No. 18-561

In The Supreme Court of the United States

ORUS ASHBY BERKLEY, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Is a delegation of Congressional power an "agency order" or "agency action" such that a party wishing to challenge that delegation must file that challenge with the agency under the administrative review scheme of 15 U.S.C. § 717r, or is the proper forum for constitutional challenges the district court?

2. Is an administrative agency's test for determining "public use" for purposes of eminent domain an "agency order" such that a party wishing to challenge that test as unconstitutional must file that challenge with the agency and adhere to its administrative review scheme, or is the proper forum for constitutional challenges the district court?

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 36-year history, including *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).[2] One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the constitutional right of citizens not to be deprived of their property in violation of their procedural and substantive due process rights.

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[1] *Amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. All counsel of record for the parties to this action received the notice required by Sup. Ct. R. 37.2(a) of *Amicus'* intention to file this brief and all counsel of record have consented to the filing of this brief.

[2] *See Snyder*, 131 S. Ct. at 1213 (citing Brief for Rutherford Institute as *Amicus Curiae*).

SUMMARY OF THE ARGUMENT

Amicus writes in support of Petitioners' petition for writ of *certiorari*, but writes separately to express its concerns about how the pattern and practice of the Federal Energy Regulatory Commission ("FERC") in adjudicating requests for eminent domain has deprived—and continues to deprive—Petitioners and numerous other individuals of their procedural and substantive due process rights.

Amicus is concerned that regardless of whether Congress's delegation of authority to FERC is permissible, the regulatory scheme at issue has effectively cut off meaningful judicial review of Petitioners' and others' constitutional challenges to property takings. Absent Court intervention, Petitioners and other similarly situated individuals will continue to have their property seized without any assessment of the constitutionality of the takings process.

ARGUMENT

The Fifth Amendment guarantees that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. It has long been established that "'the privilege of . . . acquiring, holding, and selling property, is an essential part of [the individual's] rights of liberty and property, as guaranteed by the fourteenth amendment.'" *Allgeyer v. Louisiana*, 165 U.S. 578, 590 (1897) (quoting *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888)). As part of the Fifth Amendment,

procedural due process guarantees "an opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). This Court has long made clear that "[t]he basic guarantees of our Constitution are warrants for the here and now . . . ." *Watson v. City of Memphis*, 373 U.S. 526, 533 (1963).

The Natural Gas Act ("NGA") grants FERC authority to regulate the interstate transportation of natural gas. 15 U.S.C. §§ 717b, 717c. As part of this, FERC has authority to review and decide applications from entities to take the private property of our nation's citizens. The NGA authorizes FERC to issue certificates to take property "with such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). Here, Petitioners challenged the taking of their land in the district court, which declined jurisdiction. On appeal, the Fourth Circuit ruled that "Congress implicitly divested the district court of jurisdiction to hear claims of the kind brought by Plaintiffs and instead intended for such claims to come to federal court through the administrative review scheme established by the Natural Gas Act." *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 629 (4th Cir. 2018). In so ruling, the Fourth Circuit concluded that "[t]he statutory review scheme provides for eventual review of this issue before a court of appeals; therefore Plaintiffs must work through the statutory review scheme first." *Id.* at 633.

While it is well-established that agency action is permissible in certain circumstances, there must be the opportunity for individuals to seek meaningful judicial review of agency action when, as here, the matter concerns allegations of a pattern or practice of constitutional law violations. *See Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures . . . ."). This is why the Third Circuit has found "a waiver of the exhaustion of administrative remedies requirement where the claimant raises constitutional issues . . . [because] the requirement of exhaustion does not serve any underlying policy, because in the former case the federal court is more qualified to address constitutional questions than the agency . . . ." *Rankin v. Heckler*, 761 F.2d 936, 940-41 (3d Cir. 1986).

The same analysis also applies when the administrative scheme prohibits individual review in the district court. For example, in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), the plaintiff's constitutional challenge was allowed in the district court because the plaintiff alleged a broad pattern and practice of constitutional law violations. *Id.* at 491-94. Accordingly, as Professor Eric Berger has noted, "[g]iven that agency action is a dominant mechanism for the articulation and evolution of the country's fundamental normative commitments, courts should be more sensitive to the important ways in which administrative agencies

shape constitutional meaning." Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 Boston U. L. Rev. 2029, 2098 (2011). Due process can only be satisfied if Petitioners and other similarly situated landowners are afforded a meaningful opportunity to raise their constitutional law claims in a timely manner. Here, however, as soon as FERC issues a certificate, even a "conditional" one, the acquiring entity may commence the acquisition of the property by condemnation. 15 U.S.C. § 717(h).

After "[i]ssuing such a Certificate conveys and automatically transfers the power of eminent domain to the Certificate holder. . . . Thus, FERC does not have discretion to withhold eminent domain power once it grants a Certificate. . . . With the transferred power of eminent domain, a Certificate holder can then initiate condemnation proceedings in the appropriate U.S. district court or state court." *Berkley*, 896 F.3d at 628.[3] Under the NGA, "[t]he practice and procedure in any action or proceeding for that purpose" is supposed to "conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated." *Id.* While such a requirement may suggest there is an opportunity for meaningful judicial review of constitutional law

[3] While in some circumstances, the ***government*** may take property consistent with due process if it grants a prompt post-taking hearing, *Barry v. Barchi*, 443 U.S. 55 (1979), such a situation is not present here.

claims, in practice, such review is illusory, as district courts frequently accept preliminary certificates as being sufficient for the taking of private property. *See, e.g.*, *Columbia Gas Transmission, LLC v. 1.092 Acres of Land*, No. 15-cv-00208, 2015 WL 389402, at *3 (D.N.J. Jan. 28, 2015) ("[T]he [NGA] only empowers federal district courts to evaluate the scope of the certificate and to order condemnation of property (and compensation for same) as provided in the FERC certificate.").

In addition, district courts in the Fourth Circuit (where this taking will occur) have created a "quick-take" procedure whereby property can be taken through an abridged procedure that mirrors Rule 65 of the Federal Rules of Civil Procedure. *See E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 822 (4th Cir. 2004).[4] Such quick-take procedures prevent landowners from availing themselves of procedural protections inherent in traditional judicial proceedings. Instead of providing landowners with such hearings, district courts faced with condemnation requests have typically stated that the grant of eminent domain power is essentially automatic, holding that the rehearing process is the appropriate forum for any issues related to the validity of the Certificate or the constitutionality of

[4] While Congress has imbued certain agencies with quick-take power, 40 U.S.C. § 3114, and occasionally granted such power to non-governmental entities, the NGA contains no such provision for private entities. Despite this, certificate holders frequently invoke their certificates as a basis for courts to authorize quick-take condemnations.

its underlying public use determination. *See, e.g.*, *Maritimes & Ne. Pipeline, L.L.C. v. Decoulos*, 146 F. App'x 495, 498 (1st Cir. 2005) ("Once a [certificate of public convenience and necessity] is issued by the FERC, and the gas company is unable to acquire the needed land by contract or agreement with the owner, the only issue before the district court in the ensuing eminent domain proceeding is the amount to be paid to the property owner as just compensation for the taking."); *see also Millennium Pipeline Co., L.L.C. v. Certain Permanent & Temp. Easements*, 777 F. Supp. 2d 475, 479 (W.D.N.Y. 2011); *Guardian Pipeline, L.L.C. v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 974 (N.D. Ill. 2002); *Tenn. Gas Pipeline Co. v. Mass. Bay Transp. Auth.*, 2 F. Supp. 2d 106, 110 (D. Mass. 1998).

Contrary to the regulatory scheme in place, the Constitution requires, at the very least, a hearing of landowners' constitutional arguments prior to the deprivation of their property rights. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). However, not only are takings rushed through the district courts under quick-take provisions, but the FERC readily acknowledges that it is not in a position to rule on constitutional law challenges. *See Atl. Coast Pipeline, L.L.C.*, 16 FERC P 61043, 2017 WL 4925429, at *20 (F.E.R.C. Oct. 13, 2017) ("[S]uch a question is beyond our jurisdiction: only the courts can determine whether Congress' action in passing section 7(h) of the NGA conflicts with the Constitution."); *Mountain Valley Pipeline, L.L.C.*,

161 FERC 61043, 2017 WL 4925425, at *15 (F.E.R.C. Oct. 13, 2017) (order issuing Certificates and granting abandonment authority) (same). Accordingly, the current regulatory scheme is a prime example of what Prof. Berger refers to as "courts' inadequate recognition of the fact and nature of administrative action in constitutional cases suggests that judges do not sufficiently appreciate the significant role agencies play in guiding constitutional norms." Berger, *Individual Rights*, 91 Boston U. L. Rev. at 2098.

If this were not troubling enough, FERC has specifically disclaimed any ability to halt takings of private property. *See Midcoast Interstate Transmission v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) ("The Commission does not have the discretion to deny a Certificate holder the power of eminent domain."). District courts have followed suit, on the basis that the NGA deprives them of jurisdiction.

After-the-fact review does not erase the due process violations when landowners challenge the right to take the property in the first place. *See Brody v. Village of Port Chester*, 345 F.3d 103, 112 (1st Cir. 2003). FERC's own practice of preventing review until the pipeline at issue is under construction and landowners' constitutional rights have been trampled renders such review far from "meaningful." Accordingly, FERC's actions ensure there is no adequate post-deprivation remedy. *See Kreschollek v. South Stevedoring Co.*, 78 F.3d 868, 874 (3d Cir. 1996) ("The critical distinction, however, is that in this case the administrative process is insufficient to provide Kreschollek the full relief to

which he may be entitled."). The appellate process contemplated by the NGA is, in practice, no substitute. Under the regulatory scheme, appeals to the federal courts of appeal may not proceed until FERC denies requests for rehearing or motions for stays. FERC, meanwhile, has a practice of preventing review until the pipeline is under construction. Even when (or if) appellate courts ultimately review landowners' arguments, the damage has often been done because property has already been taken. The current practice, therefore, substitutes "meaningful" judicial review for ***any*** eventual judicial review. Such a regulatory scheme renders judicial review meaningless. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005) ("[I]f a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action." (emphasis added)); *cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Accordingly, the regulatory system fails to provide due process by denying Petitioners a meaningful venue in which to assert their constitutional claims in a timely manner.

Such concerns are by no means hypothetical or limited to this case. *See Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate & Maintain a 42-Inch Gas Transmission Line Across Prop. in the Ctys. of Nicholas, Greenbrier, Monroe & Summers*, No. 2:17-cv-04214, 2018 WL 1004745

(S.D. W. Va. Feb. 21, 2018) (granting condemnation, and refusing to stay condemnation proceedings or consider Fifth Amendment condemnation questions associated with FERC's Certificate order).

Amicus acknowledges that the administrative state has an important role to play, but it cannot do so by effectively cutting off individuals' Constitutional rights. *Amicus* therefore respectfully requests that the Court review how FERC's regulatory scheme operates in practice to ensure it does not continue to eviscerate our citizens' Fifth Amendment rights.

CONCLUSION

For the reasons set forth above, *Amicus* respectfully asks this Court to grant Petitioners' request for a writ of certiorari.

Respectfully submitted,

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