No. 19-1039

In the
Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC

PETITIONER,

V.

STATE OF NEW JERSEY, ET AL.

RESPONDENTS,

On Petition For Writ Of Certiorari
To The Third Circuit Court Of Appeals

RESPONDENTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

The United States's brief confirms that certiorari is not warranted. The United States recognizes that there is no disagreement among the lower courts on the questions presented. It fails to identify any other pipeline affected by the decision below, despite passage of over a year. And it ignores entirely that PennEast is currently seeking FERC's approval of a modified pipeline consistent with the panel's ruling. The United States instead focuses primarily on its disagreements with the panel, rehashing arguments that the panel unanimously rejected.

Most notably, however, the United States introduces a powerful new reason to deny certiorari: It asserts the lower courts lacked jurisdiction to consider the question in the first place. That novel objection is wrong. But as the United States typically recognizes, the presence of such an antecedent jurisdictional issue is reason to *deny* certiorari, not to grant it. That is doubly true where, as here, the issue was not raised below—and has never been considered by any lower court in any case.

ARGUMENT

I. The United States's Antecedent Jurisdictional Question Introduces A Vehicle Problem That Supports Denying Certiorari.

PennEast filed this condemnation action against New Jersey in federal court. Pet. App. 50-51. The question presented arose because New Jersey maintains that its sovereign immunity prevents suits absent its consent. But the United States asserts that New Jersey cannot raise its immunity in the very case where it was sued. Instead, the United States insists New Jersey could have vindicated that immunity only by affirmatively filing a separate suit, against a separate entity (FERC), in a separate court. U.S. Br. 7, 8-10, 22-23. The jurisdictional objection is meritless, but it provides another reason to deny certiorari.

1. To begin, the United States does not argue—and could not plausibly argue—that the jurisdictional question it introduces independently warrants this Court's review.

As the United States typically emphasizes, the presence of such an uncertworthy jurisdictional issue makes a case "a poor vehicle" because the Court "would first have to resolve the threshold question" before reaching the issue on which the petitioner sought certiorari. Br. in. Opp. 13, *Levert v. United States*, 140 S. Ct. 383 (2019) (No. 18-1276); see also, *e.g.*, U.S. Br. 17-18, *Ortho Biotech Prods., L.P. v. United States ex rel. Duxbury*, 561 U.S. 1005 (2010) (No. 09-654).

That is especially true where, as here, this Court would be forced to decide the threshold jurisdictional issue in the first instance—without the benefit of any rulings by the courts below or by *any* lower court. The United States admits no party has raised this issue, U.S. Br. at 10, a fatal flaw given that this is "a court of 'review,' not of 'first view.'" *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2056 (2019). Indeed, the claim that New Jersey cannot assert its sovereign immunity in the federal court where it was sued was not even raised in PennEast's *en banc* or certiorari petitions. Perhaps most notably, New Jersey is not aware of any court of appeals or district court addressing this issue in any other case either.

2. The only reason the United States gives for why a brand new jurisdictional issue somehow supports certiorari is that it presents a "straightforward ground for reversal." Br. at 22. That hardly justifies an extraordinary departure from this Court's typical practice. But more importantly, the United States is wrong. While the United States argues that challenges to FERC's orders belong in the appropriate court of appeals, none of its cases address when States can assert *sovereign immunity* as a jurisdictional defense. That distinction matters. Under Article III principles, Congress lacks authority to stop a State from asserting a limit on the jurisdiction of the very court where it was sued. And even if Congress could do such a thing, it did not do so here. The United States's objection is thus incorrect—and at least requires percolation before this Court considers it.

Begin with the constitutional infirmity. It is beyond peradventure that state sovereign immunity is a limitation on the jurisdiction of Article III courts—protecting the States from "the coercive process of judicial tribunals at the

instance of private parties." *Alden v. Maine*, 527 U.S. 706, 749 (1999). Here, PennEast—a private party—sued New Jersey in federal district court. Once New Jersey asserted immunity as a defense, the Constitution required the court to decide that issue before moving forward, to ensure that its actions would be consistent with the district court's own "judicial authority in Article III." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). It defies logic and law to say that a State cannot assert a limitation on the jurisdiction of a federal court unless it affirmatively files another suit, against another party, in another court. That is why the United States points to no other instance where a State must assert its immunity in any court other than the one where it was sued.

Even if Congress could impose such a regime, it did not do so in the Natural Gas Act (NGA)—and not with the clarity this Court demands. The United States explains that the NGA assigns the courts of appeals "exclusive" jurisdiction to "affirm, modify, or set aside" FERC orders approving pipelines. 15 U.S.C. § 717r(b); U.S. Br. 8. But that exclusive grant encompasses only questions "of the type" that "Congress intended to be reviewed within the statutory structure." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010). The State's assertion of its sovereign immunity in a separate condemnation action does not fit the bill.

Indeed, New Jersey's sovereign-immunity defense falls outside the terms of Section 717r(b) because the State does not seek to "modify" or "set aside" FERC's order. New Jersey merely identifies the jurisdictional infirmity in the suit brought against it by a private party in federal court. And such condemnation suits are expressly contemplated by another provision of the NGA, apart from the exclusive-review provision on which the United States relies. See 15 U.S.C. § 717f(h). That distinguishes this case from all those cited by the United States—which were initiated by parties attacking an order outside of the NGA's framework and/or did not involve sovereign immunity. See U.S. Br. 9-10.

FERC itself has consistently taken the position that eminent-domain issues must be litigated in these separate

condemnation actions, and not in its own administrative proceedings. In fact, in the very proceedings involving this pipeline, FERC declared that any "[i]ssues related to the acquisition of property rights" through "eminent domain" cannot be considered by FERC since they are "matters for the applicable state or federal court." *PennEast Pipeline Co.,* 164 FERC ¶ 61,098, at ¶ 33 (2018); see *id.* (disclaiming the authority "to limit a pipeline company's use of eminent domain' once FERC issues the certificate," contrary to the claims in the United States's brief that it can do so). FERC has made this same point repeatedly. See, *e.g., Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042 at ¶ 81 (2017).

Importantly, not only does the jurisdictional claim conflict with Article III, the NGA, and FERC's views, but it would yield untenable results. That is because companies routinely file condemnation actions *before* courts of appeals can consider petitions that challenge the underlying FERC orders. In this case, FERC issued PennEast's certificate on January 19, 2018, and PennEast filed condemnation suits against the State less than three weeks later. Pet. App. 39. But FERC's order could not have been challenged until *six months later*, after FERC denied the statutorily-required rehearing petitions. See 15 U.S.C. § 717r(a), (b).

In the United States's view, then, Congress not only demanded that States file a separate action to assert their immunity from condemnation suits, but created a system where such action could be barred until *after* the State was subjected to "the coercive process" of a federal court. *Alden*, 527 U.S. at 749. The United States does not explain how such a regime could function. And because no lower court has ever considered the issue, there is no base of experience on which to draw. The Court should reject the invitation to grant certiorari in a case where it would have to grapple with such a surprising and troubling jurisdictional issue—and one that has yet to even percolate.

II. The United States Does Not Otherwise Show A Need For Certiorari.

The United States's remaining arguments cannot justify certiorari. For one, the traditional criteria have not

been satisfied: the United States admits the lack of a split; fails to establish that the question is so important to justify certiorari without a circuit split; and fails to prove the issue is consequential even in this case. For another, the United States's disagreements with the unanimous panel decision are misguided—rehashing the statutory and constitutional arguments the Third Circuit correctly rejected.

1. The United States's brief shows that traditional certiorari criteria have not been satisfied.

First, the United States admits that there is no split among the circuits for this Court to resolve, and that the decision below is even in line with the only district courts to consider the issue. See U.S. Br. 21-22; N.J. Br. in. Opp. 6 (collecting cases). All the United States says is that the decision below "conflict[s] with" the views and the practice of PennEast and similarly situated companies. U.S. Br. at 11. That is hardly a reason to grant certiorari.

Second, the United States's emphasis on the impact of the decision is misguided. Despite the passage of over a year since the panel's decision, the United States offers no *evidence* of disruption, only speculation. While the question presented also came up once in the Fourth Circuit (before issuance of the decision below), *Colum. Gas Transmission v. 0.12 Acres of Land*, No. 19-2040 (CA4), the parties are working to settle that case. *Id.* And neither PennEast nor FERC identifies any other pipeline affected by this issue. Although interstate natural gas projects continue to be overturned in court, the challenges involve noncompliance with environmental laws—not sovereign immunity. See, *e.g.*, *N. Plains Res. Council v. Army Corps of Eng'rs*, 454 F. Supp. 3d 985 (D. Mont. Apr. 15, 2020); *Standing Rock Sioux Tribe v. Army Corps of Eng'rs*, 471 F. Supp. 3d 71 (D.D.C. July 6, 2020). (Similar challenges to the approval of this pipeline remain pending in the D.C. Circuit.) The decision below has played no role in halting other pipelines.

Finally, the United States does not even contest that PennEast may achieve most of what it wants despite the decision below. As New Jersey previously explained, even as PennEast urges this Court to permit its condemnation

suit against New Jersey, PennEast seeks FERC approval to split its project into two phases and build a "stand-alone" Phase 1 project in Pennsylvania that would serve many of the same customers. See App. For Amend. 3, Dkt. No. CP-20-47-000 (Jan. 30, 2020). PennEast's reply had little to say in response—and the United States is conspicuously silent. Given how rarely this Court takes up questions without a split, it should not do so in a case where the question may ultimately have little practical import.

2. Contrary to the United States's position, the panel correctly resolved the case on the merits.

As a threshold matter, the United States errs in its interpretation of the Natural Gas Act. Parroting PennEast, the United States relies on the text of *other* federal statutes and strands of legislative history to argue the NGA clearly empowers private parties to hale States into federal court. See U.S. Br. at 10-13. But Judge Jordan's opinion correctly rejected that view. See Pet. App. 28-29 & n.20 (finding "the force of those arguments … slight, at best," and that they do "not change the text"). Instead, the real disagreement on statutory interpretation involves the relevant standard. The United States, like PennEast, contends that the NGA authorizes private party suits against States based on the "lack of any express carve-out" for them. U.S. Br. at 12; see *id.* at 11 (highlighting "not only what Congress wrote but, as importantly, what it didn't write" (citation omitted)). But abrogation of immunity requires unmistakable textual clarity, which mere silence cannot provide. See *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); Pet App. 18-19. The United States declines to address any of these cases, but they are fatal to its interpretation.

Because the United States cannot demonstrate any clear statutory statement, it reserves its vigor for arguing there is no constitutional issue to be avoided—*i.e.,* that the Constitution unquestionably permits private parties to file condemnation suits against States. To prove its case, the United States must show that States' consent to such suits was "inherent in the plan of the convention." *Blatchford*,

501 U.S., at 782. But this Court has found "surrender of immunity" in "only two contexts: suits by sister States, and suits by the United States." *Id.* The United States gives no reason to mint a third exception at this late date.

The United States's argument to the contrary rests on the following syllogism: (1) "the States consented in the plan of the convention to suits brought by the federal government," including condemnation suits, U.S. Br. at 15; (2) the power of eminent domain has long been delegated to private parties, *id.* at 15-17; (3) and so the States must be deemed to have consented to condemnation lawsuits by private parties too, *id.* at 17-18. The first two premises are generally correct, but the Federal Government's conclusion does not follow as a matter of logic, history, or doctrine.

Begin with the syllogism. The basic problem with the United States's view is that States have no immunity from suits by the Federal Government specifically because "submission to judicial solution of controversies arising between these two governments" does "no violence to the inherent nature of sovereignty." *United States v. Texas*, 143 U.S. 621, 646 (1892). Because that rationale rests entirely on the presence of the United States *as a party*, it includes condemnation actions brought by the United States. But it does not extend to suits by private parties, condemnation or otherwise, even when private suits are authorized by the Federal Government. As Justice Scalia wrote, "the consent, 'inherent in the convention,' to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select." *Blatchford*, 501 U.S., at 785. Were the rule otherwise, then the same syllogism would justify suits for money damages: (1) the United States can sue States for damages; (2) federal laws have long authorized private parties to sue other private parties for money damages; (3) therefore the United States can authorize private parties to sue States for money. In each case, the problem is the same—States consented to suits by *the United States*, not those to whom the United States delegated power.

Nor does the history of delegating eminent-domain power to private parties fill that gap. It is both true and

unremarkable that colonies, States, and the United States have often delegated the eminent-domain power to private parties. See U.S. Br. at 15-17. But what is missing from the lengthy recitation of that history is precedent—even one example—of delegating that power to file a condemnation suit *against a nonconsenting State*. To the contrary, such a practice was unheard of at the Framing and for most of the Nation's history. It thus strains credulity to assert that "States would have understood at the Founding" that they were consenting to private condemnation of their property, especially absent actual evidence for that view. U.S. Br. at 17-18. Instead, this analysis repeats the United States's central error: it assumes that authorizing private parties to condemn private land must include allowing them to file condemnation suits against States, relying exclusively on the history of the former in trying to prove the latter.

Perhaps because the United States itself recognizes the unprecedented breadth of its reasoning, it urges this Court to draw a distinction between condemnation actions and suits brought for money damages or to enforce the law. But precedent and first principles foreclose its distinction. As to the former, this Court has held that "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment". *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996). And as to the latter, the United States acknowledges that condemnation suits are not "mechanical," and carry great importance to defendant States. U.S. Br. at 20. As the court below noted, "the condemning party controls the timing of the condemnation actions" and "maintains control over the action through the just compensation phase, determining whether to settle and at what price." Pet. App. 18. This case proves the point: a fellow sovereign would be less likely to file condemnation suits before a State could challenge the underlying FERC order on appeal (unlike PennEast's suits here), and more likely to respect the value of public lands at the compensation stage. N.J. Br. in Opp. 10-11. This case confirms why the States did not consent to private suits—and why the United States's analysis is incorrect.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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