No. 19-1039

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

New Jersey does not deny that the decision below effectively invalidates a 70-year-old Act of Congress. Nor can it deny that FERC has confirmed that the decision poses a profound threat to the nation's natural gas infrastructure—a position underscored by 18 amici representing interests ranging from pipeline and natural gas groups to consumers to labor unions to the many other industries pipelines support. Instead, New Jersey just insists that the decision below is correct, and that FERC and everyone else intimately involved in the pipeline industry is mistaken about its impact. It is wrong on both counts.

First, New Jersey does not even try to argue that §717f(h) of the Natural Gas Act ("NGA") can be read to exclude state property under ordinary tools of statutory construction. That is because it cannot. Indeed, even a clear-statement rule could not justify the Third Circuit's decision, for Congress' intent to authorize condemnation of *all* property necessary to construct a FERC-approved pipeline is pellucidly clear. The state thus argues not so much for a clear-statement rule as for constitutional avoidance at all costs. But the state's constitutional concerns are difficult to comprehend given its concessions that states have no immunity from the federal eminent domain power, that Congress may delegate that power to private parties, and that Congress validly did so in §717f(h). That leaves the state making the peculiar claim that the Constitution permits private involvement in the sovereignty-infringing condemnation of state-owned property, but prohibits private involvement in the treasury-enhancing

process of ensuring just compensation for a concededly constitutional taking of state property—a claim that finds no support in law or logic. The decision below thus not only effectively invalidates a federal statute, but does so to avoid constitutional concerns that do not exist.

The state's efforts to deny the decision's import are even less persuasive. The Third Circuit itself acknowledged 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." Pet.App.30. FERC has confirmed as much, and indeed just reiterated that the decision will have "profoundly adverse impacts … on the development of the nation's interstate natural gas transportation system" and undermines the "entire regulatory scheme established under the NGA." FERC Rehearing Order, 171 FERC ¶61,135, Dkt. No. RP20-41-001, ¶¶2, 12 (May 22, 2020). New Jersey is thus left arguing that this is a poor vehicle because it still has *other* avenues to try to frustrate this pipeline should the decision be reversed. But all of those regulatory proceedings are on hold pending resolution of this petition, which only underscores the show-stopping nature of the decision below.

In sum, the decision below gets a profoundly important issue profoundly wrong, with adverse consequences for industry, consumers, labor, and more. The Court should grant review.

I. The Decision Below Effectively Invalidates An Act of Congress.

Under ordinary tools of statutory construction, there can be no serious dispute that §717f(h) of the NGA does not exclude state property from its delegation of the federal eminent domain power. Pet.20-24. Indeed, the state does not argue otherwise. Nor does it seriously dispute that, for the better part of a century, everyone understood §717f(h) to apply to private and state property. Instead, the state disposes of statutory text, context, history, and purpose in a mere two sentences, insisting that none of that matters because its sovereign interests necessitate a clear-statement rule. Opp.17.

But even a clear-statement rule could not save the Third Circuit's construction of §717f(h), for Congress' intent to reach *all* property necessary to construct a FERC-approved pipeline is crystal clear. The text admits of no exceptions, which is telling since Congress amended the comparable Federal Power Act provision to impose special exclusions and requirements for some (but not all) state lands. 16 U.S.C. §814; *see also id.* §824p; 49 U.S.C. §24311. The state insists that this Court must ignore related statutes and context because §717f(h) itself does not say "including states." But even when a clear-statement rule applies (and no such rule applies here), Congress need not "incant magic words in order to speak clearly." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153-54 (2013). When "traditional tools of statutory construction … plainly show" Congress' intent, then that intent controls. *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015).

The state's argument thus boils down to the claim that §717f(h) cannot be read to mean what Congress plainly intended (and what any rational means of effectuating federally approved pipelines requires) because that would render it unconstitutional. But the state fails to demonstrate any real constitutional concern to avoid. As the petition explained, the federal eminent domain authority is a distinctly federal power necessary for a national government, and the states sacrificed their immunity from the exercise of that power in the plan of the convention. Pet.25-26. Notably, the state does not disagree. To the contrary, New Jersey readily—indeed, eagerly—concedes that the federal government may exercise its eminent domain power against state and private property alike. Opp.3. And the state concedes that the government may delegate that power to private parties, and validly did so in §717f(h). Opp.3.

The state takes issue *only* with whether the government may delegate to a private party the task of initiating a judicial action to determine and provide the just compensation for state property that concededly may be taken. In other words, New Jersey would concede the absence of constitutional concern if the same condemnation action were initiated by FERC (a point it makes emphatically, Opp.19-20). And it identifies no basis to protest if FERC took state property by issuing the certificate approving a route across it, and the burden were on the state to file an inverse condemnation proceeding against the certificate holder. New Jersey's contention is simply and solely that the Constitution forbids a private party from initiating the judicial proceeding to provide

just compensation for a concededly valid taking of its property.

Nothing in law or logic supports that peculiar claim. Not one of the Eleventh Amendment cases the state (or the decision below) cites involved the federal eminent domain power or lawsuits designed to augment state treasuries. Opp.8-9. Instead, the principal authority the state invokes is *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), a case that dealt only with whether the government may delegate its bare power to sue states to private parties. *Id.* at 785. That is a radically different question from whether the government may delegate its power to execute the condemnation of property that a federal agency has determined is needed to construct interstate energy infrastructure. Having sacrificed its immunity from the federal eminent domain power, New Jersey cannot reclaim it just because the government delegates the essentially ministerial task of ensuring just compensation for the taking.

That is especially so given that condemnation actions are *in rem* proceedings that augment rather than threaten state treasuries. Pet.30-31. This Court has repeatedly concluded (not just in the bankruptcy context) that the Eleventh Amendment does not apply to *in rem* proceedings. *See, e.g.*, *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998). Even the state seems to recognize that, at the very least, an *in rem* proceeding raises no sovereign immunity concerns if the state claims only a non-possessory interest in the *res*. Opp.12-13. That alone undermines the basis for most of the decision

below since the state claims a possessory interest in only *two* of the 42 parcels at issue. Opp.1. But in fact, the state cannot claim sovereign immunity as to *any* of those parcels, for states simply do not have immunity from *in rem* proceedings to effectuate the federal eminent domain power.

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000), does not suggest otherwise. New Jersey fixates on *Stevens*' expression of "serious doubt" that the Eleventh Amendment would permit a *qui tam* relator to sue a state. *Id.* at 787. But it glosses over the critical exchange between the majority and the dissent that explains the nature of the concern. The dissent would have held that there was no Eleventh Amendment issue because a relator acts as the government's assignee. *Id.* at 802 (Stevens, J., dissenting). The majority responded *not* by positing that the Eleventh Amendment immunizes states from suits brought by private parties who have been fully assigned the government's rights, but by emphasizing that a relator acts only as "a *partial* assignee of the United States." *Id.* at 773 n.4. In other words, it was "the fact that the statute gives the relator himself an interest *in the lawsuit*," including the right to collect a bounty and to continue the suit even over the United States' objection, *id.* at 772, that animated the Court's constitutional concern.

That is manifestly not the case in a §717f(h) action. Section 717f(h) does not empower a certificate holder to condemn property or collect a bounty from the state fisc over the United States' objection. It authorizes a certificate holder to bring an action if *and*

only if FERC has already determined (through issuing the certificate) that the property may be condemned. Indeed, there is not even any inquiry into the propriety of condemnation in a §717f(h) action; that issue is sealed by FERC's determination. The follow-on action simply confirms that the plaintiff holds a FERC certificate and that negotiations have failed to fix the amount of just compensation. Pet.App.3. And the state fisc affirmatively benefits, as the certificate holder must pay the state just compensation (the amount of which does not depend on who initiated the action). Thus, unlike the *qui tam* context, there is zero threat to the state treasury and no reason to think that anything about a §717f(h) proceeding would differ for a state (or private) defendant if FERC were on the other side of "v."

The state nonetheless insists that there are "good reasons" states may have objected to allowing "private delegees" to initiate condemnation actions approved by the federal government. Opp.9-10. But the "accountability" concerns it claims are difficult to fathom when it is condemnation, not providing just compensation, that intrudes on state sovereignty, and the non-negotiable condition for a §717f(h) action is a FERC certificate authorizing the condemnation. The state is thus left positing that the government and private parties could "easily take different approaches to the same suit (from the amount of damages demanded to the willingness to settle amicably)." Opp.9. Whatever the merits of that concern as to claims that actually involve damages demands, they make little sense as to an eminent domain action, where the principal question is how much the state should be *paid*. If anything, one would think states

would prefer to resolve that issue with private parties anxious to move forward with their federally authorized pipeline. After all, few (if any) litigants have a more vested interested in condemning property on the cheap than the federal government, which not only takes property infinitely more often than the average FERC certificate holder, but is immune from having its own property taken.

II. The Question Presented Is Exceptionally Important, And There Are No Obstacles To This Court's Review.

As FERC's recent orders and the broad spectrum of amici supporting this petition confirm, the decision below is exceptionally important, for it threatens profound disruption both to the natural gas industry and to the consumers, laborers, and other industries it supports. The state's efforts to prove otherwise or suggest a vehicle problem are futile.

1. The state attempts to diminish the importance of the question presented because there is no circuit split, but that misses the point. All agree that the Third Circuit was "the first court of appeals" ever—in the seven decades since Congress passed the NGA—to let states effectively veto an interstate pipeline project by frustrating the condemnation of state property along the FERC-approved route. Opp.6. That is not because pipelines rarely require condemnation of state property. It is because it was settled law and practice "for the past eighty years" that §717f(h) covers private and state property alike. Pet.App.30. Indeed, given the extent of state land interests, including over the riverbeds that form many state

boundaries, no rational system for federally approved interstate pipelines could tolerate such a state veto.

As the state acknowledges, it was not until 2017 that a district court became the first court to suggest that §717f(h) does not reach state land. Opp.21. In the two years that followed, New Jersey and Maryland successfully invoked the same dubious reasoning to persuade first the Third Circuit and then the District of Maryland to let them effectively veto major interstate pipelines. *See Colum. Gas Transmission v. 0.12 Acres of Land*, No. 1:19-cv-1444 (D. Md. dismissed Aug. 21, 2019). As those rapid developments illustrate, the decision below provides a roadmap to vetoing FERC-approved projects that states hostile to pipeline development have already proven all too eager to follow.

This is the not the kind of dispute that can await further percolation. The Third Circuit's decision already presents a serious obstacle to transporting natural gas from resource-rich Pennsylvania to populous east-coast areas in need of resources. It makes no sense for states to have veto power over federally approved pipelines in the Third Circuit but not elsewhere, and a state veto is too great a threat to critical infrastructure development to simply put such development on hold until a circuit split emerges. That is particularly true given that New Jersey essentially admits that Congress could fix any problem in need of fixing (albeit at the cost of injecting considerable inefficiencies and burdening FERC to initiate essentially ministerial just-compensation proceedings). This Court is not in the habit of forcing Congress to intervene just because a single circuit

thinks there is a constitutional problem with a statute, which is why it routinely grants certiorari when a single circuit has invalidated or eviscerated an Act of Congress.

New Jersey tries to claim that everything in the natural gas industry remains business as usual. Opp.21. But essentially everyone involved in the industry—from the federal regulator to business interests to labor to consumers—begs to differ. In reality, the permit applications the state invokes cover all manner of pipeline projects, including some that run less than a mile. *See* Approved Major Pipeline Projects (2015-Present), FERC (May 12, 2020), https://bit.ly/30sqGAx. Only a handful involved projects of substantial length, and only two appear to be in states that opposed them. Meanwhile, states hostile to pipelines have hardly proven shy about invoking every weapon in their arsenal to fight them. *See, e.g.*, Amicus Br. of Virginia in Support of Respondents, *U.S. Forest Serv. v. Cowpasture River Preservation Assoc.*, Nos. 18-1584 & 18-1587 (U.S. Jan. 22, 2020).

Finally, the state suggests that the decision below is inconsequential because FERC can bring the condemnation proceeding itself. But no one—not even the Third Circuit—has ever understood FERC to possess that power under current law, and FERC has conclusively determined that it does not. FERC Declaratory Order, 170 FERC ¶61,064, Dkt. No. RP20-41-000, ¶25 (Jan. 30, 2020); 171 FERC ¶61,135, at ¶¶2, 15. The state tries to brush aside FERC's views on that issue because FERC did not "address the Eleventh Amendment question," Opp.7, but that is a

non sequitur. That FERC declined to opine on a constitutional issue that it cannot resolve has nothing to do with whether FERC correctly concluded that it lacks the power to bring condemnation actions. The state's seeming suggestion that FERC might have *implied* a delegation to itself had it concluded that constitutional avoidance principles compelled it to *read out* a clear delegation to certificate holders just underscores New Jersey's disregard for §717f(h)'s text and its recognition that Congress plainly intended the NGA to authorize condemnation of state property by someone. The particular someone Congress plainly intended was the FERC certificate holder, not FERC, and unless and until this Court deems that arrangement unconstitutional, Congress' will should control.

2. The state's attempts to identify a vehicle problem fare no better. The state notes that its own agencies have yet to provide the requisite approvals for this project. Opp.22. But that is hardly surprising since the state itself treated the decision below as rendering those administrative proceedings moot. So unless the state means to suggest that it has already instructed its agencies to find some pretext to block the pipeline should this effort ultimately fail, the suspension of the state regulatory proceedings in light of the decision below only underscores the decision's show-stopping effect.

The same is true of the D.C. Circuit challenges to the FERC certificate that the state invokes. Those challenges are being held in abeyance—at the state's urging—because of this litigation. Opp.22. That just confirms how the decision below stopped this pipeline

in its tracks. The state's argument thus is an effort not to forestall review, but to foreclose it.

Finally, the state's remarkable claim that PennEast does not "wish to proceed with" the pipeline strains credibility. Opp.24. PennEast has not abandoned its plans to construct the pipeline FERC approved. It has simply asked FERC for permission to begin construction on part of the pipeline that is confined to Pennsylvania. That PennEast has concluded that half a pipeline is better than no pipeline at all is hardly a basis to decline review. Indeed, nothing better illustrates the problem with the decision below than that its inevitable consequence is to restrict a federally approved interstate pipeline to a single state's borders because Pennsylvania wants it and New Jersey does not. That kind of state veto is fundamentally incompatible with the regime Congress enacted in the NGA. No sensible regime for interstate pipelines would give New Jersey the veto power the decision below affords it. This Court should not allow that anomalous decision to stand unreviewed.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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