No. _____

In the
Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC,
Petitioner,

v.

STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; NEW JERSEY STATE AGRICULTURE DEVELOPMENT COMMITTEE; DELAWARE & RARITAN CANAL COMMISSION; NEW JERSEY WATER SUPPLY AUTHORITY; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; NEW JERSEY MOTOR VEHICLE COMMISSION,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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February 18, 2020

QUESTION PRESENTED

The Natural Gas Act authorizes a private gas company to exercise the federal government's power of eminent domain to secure necessary rights-of-way for the construction of an interstate pipeline if FERC grants the company a certificate of public convenience and necessity for the project. 15 U.S.C. §717f(h). This Court has long recognized that the federal eminent domain power may be exercised against state-owned property. *See, e.g.*, *Kohl v. United States*, 91 U.S. 367 (1875). Consistent with that rule, for the better part of a century, certificate holders have invoked §717f(h) to secure rights-of-way across private- and state-owned property alike. Yet the decision below, issued without the benefit of the federal government's views, deemed this long-settled understanding mistaken and held that the federal eminent domain power in §717f(h) cannot be exercised by certificate holders as to property in which a state has an interest. In reaching that conclusion, the Third Circuit conceded that its decision "may disrupt how the natural gas industry, which has used the NGA to construct interstate pipelines over State-owned land for the past eighty years, operates." App.30. FERC has since confirmed that the Third Circuit's interpretation of §717f(h) is mistaken, but that the court's prediction about the dire consequences is correct.

The question presented is:

Whether the NGA delegates to FERC certificate holders the authority to exercise the federal government's eminent domain power to condemn land in which a state claims an interest.

PARTIES TO THE PROCEEDING

Petitioner is PennEast Pipeline Company, LLC ("PennEast"). It was the plaintiff-appellee below.

Respondents are the State of New Jersey; the New Jersey Department of Environmental Protection; the New Jersey Agriculture Development Committee; the Delaware & Raritan Canal Commission; the New Jersey Water Supply Authority; the New Jersey Department of Transportation; the New Jersey Department of the Treasury; and the New Jersey Motor Vehicle Commission. Respondents were the defendant-appellants below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states as follows:

PennEast Pipeline Company is a joint venture owned by Red Oak Enterprise Holdings, Inc., an indirect subsidiary of The Southern Company (20% interest); NJR Midstream Company, an indirect subsidiary of New Jersey Resources Corporation (20% interest); SJI Midstream, LLC, a subsidiary of South Jersey Industries, Inc. (20% interest); UGI PennEast, LLC, an indirect subsidiary of UGI Corporation (20% interest); and Spectra Energy Partners, LP, an indirect subsidiary of Enbridge Inc. (20% interest).

Publicly traded companies The Southern Company, New Jersey Resources Corporation, South Jersey Industries, Inc., UGI Corporation, and Enbridge Inc. have a 10% or greater interest in PennEast Pipeline Company.

STATEMENT OF RELATED PROCEEDINGS

1. *In re: PennEast Pipeline Co. LLC v. Verizon New Jersey Inc.*, *et al.*, No. 19-2596 (3d Cir.) (consolidated with Nos. 19-2597, 19-2598, 19-2599, 19-2600, 19-2601). On January 28, 2020, the Third Circuit vacated the district court's June 6, 2019 order condemning New Jersey's property interests in separate parcels in light of the decision challenged in this petition and remanded to the district court to determine whether New Jersey's conduct with regard to those separate parcels constitutes a waiver, estoppel, or other relinquishment of its sovereign immunity defense.

2. *Delaware Riverkeeper Network, et al. v. FERC*, No. 18-1128 (D.C. Cir.) (consolidated with Nos. 18-1144, 18-1220, 18-1225, 18-1226, 18-1233, 18-1256, and 18-1274). The petitioners in that case, including New Jersey, seek review of the FERC order granting PennEast a certificate of public convenience and necessity. On October 1, 2019, the D.C. Circuit held the consolidated cases in abeyance pending disposition of this case.

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The Natural Gas Act delegates to a gas company that obtains the requisite approvals to construct an interstate pipeline the power to secure the "necessary right[s]-of-way" to construct, operate, and maintain the pipeline "by the exercise of the right of eminent domain." 15 U.S.C. §717f(h). Since its inception, that provision has been used to secure rights-of-way over all manner of property, including property owned by a state. That practice is unremarkable. It was settled law when §717f(h) was enacted that states have no sovereign immunity from the federal eminent domain power. Accordingly, when Congress delegates that power, it delegates its power to exercise it against private- and state-owned property alike. Indeed, Congress has made that crystal clear by occasionally carving out some or all state-owned land when delegating the federal eminent domain power—something it conspicuously did not do in the NGA, which was specifically designed to overcome state efforts to hamstring pipeline development.

Notwithstanding that long-settled understanding and practice, the Third Circuit, without soliciting the views of FERC or the United States, held that private parties may not exercise the federal eminent domain power delegated by §717f(h) to secure rights-of-way over property owned by a state—or even over property in which a state merely holds a recreational or conservation easement. While the court acknowledged that §717f(h) delegates the federal domain eminent domain power, it concluded that §717f(h) cannot be read to "delegate" the federal government's "exemption" from state sovereign

immunity under the Eleventh Amendment, and hence leaves private parties with an eminent domain power that cannot be exercised as to state property.

The court forthrightly acknowledged that its construction of §717f(h) "may disrupt how the natural gas industry" has operated "for the past eighty years." App.30. FERC has since confirmed as much, issuing an order explaining that giving states an effective veto over the construction of interstate pipelines will resurrect the very same problems that §717f(h) was enacted to remedy. As FERC's order likewise explains, the decision below is not just profoundly disruptive, but also profoundly wrong, as settled principles of statutory construction readily confirm that §717f(h) contains no exception for property owned by a state. The Third Circuit's concern that this raises some sort of constitutional problem was misplaced, as the eminent domain authority certificate holders exercise under §717f(h) is the federal government's eminent domain power, as to which the Eleventh Amendment is a non sequitur. All manner of governments have long delegated eminent domain power, and nothing prevents the federal government from delegating that authority to certificate holders that have satisfied FERC review of their proposals to construct interstate pipelines.

In short, the decision below gets an exceptionally important question exceptionally wrong, as the federal agency charged with enforcing the NGA has confirmed. The Court should grant certiorari and restore the tools Congress provided to ensure the orderly development of critical interstate natural gas infrastructure.

OPINIONS BELOW

The Third Circuit's opinion is reported at 938 F.3d 96 and reproduced at App.1-31. The district court's opinion is unreported but available at 2018 WL 6584893 and reproduced at App.34-100.

JURISDICTION

The Third Circuit issued its decision on September 10, 2019, and denied a timely petition for rehearing en banc. App.32-33. Justice Alito extended the time to file a petition for writ of certiorari until March 4, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The relevant provisions of the NGA, 15 U.S.C. §§717-17z, are reproduced at App.103-66.

15 U.S.C. §717f(h) provides in relevant part:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which

such property may be located, or in the State courts.

STATEMENT OF THE CASE

A. Statutory Background

1. The right of eminent domain "appertains to every independent government" and has long been used by the United States to acquire land for public use. *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). While the federal government is a government of limited and enumerated powers, the proper execution of some of those limited powers depends on eminent domain authority. *See Berman v. Parker*, 348 U.S. 26, 33 (1954) ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear."). That reality is implicit in the Takings Clause, and this Court recognized the federal government's eminent domain power as early as *Kohl v. United States*, 91 U.S. 367 (1875). In doing so, the Court concluded that a state's interests must give way to the federal eminent domain power, for a voluntary condemnation power is an oxymoron, and if the federal government has such power, "it must be complete in itself." *Id.* at 374. Accordingly, "[t]he consent of a State can never be a condition precedent" to the "enjoyment" of the condemnation power; "[n]or can any State prescribe the manner in which [that power] must be exercised." *Id.*

Since *Kohl*, the federal government's practice of invoking its eminent domain power to take property for public use has consistently been upheld, including when that property is owned by a state. *See Chappell v. United States*, 160 U.S. 499, 510 (1896); *Okla. ex rel.*

Phillips v. Atkinson Co., 313 U.S. 508 (1941). The federal government has exercised the eminent domain power to accomplish everything from securing adequate water supply to establishing federal parks like Rock Creek National Park.

For more than 200 years, Congress has followed the lead of governments at every level by delegating the federal eminent domain power to private parties through statutes and agency action, with this Court's approval. *See, e.g.*, *Luxton v. N. River Bridge Co.*, 153 U.S. 525 (1894); *Curtiss v. Georgetown & Alexandria Tpk. Co.*, 10 U.S. (6 Cranch) 233 (1810). When private parties exercise that power, they are exercising a delegated power, and accordingly may take property only to the extent the federal government may do so itself—*i.e.*, for a public purpose, and in exchange for just compensation. *See, e.g.*, *Luxton*, 153 U.S. at 532-34. But within those constraints, Congress has long understood that it may authorize a private party to take any property the federal government itself could take. Sometimes Congress identifies the property that may be taken; other times it reserves that right to a federal agency; still other times it sets forth in the delegating statute constraints to govern the private party's selection of appropriate land to take. And when Congress wants to make clear that certain property may *not* be taken, it says so expressly. For example, when Congress delegated to Amtrak the power to condemn property "necessary for intercity rail passenger transportation," it expressly carved out "property of … a State [or] a political subdivision of a State, or a governmental authority." 49 U.S.C. §24311; *see also* 16 U.S.C. §824p (delegating eminent domain power for electric transmission facilities, but

only for facilities located "on property other than property owned by the United States or a State").

2. In the mid-1930s, Congress enacted the Federal Power Act ("FPA") and the NGA. The FPA authorized the Federal Power Commission to regulate interstate transmission and sales of electric energy and the licensing of hydropower facilities. *See generally* 16 U.S.C. §§791-828. The NGA, for its part, established a framework for regulating the interstate transportation and sale of natural gas, *see* 15 U.S.C. §717(a), and gave the Federal Power Commission (now FERC) exclusive jurisdiction over the transportation and sale of natural gas for resale in interstate commerce. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988). Section 814 of the FPA, as originally enacted, granted hydropower licensees who were unable to acquire necessary rights-of-way to transmit electricity by contract "the right of eminent domain." The NGA, by contrast, gave FERC more limited powers with respect to the construction of new pipelines, and did not in its original form give FERC a mechanism to authorize natural gas companies to acquire land to develop new infrastructure under FERC's supervision.

That role was instead largely left to the states, which inevitably led to the kinds of complications and inefficiencies that arise when instrumentalities of interstate commerce are not subject to uniform regulation. *See Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644, 646 (5th Cir. 1950). To remedy those problems, in 1942, Congress amended the NGA to give FERC more comprehensive regulatory authority over the construction of new interstate

pipelines as well as the use of existing ones. *See* Pub. L. No. 49-444, 56 Stat. 84 (1942). Since 1942, a natural gas company that wants to construct a new interstate pipeline must obtain FERC's approval. FERC must hold a hearing before granting any such approval, and may issue the requisite certificate of public convenience and necessity for the construction of a new pipeline only if, among other things, it determines that the new pipeline "is or will be required by the present or future public convenience and necessity." *Id.*

Notwithstanding this new federal approval process, some states continued to frustrate the development of interstate pipelines in the wake of the 1942 amendments, by imposing strict protectionist constraints on a natural gas company's ability to exercise eminent domain to secure the necessary rights-of-way to build and operate a pipeline. For example, the Arkansas constitution prohibited a foreign corporation from condemning property; Wisconsin granted the eminent domain power only to Wisconsin-based companies; and Nebraska permitted companies to exercise eminent domain only if they distributed gas within the state. *See* S. Rep. No. 80-429, 2-3 (1947). Other states provided that "property may be taken for public use," but narrowly defined "public use" as "the use of the public of the particular State conferring the right of eminent domain." *Id*. at 2. The various state restrictions posed intolerable obstacles to the development of a classic channel of *interstate* commerce.

Congress responded to these state restrictions by amending the NGA again in 1947, this time to grant

certificate holders the power as a matter of federal law to acquire the "necessary right[s]-of-way" to construct, operate, and maintain interstate pipelines "by the exercise of the right of eminent domain." *See* 15 U.S.C. §717f(h); Pub. L. No. 80-245, 61 Stat. 459 (1947). As one of its sponsors explained, this delegation of the federal government's eminent domain power was a "necessary tool[] to make effective the orders and certificates" of FERC. *Amendments to the Natural Gas Act: Hearing on S.1028 Before the Sen. Comm. on Interstate and Foreign Commerce*, 80th Cong. 12 (1947) (statement of Sen. Moore).

To step into the shoes of the federal government and exercise its eminent domain power, a natural gas company must have a certificate from FERC. 15 U.S.C. §717f(h). The NGA directs that a certificate may issue only if the proposed pipeline "is or will be required by the present or future public convenience and necessity"; if the applicant fails to establish the necessity of the project, its "application shall be denied." *Id.*; §717f(e). FERC approves not just the necessity of the proposed pipeline *vel non*, but also evaluates the proposed route for the pipeline through a process in which affected property owners are free to appear and object. *See, e.g.*, App.35-43. And to bring a condemnation proceeding, the certificate holder must show that it "cannot acquire by contract" or was "unable to agree with the owner" on the compensation to be paid for the property or right-of-way it seeks to condemn. 15 U.S.C. §717f(h). If (and only if) all those prerequisites are satisfied, the certificate holder may "acquire" the necessary property or rights-of-way "by the exercise of the right of eminent domain in the district court of the United States for the district in

which such property may be located, or in the State courts." *Id.*[1] The provision delegating the federal government's eminent domain power to certificate holders in the NGA was modeled after, and tracked nearly verbatim, the delegation in §814 of the FPA. *See* 16 U.S.C. §814; S. Rep. No. 80-429 (1947).

Over the ensuing 70 years, the NGA's delegation of the federal eminent domain power effectively put an end to state efforts to frustrate interstate infrastructure development, and provided "a necessary protection of the free flow of commerce." S. Rep. No. 80-429, at 3. Often, the very existence of that power facilitated negotiations and obviated the need to invoke it. And when efforts to negotiate proved futile, the authority has been critical to ensuring that needed natural gas reaches consumers (often consumers in a different state). Natural gas companies have long deployed that power, moreover, with respect both to private property and to property in which a state (including New Jersey) claimed an interest. *See, e.g.*, *Transcon. Gas Pipe Line Co. v. 0.607 Acres of Land*, No. 3:15-cv-00428 (D.N.J. Feb. 23, 2015). Those efforts rarely drew any objection from states, and Congress has never made any effort to constrain the use of the §717f(h) eminent domain power against state-owned property.

Congress' silence on that score in the NGA contrasts with its actions concerning the FPA. While hydropower licensees continue to enjoy the federal eminent domain power under that statutory regime,

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[1] To proceed in federal rather than state court, the certificate holder also must establish that the value of the property at issue exceeds $3,000. *Id.*

in 1992, Congress amended the FPA—but not the NGA—to carve out a subset of state-owned properties. In particular, the FPA provides that "no licensee may use the right of eminent domain under this section to acquire any lands or other property that, prior to October 24, 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law." 16 U.S.C. §814. For parks, recreation areas, and wildlife refuges established after that date, a licensee may still exercise the eminent domain power, but only after a "public hearing held in the affected community," and only after FERC finds that "the license will not interfere or be inconsistent with the purposes for which such lands or property are owned." *Id.*

Notably, the legislative history explained that this amendment was necessary to grant these lands this special status because "[u]nder current law, when FERC issues a hydropower license, the licensee is granted a Federal power of eminent domain to condemn all non-Federal lands required for the project. This power *includes the power to condemn lands owned by States*." H.R. Rep. No. 102-474, 99-100 (1992) (emphasis added). Even with that recognition, moreover, Congress withdrew the eminent domain power under the FPA only as to certain specified state-owned lands, not as to all lands in which a state holds any interest at all. And Congress limited the ability of states to block development by acquiring new property interests along the route of a proposed development. By contrast, Congress did not take even those modest steps in the NGA, which instead continues to

authorize a certificate holder to exercise the federal eminent domain power to obtain the necessary property rights to cross any lands that FERC authorizes a new interstate pipeline to cross.

B. Factual Background and Procedural History

1. In 2015, PennEast applied for a certificate to construct and operate a 116-mile natural gas pipeline that will transport gas from Pennsylvania to New Jersey. App.3. The pipeline is expected to provide approximately one billion cubic feet per day of natural gas transportation capacity from northern Pennsylvania to markets in New Jersey, eastern and southern Pennsylvania, and surrounding states. 3CA-JA373. The certificate-approval process was extensive, involving thousands of public comments and several public meetings. Following the initial public comment period, FERC issued a draft Environmental Impact Statement (EIS) assessing the environmental impacts of the pipeline project, including the impacts on the specific properties the pipeline route would cross. FERC provided public notice of that statement and solicited public comments.

New Jersey was an active participant in that process, filing protests, comments, and other correspondence with FERC during the public comment period.[2] Many of the properties the pipeline

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[2] *See, e.g.*, Letter from J. Gray, Deputy Chief of Staff, N.J. Dept. of Envtl. Prot., to K. Bose, Sec'y, FERC (Dec. 20, 2016) (on file FERC Docket No. CP15-558); Letter from M. Catania, Chair, N.J. Nat. Lands Tr., to K. Bose, Sec'y, FERC (Feb. 9, 2018) (on file FERC Docket No. CP15-558); Comments of the N.J. Div. of Rate

would cross implicated New Jersey's interests and were the subject of its comments and letters on the proposed pipeline project. PennEast endeavored to work cooperatively with New Jersey and others whose property interests the proposed pipeline would implicate. In response to environmental and engineering concerns raised by New Jersey, members of the public, property owners, and others, PennEast proposed 33 route modifications, as well as various other changes to the project. FERC Order Issuing Certificates, 162 FERC ¶61,053, ¶96. And PennEast ultimately incorporated a total of 70 route modifications based on "comments and feedback from landowners, agencies and municipalities." *Id.* ¶211.

As part of its review process, FERC evaluated the potential environmental impact on the properties along PennEast's proposed route. That review included the properties in which New Jersey asserted an interest. In its final EIS published in the Federal Register, FERC concluded that nearly all of the parcels in which New Jersey asserted an interest that were "subject to types of conservation or open space protective easements" would "generally retain their conservation or open space characteristics" if the pipeline were constructed. App.4 n.1.

Counsel, FERC Docket No. CP15-558 (Sept. 12, 2016); Letter from K. Marcopul, Dep. State Hist. Pres. Officer, N.J. Hist. Pres. Off., to K. Bose, Sec'y, FERC (April 12, 2019) (on file FERC Docket No. CP15-558); Letter from M. Nordstrom, Exec. Dir., N.J. Highlands Water Prot. & Plan. Council, to K. Bose, Sec'y, FERC (Aug. 23, 2016) (on file FERC Docket No. CP15-558); Letter from S. Payne, Exec. Dir., N.J. Agric. Dev. Comm., to K. Bose, Sec'y, FERC (May 31, 2017) (on file FERC Docket No. CP15-558).

In 2018, after careful consideration of PennEast's application and supplements, the EIS, field investigations, and an alternatives analysis (among other information), FERC ultimately determined that "the public convenience and necessity require[d] approval of PennEast's proposal" and granted PennEast the certificate. App.4; 3CA-JA247. The certificate ensures ongoing federal involvement and oversight of both the construction and the operation of the pipeline. 3CA-JA295-309.

2. PennEast successfully negotiated with most property owners to obtain the necessary rights-of-way to properties the pipeline would cross. New Jersey, however, refused to grant PennEast the requisite rights as to the properties over which the state asserted an interest. Eventually, PennEast was forced to bring a series of condemnation actions as to those properties in federal court. This case involves 42 of the 49 properties in which the state claims an interest. As to these 42 parcels, the state claims a possessory interest in only two; the remaining 40 involve only non-possessory state interests, mostly in the form of easements "requiring that the land be preserved for recreational, conservation, or agricultural use." App.5.

While New Jersey had acquiesced in NGA and FPA condemnation proceedings in the past, *see* App.66 n.30 and *Halecrest Co.*, 60 FERC ¶61,121, 1992 WL 12567263 (1992) (granting a license, without objection from New Jersey as to the exercise of eminent domain, to construct and operate a hydroelectric storage project pursuant to FPA's eminent domain provision), this time it came armed with a new theory: According

to New Jersey, the Eleventh Amendment bars a certificate holder from using §717f(h) to condemn property in which a state holds any type of interest—even a non-possessory one. The district court was "not persuaded." App.66. As it explained, "PennEast has been vested with the federal government's eminent domain powers and stands in the shoes of the sovereign," and it is undisputed that the federal government could exercise that power as to property in which a state has an interest. App.65. Accordingly, the court concluded that the Eleventh Amendment has no role to play. App.66.

3. New Jersey and the various state agencies involved (collectively, respondents) appealed, contending that they have Eleventh Amendment immunity from PennEast's condemnation claims that §717f(h) does not abrogate. App.11. In the alternative, they argued that the NGA should not be interpreted to delegate the power to exercise eminent domain against property in which a state has an interest unless it does so "clearly and unequivocally," which they insisted it does not.

The Third Circuit agreed with respondents and vacated the district court's condemnation orders. According to the Third Circuit, when the federal government condemns state property—as all agree it may—it employs two federal powers, not one: the federal eminent domain power, and the federal government's "exemption" from the Eleventh Amendment. *Id*. The court therefore concluded that it could not read §717f(h) to apply to property in which a state has an interest unless Congress "clearly" delegated *both* the federal eminent domain power *and*

"the federal government's exemption from sovereign immunity." App.11, 27. Because §717f(h) "does [not] reference 'delegating' the federal government's ability to sue the States," the court found its newly minted rule unsatisfied. App.27.

The court acknowledged that its holding broke new ground and "may disrupt how the natural gas industry, which has used the NGA to construct interstate pipelines over State-owned land for the past eighty years, operates." App.30-31. And while it suggested a "work-around" under which the federal government could bring the condemnation proceedings itself, and "then transfer the property to the natural gas company," the court acknowledged that it had not solicited the federal government's views about the feasibility or legality of this "work-around," and conceded that, even if feasible, "such a change would alter how the natural gas industry has operated for some time." *Id*. The court ultimately dismissed such concerns as "an issue for Congress, not a reason to disregard sovereign immunity." App.31.

C. FERC's Declaratory Order

PennEast sought rehearing en banc and implored the Third Circuit to at least solicit the views of FERC before effectively invalidating an Act of Congress and fundamentally disrupting the NGA. PennEast also solicited those views itself, filing a petition with FERC seeking a declaratory order on the scope of the eminent domain power that §717f(h) delegates. But the Third Circuit denied PennEast's rehearing petition without either soliciting or awaiting FERC's views.

In the meantime, FERC proceeded with notice and comment on the declaratory order petition, and after obtaining comments and holding a hearing, FERC ultimately issued an order explaining that §717f(h) "does not limit a certificate holder's right to exercise eminent domain authority over state-owned land." FERC Declaratory Order, 170 FERC ¶ 61,064, Dkt. No. RP20-41-000, ¶25 (January 30, 2020) ("FERC Order"). FERC further explained that the Third Circuit's contrary conclusion will have "profoundly adverse impacts on the development of the nation's interstate natural gas transportation system, and will significantly undermine how the natural gas transportation industry has operated for decades." *Id.* ¶56. In particular, it will "impair Congress's intent in providing certificate holders with this vital tool because it would allow states to nullify the effect of Commission orders affecting state land … through the simple expedient of declining to participate in an eminent domain proceeding brought to effectuate a Commission certificate." *Id.* ¶58.

FERC also explained that the Third Circuit's "work-around" is in fact not workable at all. Although §717f(h) "requires the Commission's determination as to which land may be condemned for the public convenience and necessity," it "delegates eminent domain authority solely to certificate holders and not to the Commission," so FERC has no power to carry out a condemnation proceeding in a certificate holder's stead. *Id.* ¶¶26, 49, 53. Allowing states "to block natural gas infrastructure projects that cross state lands by refusing to grant easements" thus will inevitably "impair the NGA's superordinate goal of

ensuring the public has access to reliable, affordable supplies of natural gas." *Id.* ¶58.

Commissioner Glick dissented, principally on the ground that FERC should leave interpretation of §717f(h) to the courts. *Id.* ¶1 (Glick, dissenting). Commissioner Glick did not ultimately take a position on whether §717f(h) applies to land in which a state has an interest, but rather opined only that, in his view, "the evidence simply is not clear one way or the other." *Id.* ¶2.

REASONS FOR GRANTING THE PETITION

The decision below effectively invalidates an Act of Congress and will "disrupt how the natural gas industry" has operated "for the past eighty years" to boot. App.30. To the extent there were any doubt about that, FERC laid it to rest in its recent order, which cogently explains both why §717f(h) cannot be read to exempt property in which a state has an interest, and why the Third Circuit's contrary conclusion will have "profoundly adverse impacts on the development of the nation's interstate natural gas transportation system." FERC Order ¶56. Simply put, state veto power and interstate pipelines are incompatible, as Congress recognized more than 70 years ago in arming pipeline certificate holders with the federal eminent domain power. As FERC explained, the decision below is both profoundly wrong and profoundly consequential—a combination that cries out for this Court's review.

Applying ordinary principles of statutory construction, there can be no serious dispute that §717f(h) applies to private property and state property alike. The statutory text admits of no exception for

state property, the statutory purpose is incompatible with such an exception, and for the better part of a century the statute has uniformly been understood to contain none. The contrast with the FPA is telling. In that context, Congress acted to carve out a narrow subset of state property, while leaving the NGA authority undisturbed. Yet the decision below would render the NGA's eminent domain authority useless against all manner of state property interests, even a recently acquired easement.

It is little surprise, then, that the decision below did not rely on ordinary principles of statutory construction. Instead, it invented a new "clear statement" rule that requires Congress not just to clearly delegate the federal eminent domain authority, but to clearly indicate that Congress intended to abrogate the states' Eleventh Amendment immunity in the resulting condemnation proceedings. But that rule requires Congress to clearly abrogate something that does not exist. States sacrificed any immunity from the federal government's eminent domain authority in the plan of the convention. As long as the delegation of that authority is sufficiently clear, there is no state sovereign immunity to abrogate. That is all the more true because the condemnation action is an *in rem* proceeding and provides states with just compensation. Thus, the normal Eleventh Amendment concern that private-party suits will drain state treasuries is wholly inapplicable here.

The Third Circuit's contrary conclusion is not only wrong, but immensely consequential. Left standing, the decision will "allow states to nullify the effect of

Commission orders affecting state land"—even "private land in which the state has an interest"—through "the simple expedient of declining to participate in an eminent domain proceeding brought to effectuate a Commission certificate." FERC Order ¶58. Congress certainly did not intend that result, and the Constitution in no way commands it. The Court should grant certiorari and restore to certificate holders the power to take the steps necessary to construct, maintain, and operate the interstate pipelines that FERC approves.

I. The Decision Below Effectively Invalidates An Act Of Congress, Out Of A Misguided Effort To Avoid Constitutional Concerns That Do Not Exist.

For more than 70 years, §717f(h) of the NGA has been understood by everyone—certificate holders, states, courts, and the federal agency that administers the NGA—to delegate to certificate holders the power to exercise federal eminent domain to obtain any property rights needed to construct a FERC-approved interstate pipeline, whether those property rights belong to a private party or to a state. That is unsurprising, as a straightforward application of settled principles of statutory construction compels that conclusion, and the history behind the provision proves that a state veto and interstate pipelines are not compatible. The Third Circuit reached a contrary conclusion not by applying those settled principles or accounting for Congress' evident intent in adding the eminent domain provision to the NGA, but by inventing a clear statement rule to avoid a constitutional concern that does not exist. In doing so,

the court effectively invalidated an Act of Congress and upset nearly a century of settled industry practice.

A. Statutory Text and Context Make Clear That the NGA Delegates the Federal Government's Eminent Domain Power.

"As in any statutory construction case," the Court "start[s], of course, with the statutory text." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013). Here, it can end there too. Section 717f(h) provides that, "[w]hen any holder of a certificate" to construct an interstate pipeline cannot acquire by contract or negotiation "the necessary right-of-way to construct, operate, and maintain" the pipeline, it "may acquire the same by the exercise of the right of eminent domain in the district court of the United States." 15 U.S.C. §717f(h). By its plain terms, that language admits of no exceptions; it instead applies to *any* property "necessary … to construct, operate, and maintain a pipe line." *Id.* The plain language of the NGA thus makes clear that Congress delegated to certificate holders the power to exercise eminent domain to obtain *any* property rights that cannot be obtained by consent and are needed to construct a pipeline, regardless of whether the property is in private or state hands. That sweeping authority reflects the basic realities that eminent domain power is unnecessary when property owners consent, and that a state veto power is incompatible with interstate pipelines.

The notion that a sweeping grant of federal eminent domain authority extends to all manner of property is underscored by the express inclusion of

limited exceptions in other statutes. For instance, Congress delegated the federal eminent domain power to Amtrak, but it expressly carved out of that authority "property of … a State" or "a political subdivision of a State." 49 U.S.C. §24311. And the FPA's delegation of the eminent domain power was amended to carve out a narrow subset of pre-existing state lands and to require special procedures for the condemnation of "lands or other property that are owned by a State or political subdivision and are part of or included within a public park, recreation area or wildlife refuge." 16 U.S.C. §814. More recently, in amending the FPA in 2005 to give FERC siting and permitting authority over electric transmission facilities in National Interest Electricity Corridors, Congress provided permit holders the right of eminent domain, but only for facilities located "on property other than property owned by the United States or a State." 16 U.S.C. §824p. As these provisions confirm, Congress assumes that a broad grant of federal eminent domain authority reaches all manner of needed property, and when Congress wants to exempt state-owned land, "it has done so clearly and expressly." *FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 302 (2003).

The state-land proviso in §814 of the FPA is particularly instructive because it is a more recent addition and §717f(h) of the NGA was modeled on §814 of the FPA. *See* S. Rep. No. 80-429. Section 814 did not contain any exception for state land when §717f(h) was enacted. That proviso was only added in 1992—and was added precisely because, "[u]nder current law" at the time (*i.e.*, the version of §814 after which §717f(h) was modeled), the eminent domain power

delegated by §814 "includes the power to condemn lands owned by the States." H.R. Rep. 102-474, 99-100. Yet while Congress carved out exceptions for a subset of state-owned land in the FPA, it made no comparable amendment to the NGA. Moreover, even as to §814 of the FPA, Congress did not exempt *all* land in which a state has an interest out of a newfound concern for state sovereignty. Its concern was focused on park lands, as it exempted only lands that are (1) "owned by a State or political subdivision," and (2) "part of or included within a public park, recreation area or wildlife refuge." 16 U.S.C. §814. That language setting out a carefully circumscribed subset of state property interests would be nonsensical surplusage if the delegation of federal eminent domain power that preceded it did not reach state property. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) ("the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme").

Particularly when read in conjunction with the revisions to the FPA provision on which it was modeled, there can be no serious dispute that, as a textual matter, §717f(h) admits of no exception for state-owned lands (let alone an exception for any state interest in property, no matter how minor, non-possessory, or recently acquired). But to the extent the text left any doubt on that score, the context in which it was enacted eliminates it. When Congress added §717f(h) to the NGA in 1947, it was already settled law that "[t]he fact that land is owned by a state is no barrier to its condemnation by the United States." *Atkinson*, 313 U.S. at 534. That was not lost on Congress; an opponent of the bill specifically urged

its rejection on the ground that it would "permit the taking of State-owned lands … by a private company." *Amendments to the Natural Gas Act: Hearing on S.1028 Before the Sen. Comm. on Interstate and Foreign Commerce*, 80th Cong. 12 (1947). Yet Congress forged ahead without seeing fit to adopt any exception for state property.

Congress forged ahead because a principal reason it was adding §717f(h) to the NGA was to counteract state efforts to frustrate the exercise of eminent domain by interstate pipeline developers. *See supra* pp.7-8; S. Rep. No. 80-429, 2-3. A decade of experience with an NGA that lacked a federal eminent domain provision made clear to Congress that reliance on consensual state actions was incompatible with the development of interstate pipelines. Having gone to the trouble of adding an eminent domain provision to overcome state obstacles to interstate pipelines, Congress would not have exempted states or otherwise given them a de facto veto power over interstate pipeline routes.

It is little surprise, then, that FERC, the agency tasked with implementing the NGA, agrees that §717f(h) reaches property owned by a state. As FERC explained, that conclusion follows directly from the text, which "contains no limiting language concerning state land." FERC Order ¶25. Moreover, "Congress's decision to amend an analogous statute to expressly carve out [some] state lands, but not to similarly amend NGA section 7(h)," makes crystal clear that "the eminent domain authority exercised by certificate holders" under the NGA and the FPA both pre- and post-amendment "does, in fact, apply to state lands."

Id. FERC further explained that the text is consistent with the legislative history, which describes Congress' "specific intent to prevent states from conditioning or blocking the use of eminent domain by certificate holders," and its own orders, which have long rejected arguments to limit the exercise of eminent domain over state-owned property. *Id.* at ¶¶25-26 (citing *Tenneco Atl. Pipeline Co.*, 1 FERC ¶63,025, 65,204 (1977); *E. Tenn. Nat. Gas Co.*, 102 FERC ¶61,225, at ¶68 (2003)).

History and practice likewise confirm what the plain text and context make clear. For 70 years, pipeline developers have been employing §717f(h) to obtain *whatever* property rights FERC has determined they need to construct an interstate pipeline, without regard to whether those rights must be condemned from a private party or a state. For 70 years, FERC has expressly condoned this practice. For 70 years, states (including New Jersey, *see* App.66 n.30) have raised any concerns with FERC before a certificate issues, and then acceded to any resulting condemnation actions if negotiations stalled. *See, e.g.*, *Transcon. Gas Pipe Line Co. v. 0.607 Acres of Land*, No. 3:15-cv-00428 (D.N.J. Feb. 23, 2015) (condemnation action over state land in New Jersey proceeded without objection); *Transcon. Gas Pipe Line Co.*, *v. 2.163 Acres of Land*, No. 3:12-cv-07511 (D.N.J. Jan. 10, 2013) (same); *Halecrest Co.*, 60 FERC ¶61,121 (same). And for 70 years, the courts did not even hint at the notion that any of this poses a constitutional concern.

B. The Decision Below Is the Product of a Misguided Effort to Avoid Constitutional Concerns That Do Not Exist.

As the foregoing makes clear, as a matter of statutory interpretation, the question presented is not a close call. The text of §717f(h) admits of no exception for any state-owned property; its purposes are incompatible with a state veto power; it has never been understood to contain a state-property exception; and unlike its FPA cousin, it has never been amended to add one. The Third Circuit reached a contrary conclusion only by eschewing settled tools of construction in favor of a newly minted double "clear statement" rule. According to the Third Circuit, a delegation of the federal eminent domain power cannot be read to authorize the delegee to condemn state property unless Congress makes it "unmistakably clear" that it has delegated two things: (1) the federal eminent domain power, and (2) "the federal government's exemption from Eleventh Amendment immunity." App.30. That approach is at best double counting; at worst it fundamentally misunderstands eminent domain and sovereign immunity. As to the federal government's eminent domain authority, states sacrificed any immunity they had in the plan of the convention. Thus, asking for a clear abrogation of sovereign immunity even when the grant of federal eminent domain power is clear is to ask Congress to clearly abrogate something that does not exist.

Eminent domain is an inherently governmental power that "appertains to every independent

government" as an "attribute of sovereignty." *Boom Co.*, 98 U.S. at 406 (1878). Because the power is inherently and exclusively governmental in nature, it may be exercised *only* by the government, or by a private party acting on its behalf. Such delegations have long been common at every level of government, particularly when it comes to railroads and utilities. *See, e.g.*, *Luxton*, 153 U.S. 525; *see also* A. Bell, *Private Takings*, 76 U. Chi. L. Rev. 517, 545 (2009) ("In the nineteenth century, every state in the union delegated the power of eminent domain to turnpike, bridge, canal, and railroad companies. These delegations essentially put the private actor—the company beneficiary of the delegation—in the place of the government with regard to the law of eminent domain."). But even when the power is delegated, it remains an exercise of a distinctly governmental power, which is why the delegee must provide just compensation and is a government actor for constitutional purposes. *See Luxton*, 153 U.S. 525; *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974); *Private Takings* at 545. At least in our common-law traditions, there is no such thing as a purely "private" condemnation action. If one private party wants property that concededly belongs to another, he must convince the latter to part with it; he cannot get a court to compel its surrender, no matter how just or generous the compensation he offers in exchange.

That fundamentally differentiates an exercise of the federal domain power from contexts in which this Court has applied Eleventh Amendment abrogation principles, nearly all of which have involved private suits for money damages. *See, e.g.*, *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Bd. of Tr.*

of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706, 730-54 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997). When Congress empowers private parties to bring damages actions against a state, it is empowering them to bring a *private* action, to enforce *private* rights, for their own *private* benefit. Such a suit is not distinctly governmental. Many of those statutes authorized a private cause of action against any employer. A condemnation action, by contrast, is not an action that a private party could bring against *anyone* on its own behalf. A private party may exercise that power only via a delegation, and only for a public purpose, and must provide just compensation in exchange. *See Luxton*, 153 U.S. at 529-30.

The governmental nature of the eminent domain power is critical because states do not have sovereign immunity from the federal eminent domain power. When the federal government needs land for a public purpose, it may take it, with or without the consent of the state. *See Chappell*, 160 U.S. at 510. And it may do so even if that land belongs to the state itself. *See, e.g.*, *Atkinson*, 313 U.S. at 534; *Wayne County v. United States*, 53 Ct. Cl. 417, *aff'd* 252 U.S. 574 (1920). New Jersey conceded as much below, and the Third Circuit agreed. App.65. While the federal government's ability to force states to yield state-owned lands may intrude on state sovereign interests, any immunity from such actions was yielded in "the plan of the [c]onvention" as reflected in the Supremacy Clause. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 377 (2006); U.S. Const. art. VI, cl.2.

Because the eminent domain authority is both inherently governmental and inherently federal, the search for a separate "delegation" of the federal government's "exemption from Eleventh Amendment immunity," App.27, is mistaken. When the federal government exercises its own eminent domain authority via a condemnation action it does not need to invoke any "exemption from Eleventh Amendment immunity." The states yielded any immunity they had from such actions in the plan of the convention. The federal government may bring the action because states have no immunity from *the federal eminent domain power*. Thus, when Congress delegates the federal eminent domain power to a third party, asking for a separate abrogation of state sovereign immunity from the federal eminent domain power is asking for an abrogation of something that does not exist. The delegee is a federal actor for both Takings Clause and sovereign immunity purposes, and thus is not subject to a state sovereign immunity objection.

Indeed, the delegated power is not just inherently federal, but inherently compulsory. A purely consensual power of eminent domain and strictly voluntary condemnation actions are oxymoronic. What differentiates the eminent domain power from normal arms-length negotiations is the ability to invoke governmental power to condemn the land at issue. U.S. Const. amend. V. It thus makes no sense to ask Congress to delegate separately both its eminent domain authority against all property owners (including states) and its ability to bring condemnation actions against all property owners (including states). They are one and the same. Indeed, if there is any difference between them, it is

that the federal government's ability to take state-owned property through eminent domain is the real intrusion on state sovereignty (albeit one plainly inherent in the plan of the convention). The accompanying condemnation action is not some distinct affront to state sovereignty, but a means of providing just compensation to the state. Thus, asking for a separate authorization for the condemnation action gets matters exactly backward.

The Third Circuit's concern with the prospect of condemnation proceedings being filed by someone other than "an accountable federal official," App.30, is misplaced for largely the same reasons. The right way for Congress to ensure appropriate oversight over delegations of the eminent domain power is by exercising authority over *what property may be taken*, not by hamstringing the ministerial power of effectuating the resulting land transfer. And that is precisely the dichotomy that the NGA sensibly draws. As FERC has explained, *FERC* is the one who makes the "determination as to which land may be condemned for the public convenience and necessity." FERC Order ¶53. The only thing Congress delegated to the private companies is the power to execute FERC's determination by negotiating for the transfer of the requisite property rights or bringing a condemnation proceeding when negotiation fails. The Third Circuit's concern thus not only is misplaced, but produced a bizarre regime under which certificate holders cannot do the one thing that Congress most wanted them to be able to do: relieve the government of the burden of effectuating FERC's decision that land is appropriate for condemnation if negotiation fails.

The cases on which the Third Circuit relied neither compel nor even support the result it reached. The Eleventh Amendment cases the court invoked do not involve the federal eminent domain power, and thus provide no support for the notion that states may assert sovereign immunity when a private party is exercising a delegated federal governmental power. As for *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775 (1991), that case involved a claim that the government had delegated its bare power to sue states, not a delegation of a distinct governmental power as to which states have no sovereign immunity. Whatever concerns may arise if Congress were to simply empower a private party to bring any and all suits against states, those concerns have nothing to do with whether Congress may empower a narrow band of private parties to condemn state land to effectuate a federal public interest.

Moreover, as noted, condemnation actions do not even implicate the Eleventh Amendment, as condemnation actions are *in rem* proceedings, *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), designed to provide just compensation. This Court has expressly recognized that an *in rem* suit is "not a suit against the State for purposes of the Eleventh Amendment." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 443, 450-51 (2004). A judgment in an *in rem* case "is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner." *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977). Accordingly, *in rem* actions "do[] not implicate state sovereignty to nearly the same degree as other kinds of [lawsuits]." *Katz*, 546 U.S. at 378. The Third Circuit dismissed those cases

as involving "specialized areas of bankruptcy and admiralty." App.24. But few areas are more specialized or unlike *in personam* damages actions than a condemnation action. Indeed, to the extent that a principal concern of the Eleventh Amendment is that private suits would drain the state treasury, extending Eleventh Amendment immunity to condemnation proceedings designed to ensure just compensation gets matters backward and underscores that the real intrusion into state sovereignty here is the federal government's ability to take state property for public use. Asking for a separate abrogation for the condemnation actions that ensure just compensation for the taking is deeply mistaken.

In all events, even assuming there may be some sovereign immunity limits on the types of *private in rem* actions a private party may bring, *see Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), an exercise of the delegated federal eminent domain power is a different matter. That likely explains why, for the first 70 years of its existence, §717f(h)'s application to property owned by a state went virtually uncontested—and was accepted even by New Jersey itself. The Third Circuit's contrary conclusion thus effectively invalidates a core application of §717f(h) for reasons that find no grounding in the Constitution.

II. The Decision Below Threatens To Disrupt The Development Of Energy Infrastructure All Throughout The Nation.

There can be no serious question that this case is of immense national importance. The Third Circuit not only effectively invalidated an Act of Congress, but admitted that its decision "may disrupt how the

natural gas industry" has operated "for the past eighty years." App.30. FERC has since confirmed that prediction, opining that the decision will "have profoundly adverse impacts" on infrastructure development and will "significantly undermine how the natural gas transportation industry has operated for decades." FERC Order ¶56.

Congress long ago recognized that interstate pipelines and state veto powers are incompatible. Yet as FERC explained, left standing, the Third Circuit's decision will "allow states to nullify the effect of Commission orders affecting state land—and, apparently, private land in which the state has an interest—through the simple expedient of declining to participate in an eminent domain proceeding brought to effectuate a Commission certificate." FERC Order ¶58. That is no small matter, as it is commonplace for pipelines to cross property in which a state holds some sort of interest.[3] States often have fee interests in the beds of navigable rivers that form state boundaries. That is true for every state east of the Mississippi River. If those state boundaries are converted into barriers to pipeline development, the federal interest in ensuring the interstate transport of natural gas could be critically frustrated, particularly when a state blocks pipelines designed to service consumers in other states. And fee interests in navigable rivers are just the tip of the iceberg. New Jersey is a case in point. New Jersey claims a property interest in more

[3] *See, e.g.*, Plaintiff's Reply in Support of its Motion for an Order of Condemnation and for Preliminary Injunction 5, *Columbia Gas Transmission, LLC v. 0.12 Acres of Land*, No. 1:19-cv-01444-GLR (D.Md. July 8, 2019) (compiling examples).

than 1,300 square miles—more than 15% of all the land in the state—including through recently conveyed non-possessory easements. *See* FERC Order ¶12. Those widespread interests vindicate the wisdom of Congress' approach in the FPA of exempting only the states' pre-existing ownership of park lands from the federal eminent domain authority. The decision below, by contrast, grants an effective state immunity for a wide variety of non-possessory interests.

The decision's disruptive effects on the natural gas industry are reason enough to grant review. After all, natural gas accounts for almost a quarter of the country's total energy consumption, and the "most reliable and safest way" to "transport [] huge volumes of hazardous liquids and gas" is through pipelines. "Pipeline Basics," Pipeline & Hazardous Materials Safety Administration, U.S. Department of Transportation, available at https://bit.ly/36Ztu7L. The 2.6 million miles of pipelines that crisscross the country provide volumes of energy "well beyond the capacity of other forms of transportation." *Id*., "General Pipeline FAQs," available at https://bit.ly/36Yehnu.

The baleful impacts of the decision below go well beyond the pipeline. The pipeline projects that the decision will stymie are by definition projects where FERC has determined there is a need for additional energy resources. The cost of giving states a veto power over interstate pipelines will be measured in thousands of lost jobs, millions of forgone tax revenues, and tens of millions in increased consumer costs. This pipeline alone would provide one billion cubic feet per day of natural gas transportation

capacity—not to mention saving the region more than $1 billion and creating 12,000 new jobs. *See* "Economic Impact," PennEast Pipeline, available at https://bit.ly/2Uuw1Ee. And, of course, the decision threatens the precise kind of economic balkanization the Constitution was designed to prevent. Individual states have different priorities and will derive different benefits from pipelines depending on whether they are resource-rich, energy-challenged, or a pass-through state. Interstate pipelines are classic channels of interstate commerce. They are the last place states should enjoy a veto power.

The Third Circuit's only answer to all of this disruption was to suggest the possibility of a "work-around" whereby FERC would bring the condemnation action itself, and then somehow transfer the property or rights-of-way to the certificate holder. App.31. But as FERC explained, that "work-around" is merely theoretical, as Congress has not given the Commission the power to bring eminent domain proceedings, let alone given it the power to "pay just compensation" or to "transfer[] the property from the Commission to the pipeline" once it is condemned. FERC Order ¶¶52-53. Instead, under the system Congress actually designed, FERC is tasked with determining whether an exercise of eminent domain would be appropriate, while the certificate holder is tasked with implementing that determination and providing just compensation.

That is no accident; that structure allows FERC to focus on the issues that necessitate its oversight and expertise—*i.e.*, determining whether a pipeline is needed, and whether its proposed route is

appropriate—while leaving to the certificate holder the ministerial task of negotiating for the requisite property rights or bringing a condemnation action to the extent necessary to obtain them. Congress should not be forced to empower FERC to expend inordinate government resources litigating condemnation proceedings just because one court misunderstood how state sovereign immunity principles apply (or, more aptly, do not apply) in this context.

In sum, the decision below threatens direct, immediate, and severe consequences for the nation's energy markets, and injects uncertainty that undoubtedly will chill investments in infrastructure projects all across the country. The NGA has supported the energy needs of this country for nearly a century, but it cannot continue to do so with the effective veto power of a state lurking in every corner. This Court should grant review and restore the statutory regime that Congress created.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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February 18, 2020