVP's proof of contractual penalties that would follow from construction delays without the injunctions, the Landowners say it "wildly exaggerates what [MVP] would actually pay," AOB30, but never explain how that is so. The Landowners also repeat their complaint that Cooper's testimony showed the maximum amount of penalties MVP would assume, and claim that MVP could "mitigate" those penalties, AOB31, but they do not—because they cannot—dispute that such penalties would be imposed, and further supported the findings of irreparable harm. Landowners additionally assert that MVP could invoke "force majeure" provisions in its contracts to avoid penalties, AOB30, but they cite no case holding that the bare possibility of force-majeure relief negates a showing of irreparable harm, and their speculation that hypothetical courts might provide relief

under the particular force-majeure provisions here relief is just that—speculation that cannot show any clear error by the three district courts.

The Landowners launch similar attacks on MVP's proof of increased "carrying costs" resulting from a construction delay, AOB32-33, but those fail for the same reasons noted above. The Landowners also contend that the additional $40 million in administrative costs MVP would incur did not threaten its existence, AOB32, but that is just another manifestation of their erroneous claim that only "ruinous" economic harm is irreparable in this Circuit—that's wrong.

The Landowners' final challenges—to the district courts' findings of non-economic irreparable harm—are more of the same. They claim, without any rebuttal evidence of their own, that Cooper's testimony regarding harm to MVP's reputation and goodwill was speculative. AOB33. The Landowners ignore Cooper's extensive experience with pipeline projects—including MVP's Project—which formed the basis for his testimony. JA935-JA936; JA1707-JA1708; JA2404-JA2405. The Landowners also claim that MVP's harm to its reputation and loss of goodwill is another form of economic loss that is not irreparable harm because it would not "threaten MVP's existence." AOB34. This is doubly wrong—harm to one's commercial reputation is not "economic" simply because it

will have economic repercussions and, as noted, non-ruinous but unrecoverable economic harms are irreparable under this Court's precedents, *supra* at 23-25.[5]

D. The Landowners' Contention That The Injunctions Were "Automatically" Granted Is Meritless.

Ignoring the district courts' actual findings, the Landowners claim that the district courts "automatically" granted the injunctions simply because FERC granted the Certificate approving the Project. AOB37-46. What the district courts actually found—and the extensive process that led to their findings—make clear that this argument is simply unfounded. The district courts allowed discovery, conducted evidentiary hearings, and issued lengthy, well-reasoned opinions that followed *Sage* and addressed each of the *Winter* factors. JA1397, JA1419-JA1432; JA1978-JA1979, JA2008-JA2027; JA2696, JA2712-JA2721.

On likelihood of success on the merits, the district courts did not find that MVP is "likely to succeed on the merits because, *inter alia*, it holds a FERC Certificate." AOB37. Rather, they determined that MVP had *already* succeeded on the merits by obtaining partial summary judgments confirming its right to

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[5] The Landowners' cited authorities for these assertions are inapposite. *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.*, 984 F.2d 113, 120 (4th Cir. 1993) (emphasis added), described the alleged harms there—including, among several, "injury to reputation"—as "*largely* economic," and affirmed the denial of an injunction where the harms were "highly speculative." *Morrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 526 (4th Cir. 1989), did not even address reputational harm, and upheld the denial of an injunction because the "potential damage" to "customer goodwill is limited."

condemn. JA1421; JA2009; JA2715. The Landowners do not challenge these findings.

On irreparable harm, here again the district courts did not rely solely on the FERC Certificate. Rather, they found that, based on the record before them, MVP would suffer irreparable harm from unrecoverable economic losses and non-economic losses. *Supra* at 14-16; JA1421-JA1428; JA2010-JA2020; JA2009 JA1421; JA2009; JA2716-JA2720. The Landowners insist that finding irreparable harm in this circumstance will render the irreparable-harm analysis "automatic" and "meaningless" because pipeline developers always suffer delayed revenue and increased costs and penalties if denied immediate possession. AOB38-39. But there is no substantiation for this conjecture—the three courts' findings were based on the record before them and the particular showing MVP made.

The district courts' balance-of-equities analysis did not treat the FERC Certificate as the "sole determining factor" either. AOB39. Rather, the district courts properly recognized that the arguments against immediate possession involve only "timing" for most owners. *Sage*, 361 F.3d at 829; JA1427-JA1431; JA2022; JA2720; *supra* at 14-16. That is, the harm to defendants' property results from the taking and not from immediate possession. *Id*. As observed in *Sage*, the fact that an injunction will allow entry now rather than later is not "a type of an inherent harm that is irreparable," but rather is an ordinary burden of citizenship.

361 F.3d at 829. And although the Landowners do not acknowledge it, their rights to just compensation are fully protected by the bonds and deposits required by the district courts' rulings. JA1496-JA1498; JA2029-JA2034; JA2726-JA2728.

Nevertheless, the Landowners assert that immediate possession should have been denied because of challenges to the Project pending before FERC and the D.C. Circuit. AOB39-40. But the Landowners already have sought that exact relief from this Court, the D.C. Circuit, and FERC, and none of their requests have been granted. *E.g., Mountain Valley Pipeline, LLC v. 0.335 Acres*, No. 18-1175, Doc. 42 (4th Cir. Mar. 5, 2018); *Berkley v. Mountain Valley Pipeline, LLC*, No. 18-1042, Doc. 30 (4th Cir. Feb. 15, 2018); *see also supra* at 9.

Moreover, the law is settled that the pending review of a FERC certificate is not grounds to deny injunctive relief that—as here—is supported by the law and the record. *See, e.g., In re Algonquin Nat. Gas Pipeline Eminent Domain Cases*, No. 15-CV-5076, 2015 WL 10793423, at *7 (S.D.N.Y. Sept. 18, 2015) (holding that "absent a stay by FERC," rehearing requests before FERC "neither prohibit these proceedings from going forward nor affect Algonquin's substantive right to condemn or the need for immediate possession"); *Sabal Trail v. 7.72 Acres*, No. 3:16-CV-173, 2016 WL 8900100, at *4, 12 (M.D. Ala. June 3, 2016) (granting immediate possession despite the fact that FERC had granted requests for rehearing); *Steckman Ridge LLC v. Exclusive Nat. Gas Storage Easement Beneath*

11.078 Acres, No. CV 08–168, 2008 WL 4346405, at *3, 18 (W.D. Pa. Sept. 19, 2008) (same).

There was nothing "casual" about the district courts' grant of injunctive relief, and the Landowners' claims that the district courts acted as a "mere rubber stamp" for MVP is unfounded.

E. *Sage* Was Correctly Decided And There Is No Colorable Reason To Reconsider It Through An Extraordinary Initial En Banc Hearing.

Toward the end of their brief, the Landowners settle on their central contention—that this Court's decision in *Sage*, while binding on this Court, was wrongly decided and should be overruled following an initial hearing en banc. The Landowners are right about *Sage* being binding precedent, as this Court acknowledged just a year ago. *Columbia Gas*, 701 F. App'x at 231 n.7.

But there is no merit to their attack on *Sage*, and they point to no intervening authority to support revisiting *Sage* or conducting an extraordinary initial hearing en banc. Rather, in the 14 years since *Sage* was decided, the Third, Eighth, and Ninth Circuits, dozens of district courts across the country, and this Court in *Columbia Gas*, all have followed *Sage*.[6] *See, e.g., Nexus Gas Transmission, LLC*

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[6] Landowners don't acknowledge it, but the defendants in *Sage* and *Columbia Gas* each unsuccessfully petitioned for rehearing en banc, and the defendants in *Sage* also unsuccessfully petitioned the Supreme Court for certiorari. Petition for Writ of Certiorari, *Joyce v. East Tenn. Nat. Gas Co.*, No. 04-174, 2004 WL 1822154, at *4-27 (U.S. Aug. 4, 2004); *Joyce v. East Tenn. Nat. Gas Co.*, 543 U.S.

v. City of Green, No. 5:17-cv-2062, 2017 WL 6624511, at *4 (N.D. Ohio Dec. 28, 2017) ("'*Sage* represents the approach taken by virtually every federal court that has considered the issue.'"); *Steckman Ridge GP*, 2008 WL 4346405, at *9 (describing *Sage* as "the leading case" on immediate possession in NGA condemnations). *Sage* was correctly decided, and the district courts' adherence to *Sage* was entirely appropriate—indeed, compelled.

1. *Sage* has been uniformly followed and there is no ground for an initial hearing en banc.

The Landowners' pitch for an initial hearing en banc to reconsider *Sage* begins with the contention that *Sage* conflicts with the Seventh Circuit's decision in *Northern Border Pipeline Co. v. 86.72 Acres*, 144 F.3d 469 (7th Cir. 1998). AOB1, 50-51. *Sage* itself rejected any tension with that case, however, and rightly so. *Sage*, 361 F.3d at 824-26; *see also Columbia Gas*, 701 F. App'x at 231 n.7. In *Northern Border*, the pipeline developer did not seek an order confirming its authority to condemn the property. *Northern Border*, 144 F.3d at 471-72; *Sage*, 361 F.3d at 827. The district court thus denied an injunction on grounds that the company had no legal right to immediate possession and, in any event, did not meet the standards for an injunction. *Northern Border*, 144 F.3d at 471. The

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978 (2004) (mem.) (denying petition for certiorari); *Goforth v. East Tenn. Nat. Gas Co.*, 543 U.S. 978 (2004) (mem.) (same).

Seventh Circuit held that without a substantive entitlement to the property, the district court properly denied an injunction. *Id.* at 472; *Sage*, 361 F.3d at 827.

Consistent with *Sage*, district courts in the Seventh Circuit interpret *Northern Border* as allowing immediate possession where the gas company obtains a condemnation order and meets the injunction requirements. *See, e.g., Rockies Express Pipeline, LLC v. 123.62 Acres*, No. 1:08-cv-0751, 2008 WL 4493310, at *2 (S.D. Ind. Oct. 1, 2008) ("[O]nce a natural gas company's condemnation authority is confirmed, its right to immediate possession follows."); *Guardian Pipeline, LLC v. 295.49 Acres*, No. 08-cv-0028, 2008 WL 1751358, at *22 n.11, 23 (E.D. Wis. Apr. 11, 2008) (distinguishing *Northern Border* and granting immediate possession to gas company that obtained condemnation ruling).

Despite their frontal assault on *Sage*, the Landowners notably fail to cite a single case contrary to *Sage*. That is because in the only such case that exists—*Transwestern Pipeline Co. v. 9.32 Acres*, 544 F. Supp. 2d 939 (D. Ariz. 2008)—the Ninth Circuit later expressly rejected the Arizona district court's disagreement with *Sage*. *See Transwestern Pipeline*, 550 F.3d at 777 ("[U]pon the issuance of an order of condemnation . . . . the district court may use its equitable powers to grant possession to the holder of a FERC certificate if the gas company is able to meet the standard for issuing a preliminary injunction.").

At the same time, the Landowners ignore the legion of cases that have followed the *Sage* approach. These include decisions from the Third, Eighth and Ninth Circuits, *Transcontinental Gas Pipe Line Co. v. Permanent Easement for 2.59 Acres*, 709 F. App'x 109 (3d Cir. Sept. 12, 2017) (affirming injunction granting immediate possession); *Columbia Gas Transmission LLC v. 1.01 Acres*, 768 F.3d 300, 314-16 (3d Cir. 2014) (reversing district court and granting immediate possession); *Alliance Pipeline*, 746 F.3d at 368-69 (affirming injunction granting immediate possession); *Transwestern Pipeline*, 550 F.3d at 778 ("[U]pon the issuance of an order of condemnation . . . the district court may use its equitable powers to grant possession to the holder of a FERC certificate if the gas company is able to meet the standard for issuing a preliminary injunction."), as well as district courts in virtually every circuit, *see, e.g., Maritimes & Ne. Pipeline, LLC v. 6.85 Acres*, 537 F. Supp. 2d 223, 227 (D. Me. 2008); *Constitution Pipeline Co. v. Permanent Easement for 1.77 Acres*, No. 3:14-cv-2094, 2015 WL 1638370, at *3-4 (N.D.N.Y. Mar. 16, 2015); *Transcontinental Gas*, 2017 WL 3485752, at *1, 5; *Steckman Ridge*, 2008 WL 4346405, at *9; *Columbia Gas Transmission, LLC v. 169.19 Acres*, No. 1:18-cv-08, 2018 WL 1004485, at *4 (N.D. W. Va. Feb. 21, 2018); *Columbia Gas Transmission, LLC v. 252.071 Acres*, No. 15-cv-3462, 2016 WL 1248670, at *12-19 (D. Md. Mar. 25, 2016); *Cadeville Gas Storage LLC v. 18.935 Acres*, No. 12-cv-2822, 2013 WL 12181634, at *2-4 (W.D. La. July 31,

2013); *Columbia Gas*, 2017 WL 838214, at *6, 9; *Rockies Express*, 2008 WL 4493310, at *2; *Alliance Pipeline LP v. 4.500 Acres*, 911 F. Supp. 2d 805, 813-14 (D.N.D. 2012); *Gas Transmission Nw., LLC v. 15.83 Acres*, 126 F. Supp. 3d 1192, 1199-1201 (D. Ore. 2015); *Humphries v. Williams Nat. Gas Co.*, 48 F. Supp. 2d 1276, 1280 (D. Kan. 1999); *Transcontinental Gas Pipe Line Co. v. Parcel of Land Comprising 6.896 Acres*, No. 2:17-cv-12, 2017 WL 459858, at *1 (M.D. Ala. Feb. 2, 2017).

2. *Sage* correctly ruled that immediate-possession injunctions are not unconstitutional "quick-takes."

Writing on their wished-for blank slate where *Sage* does not exist, the Landowners knock down a straw man of their own making—they claim the district courts' immediate-possession orders here amount to improper judicial "quick-takes" of the Landowners' property that are not authorized by the NGA and therefore unconstitutional. AOB48-50. The essential premise of their argument is fundamentally flawed. The fact is, injunctions granting immediate possession in NGA cases simply are *not* "quick-take orders." AOB57. Quick-take authority derives from the Declaration of Taking Act ("DTA"), which allows the federal government to acquire *title* to property by filing a declaration of taking and depositing with the court an estimate of just compensation. 40 U.S.C. § 3114.

As this Court recognized in *Sage*, however, an injunction granting immediate possession in an NGA case is different from a quick-take. *Sage*, 361

F.3d at 822-23, 825-26; *see also Constitution Pipeline Co. v. Permanent Easement for 1.92 Acres*, No. 3:14-cv-2445, 2015 WL 1219524, at *3 (M.D. Pa. Mar. 17, 2015) (rejecting landowners' attempt to conflate a quick-take with immediate possession and noting the "marked difference" between the two remedies). To obtain immediate possession, a company must show a substantive right to condemn the property and thereafter satisfy the test for a preliminary injunction. This is a "much stiffer burden than the government [has] under the DTA." *Sage*, 361 F.3d at 825. The company must also post a bond and or deposit to secure the defendants' interest in compensation. *Id*. at 824. And unlike a quick-take, an injunction provides only access. Title does not pass until after payment of just compensation in a condemnation action. *Id.* at 825.

The Landowners try to further leverage their flawed premise—that injunctions under the NGA that grant immediate possession are quick-takes—by asserting that such relief violates the separation-of-powers doctrine because the NGA does not in fact provide quick-take power. AOB50. Aside from its erroneous premise,[7] this argument does not withstand analysis. To begin with, immediate possession is authorized by the NGA. Congress has delegated federal

[7] Because the immediate-possession injunctions are not quick-takes, *supra* at 52, the Landowners' cited cases for the proposition that only Congress can authorize a quick-take are far afield and irrelevant. AOB47 (citing *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Secombe v. Milwaukee & St. P. R. Co.*, 90 U.S. 108, 117-18 (1974)).

eminent domain authority to FERC certificate holders. 15 U.S.C. § 717f(h). Congress also has delegated authority to FERC to issue certificate orders, and identified the public use that supports the taking and immediate entry. *Id.* §§ 717(a), 717f(c). Congress has granted district courts jurisdiction to decide condemnation cases under the NGA, *id.* § 717f(h), and their role is to enforce the FERC certificate as written. *E.g.*, *Transwestern Pipeline*, 550 F.3d at 778 n.9.

Immediate possession also is appropriate under Federal Rule of Civil Procedure 65. Federal Rule of Civil Procedure 71A, the special rule for condemnation actions, provides that the regular rules of procedure apply to any subject not covered by the special rule. Fed. R. Civ. P. 71.1(a). Therefore, the Rules of Civil Procedure allow a gas company to seek a preliminary injunction under Rule 65 for immediate possession. And because "Congress has not acted to restrict the availability of Rule 65(a)'s equitable (injunctive) remedy in an NGA condemnation," *Sage* properly "conclude[d] that the rule applies." 361 F.3d at 825 (citing *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291 (1960)); *see also McQuiggin v. Perkins*, 569 U.S. 383, 397 (2013) ("'[W]e will not construe a statute to displace courts' traditional equitable authority absent the clearest command.'") (citation omitted).[8]

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[8] Numerous courts agree with *Sage* that immediate possession is available in NGA condemnation suits notwithstanding the absence of delegated quick-take power. *E.g.*, *Sabal Trail v. Real Estate*, No. 1:16-cv-63, 2016 WL 8919397, at *7

The Landowners do not contest MVP's right to condemn. AOB4. The district courts recognized that MVP has an interest in the property that is enforceable in equity upon meeting the conditions for an injunction. *Sage*, 361 F.3d at 823-24. This authorized the district courts to grant "intermediate relief of the same character as that which may be granted finally." *Id.* (finding that immediate possession was proper intermediate relief because condemnation orders established company's right to possession upon entry of final judgment).

"[T]he Constitution does not prevent a condemnor from taking possession of property before just compensation is determined and paid." *Id*. at 824 (citing *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)). And MVP has posted bonds and deposited funds ensuring that just compensation will be paid. *Cherokee Nation*, 135 U.S. at 659 (stating that landowner is entitled to "reasonable, certain, and adequate provision for obtaining compensation" before his occupancy is disturbed). Landowners have the right to draw down the appraised amount, which some defendants have done. *E.g.*, W.D. Va., No. 7:17-

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(N.D. Fla. May 23, 2016) ("[T]he Fourth Circuit had it right in *Sage* . . . . That Congress didn't include a statutory quick-take power, with something like the DTA's lower bar, doesn't necessarily preclude a party from obtaining immediate possession by meeting the more stringent requirements for a preliminary injunction . . . . Congress was presumably aware that such a mechanism was available."); *Constitution Pipeline*, 2015 WL 1219524, at *3 ("'[B]ecause Congress has not acted to restrict the availability of Rule 65(a)'s equitable (injunctive) remedy in an NGA condemnation, we conclude that the rule applies.'") (quoting *Sage*); *Northern Nat. Gas Co. v. Approximately 9117.53 Acres*, No. CV 10-1232, 2012 WL 859728, at *4 (D. Kan. Mar. 13, 2012) (same).

cv-492, ECF No. 794 (disbursement order). Landowners do not challenge the adequacy of the bonds and deposits. AOB4.

The Landowners incorrectly assert that *Sage* "entirely ignored" *Washington Metropolitan Area Transit Authority v. One Parcel of Land ("WAMTA"),* 706 F.2d 1312, 1321 (4th Cir. 1983). AOB51. In fact, *Sage* cites *WAMTA* on the issue of adequate assurance of just compensation. 361 F.3d at 824. In *WAMTA*, the authority filed a declaration of taking under the DTA. 706 F.2d at 1315-16. The Court upheld the quick-take on grounds that Congress had delegated quick-take power to the authority. *Id*. at 1319. *WAMTA* does not address whether districts court have equitable power to issue preliminary injunctions for immediate possession.

The Landowners' suggestion that the panel in *Columbia Gas Transmission* endorsed a rehearing of *Sage* is likewise incorrect. AOB55. The decision in *Columbia Gas Transmission* reaffirmed *Sage*, 701 F. App'x at 231 n.7, and the Court thereafter denied rehearing en banc with no judge requesting a poll. No. 16-1017, Doc. 71.

Finally, the Landowners cite several Supreme Court cases for the proposition that "congressional silence is negation in the context of eminent domain." AOB54. Landowners' argument misses the point. *Sage* relied upon Rule 65, not the NGA. 361 F.3d at 822, 824 (recognizing that NGA does not grant

quick-take power and finding authority to grant immediate possession under Rule 65). "[B]ecause Congress has not acted to restrict the availability of Rule 65(a)'s equitable (injunctive) remedy in an NGA condemnation," *Sage* properly concluded that Rule 65 applies. *Id*. at 825. *See also Mitchell*, 361 U.S. at 291 ("'[E]quitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.'") (citation omitted).

VI. CONCLUSION

For the foregoing reasons, the district courts' injunction orders granting MVP immediate possession should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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