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

BRIEF FOR PETITIONER

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
KASDIN M. MITCHELL
MICHAEL D. LIEBERMAN
MARIEL A. BROOKINS
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether the Natural Gas Act 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.

2. Did the Court of Appeals properly exercise jurisdiction over this case?

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

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Statutes

Regulations

Other Authorities

INTRODUCTION

This case arises out of New Jersey's efforts to block construction of a 116-mile interstate natural gas pipeline that was approved by FERC under the Natural Gas Act (NGA). The NGA authorizes FERC to consider the need for new pipelines and their proposed routes. FERC's regulatory process allows countless stakeholders, including states and other property owners affected by the proposed route, to voice their concerns. If, after hearing from the interested parties, FERC determines that the pipeline "is or will be required by the present or future public convenience and necessity," it issues a certificate that specifies the route. 15 U.S.C. §717f(c), (e). To secure the rights-of-way necessary to effectuate the approved route, and to ensure that adversely affected property owners obtain just compensation, the NGA grants the certificate holder 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." *Id.* §717f(h).

Since its inception, §717f(h) has been used to secure rights-of-way over all manner of property, and to provide just compensation to all manner of property owners, including states. The very fact that certificate holders are vested with the federal eminent-domain power means that compensation for most rights-of-way is negotiated voluntarily. But when negotiations fail, §717f(h) provides a cause of action. The resulting action is designed not to re-open the FERC certificate process—any such collateral attack is verboten—but solely to allow certificate holders to secure the rights-of-way and provide just compensation. That practice

is unremarkable. It has been settled law since before the Founding that the eminent-domain power may be delegated to private parties. And it was settled law when §717f(h) was enacted that states have no sovereign immunity from the *federal* eminent-domain power. Thus, for nearly 70 years, FERC has issued certificates for pipelines that cross state lands, and certificate holders have used §717f(h) to secure rights-of-way and provide just compensation to property owners, including states, without objection.

That changed when PennEast initiated this §717f(h) action, pursuant to its duly issued FERC certificate, to secure rights-of-way over property in which New Jersey claims an interest and to provide just compensation for those rights-of-way. Consistent with the narrow office of §717f(h), New Jersey did not challenge the FERC certificate or the fact that it authorized a pipeline across state lands. Instead, it asserted that the Eleventh Amendment prohibits PennEast, rather than FERC, from initiating the §717f(h) action—even though §717f(h) authorizes only the certificate holder (and not FERC) to initiate the action and provides no carve-out for state lands. The district court rejected that argument, but the Third Circuit reversed, applying a novel, double-barreled clear statement rule to hold that §717f(h) should not be read to apply to land in which a state claims an interest. According to the Third Circuit, Congress had to not only make clear it had delegated the federal eminent-domain authority, but make equally clear that it was abrogating the states' sovereign immunity from the §717f(h) action.

That decision is deeply flawed and seriously misunderstands both eminent domain and sovereign immunity. Certificate holders do not exercise private power under §717f(h); they exercise the federal eminent-domain power. That makes New Jersey's incantation of sovereign immunity and the Third Circuit's demand for a clear abrogation non-sequiturs. States consented to the federal government's eminent-domain power in the plan of the convention, and it was established long before the Founding that eminent-domain power can be validly delegated. The classic delegation empowered a private party tapped to execute a public improvement project—whether a dam or turnpike—to secure rights-of-way and provide property owners with just compensation. Section 717f(h) is the modern analog of such delegations, and it is no more problematic. Indeed, the Third Circuit's search for a clear abrogation of sovereign immunity was doubly misplaced, as a §717f(h) action is *in rem* and raises none of the concerns of *in personam* suits. Far from posing any threat to the treasury, a §717f(h) action seeks to augment the state fisc by providing just compensation. Any threat to state dignity comes from FERC's approval of the route across state lands, not from the ministerial process of ensuring just compensation for affected property owners.

The decision below not only is wrong but poses an obvious threat to pipeline development. It provides a road map for converting state lands—including the beds of rivers forming state boundaries—into barriers to pipeline development. That prospect well illustrates why the framers granted the new federal government the power to regulate interstate commerce and why this Court should reverse.

OPINIONS BELOW

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

JURISDICTION

The Third Circuit issued its decision on September 10, 2019, and denied a timely petition for rehearing en banc. A petition was timely filed thereafter. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

A. Constitutional Background

1. The right of eminent domain "appertains to every independent government" and has long been used by the United States to acquire land, including state land, for public use. *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). The federal government is one of limited and enumerated powers, but the proper execution of some of those powers—such as establishing federal courthouses and post roads, to name just two—depends on the ability to exercise eminent domain. *Kohl v. United States*, 91 U.S. 367, 372 (1875). Thus, the combination of express grants of federal authority and the Necessary and Proper Clause have long been understood to confer a federal eminent-domain authority. As long as "the object is within the authority of Congress, the right to

realize it through the exercise of eminent domain is clear." *Berman v. Parker*, 348 U.S. 26, 33 (1954); *see also Luxton v. N. River Bridge Co.*, 153 U.S. 525, 529 (1894). Moreover, the Fifth Amendment's Takings Clause presupposes a federal eminent-domain power, as there would be no need (especially pre-incorporation) for a just-compensation guarantee if the new federal government lacked eminent-domain authority. *Kohl*, 91 U.S. at 372-73.

This Court recognized the federal government's eminent-domain power as early as *Kohl*, which addressed an Act of Congress authorizing the Treasury Secretary to use eminent domain to acquire land in Ohio for a federal building. In the course of upholding federal-court jurisdiction over the condemnation proceedings, the Court confirmed that the federal government has "the power to appropriate lands or other property within the States for its own uses." 91 U.S. at 372. The "power to establish post-offices and to create courts within the States," the Court explained, includes the power to obtain sites for those buildings "by such means as were known and appropriate" at the Founding. *Id.* Because eminent domain "was one of those means well known when the Constitution was adopted," the federal government's eminent-domain power "ought not to be questioned." *Id.*

This Court likewise long ago recognized that, in light of the Supremacy Clause and the broader plan of the convention, "[t]he fact that land is owned by a state is no barrier to its condemnation by the United States." *Okla. ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941); *see also, e.g.*, *Dickey v.*

Maysville, W.P. & L. Turnpike Co., 37 Ky. (7 Dana) 113, 113, 118-19 (Ky. 1838) (acknowledging that Congress can "exert its right of eminent domain, and buy a State road"). Although the federal government's ability to take state-owned lands may intrude on state sovereign interests, the states plainly surrendered any immunity from the federal government's eminent-domain power in the plan of the convention. *Kohl*, 91 U.S. at 368. In light of the Supremacy Clause, a state cannot resist the federal eminent-domain power or frustrate its effectuation, for only one sovereign can exercise the eminent-domain power, and a voluntary condemnation power is an oxymoron. If the federal government has the eminent-domain 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 that power; "[n]or can any State prescribe the manner in which [that power] must be exercised." *Id.*

2. It is equally well settled that the eminent-domain power may be delegated to private parties in service of a public use. Indeed, for more than two centuries, state legislatures and Congress have delegated eminent-domain power to private parties.

Prominent early examples include the colonial-era Mill Acts, which granted owners of private grist mills the right to flood upstream lands. The first such law was passed in Virginia in 1667; it authorized any landowner willing to erect a mill and possessing land on one side of a creek to obtain rights to land on the other side from an owner refusing to sell. 1667 Va. Mill Act, *reprinted in* William Waller Hening, *Statutes at Large; Being a Collection of All the Laws of Virginia*

from the First Session of the Legislature, Act IV, 2 Stat. 260-261 (1667). Maryland followed suit in 1669, *see* 2 William Hand Browne, *Proceedings & Acts of the General Assembly of Maryland*, Maryland Historical Society 211-14 (1884), and many other colonies did likewise thereafter, *see Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 16-17 & n.2 (1885). These laws were so prevalent that, after the Revolution and adoption of state constitutions, they continued in effect "for some time" before anyone even thought to question their constitutionality. John Lewis, *A Treatise on the Law of Eminent Domain in the United States* §178 (1888) ("Lewis"). Even then, the objections concerned state-law "public use" limitations, not the delegations, and the laws were almost uniformly upheld. *See, e.g.*, *Hazen v. Essex Co.*, 66 Mass. (12 Cush.) 475, 478 (1853).

Colonial and state governments regularly authorized private citizens to exercise eminent domain to construct roadways. *See* 1 *Nichols on Eminent Domain* §1.22[7] (2021) ("Nichols"). As early as 1735, a Pennsylvania statute permitted private landowners to seek legislative approval to construct roads from their own dwellings "to a highway or place of necessary public resort, or to any private way leading to a highway." Lewis §167. If the road was approved, the person requesting it had to pay compensation to anyone whose "improved ground" was taken. 1735 Pa. Highway Act, *reprinted in* 4 James T. Mitchell & Henry Flanders, *The Statutes at Large of Pennsylvania* §§1-2, at 297-298 (Clarence M. Busch ed. 1897); *see also Kelo v. City of New London*, 545 U.S. 469, 512-14 (2005) (Thomas, J., dissenting).

Delegation of the eminent-domain power continued after the Founding, with state legislatures and Congress commonly delegating the power to private companies for infrastructure projects. The idea that private entities can execute large-scale public improvements more efficiently than the government is no novelty. *See, e.g.*, *Raleigh & G.R. Co. v. Davis*, 19 N.C. (2 Dev. & Bat.) 451, 469 (1837) ("An immense and beneficial revolution has been brought about in modern times, by engaging individual enterprise, industry, and economy, in the execution of public works of internal improvement."). Moreover, when the private delegee would generate a revenue stream from the completed infrastructure project, it made sense for that party to spearhead the condemnation and to furnish just compensation. During the nineteenth century, "every state in the union delegated the power of eminent domain to turnpike, bridge, canal, and railroad companies." Abraham Bell, *Private Takings*, 76 U. Chi. L. Rev. 517, 545 (2009). While state courts scrutinized these projects to ensure compliance with state-law "public use" restrictions, *see Kelo*, 545 U.S. at 512-14 (Thomas, J., dissenting), the mere delegation of eminent-domain power itself was not controversial. Courts recognized that legislatures had broad discretion over how best to employ eminent domain toward public ends. *See, e.g.*, *Inhabitants of Worcester v. W. R.R. Corp.*, 45 Mass. (4 Met.) 564, 564-66 (1842); *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45, 60-64 (N.Y. Ch. 1831); *see also Olcott v. Fond du Lac Cnty.*, 83 U.S. 678, 694 (1872).

Congress has a similarly long history of delegating federal eminent-domain power to private

parties, often with this Court's approval. In 1809, for example, it authorized the Georgetown and Alexandria Turnpike Company to construct a turnpike through Alexandria, delegating it the power to condemn the necessary property if owners refused to cooperate. *See* Act of Mar. 3, 1809, ch. 31, §7, 2 Stat. 541-542; *Custiss v. Georgetown & Alexandria Tpk. Co.*, 10 U.S. (6 Cranch) 233 (1810) (reversing judgment quashing inquisition into value of property being taken under the Act); *Luxton*, 153 U.S. 525. Courts have long upheld such delegations, even when private parties condemned land belonging to another sovereign. In *Stockton v. Baltimore & N.Y.R. Co.*, 32 F. 9 (C.C.D.N.J. 1887) (Bradley, J.), for example, New Jersey sought to enjoin construction of a bridge because the piers would rest on land in which it had an interest. Justice Bradley, riding circuit, rejected that argument in an opinion that has since been repeatedly approved by this Court, holding that the Act of Congress was "valid and constitutional, and does not injuriously affect any property or other rights of the state of New Jersey." *Id.* at 21.

Likewise, in *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641 (1890), this Court rejected the Cherokee Nation's objection to the delegated exercise of federal eminent domain over tribal lands. As long as the contemplated railroad would serve public ends, "the corporation by which it is constructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property." *Id.* at 657-58. Given Congress' determination that the corporation was better suited than the government to build the railroad, "it would clearly be pressing a constitutional

maxim to an absurd extreme" to force Congress to serve public ends "in the way which is least consistent with the public interest." *Id.* at 658.

Of course, private parties may take property only to the extent the federal government could 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, both Congress and this Court have long understood that the federal government may delegate its eminent-domain power. Sometimes Congress specifically identifies the property to be taken and gives the private delegee only the ministerial task of executing Congress' will and providing just compensation; other times an agency is tasked with selecting the property; still other times Congress authorizes the private delegee to select appropriate land meeting statutory criteria. And when Congress wants to make property that otherwise would satisfy that criteria off-limits, it says so expressly. For example, when Congress delegated to Amtrak the power to condemn property "necessary for intercity rail passenger transportation," it carved out "property of … a State [or] a political subdivision of a State, or a governmental authority." 49 U.S.C. §24311(a)(1)(A); *see also* 16 U.S.C. §824p(e)(1) (delegating eminent-domain power for transmission facilities located "on property other than property owned by the United States or a State").

B. Statutory Background

In the mid-1930s, Congress enacted the Federal Power Act ("FPA") and the Natural Gas Act ("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 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 "the right of eminent domain," which licensees could exercise to acquire necessary rights-of-way they could not acquire by contract. The NGA, by contrast, initially gave FERC more limited powers with respect to new pipelines and did not include a mechanism for FERC to authorize natural gas companies to acquire land to develop new infrastructure.

That role was initially largely left to the states, but that arrangement proved unsuccessful, as it produced 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, Congress amended the NGA in 1942 to give FERC more comprehensive authority over existing pipelines and the construction of new ones. *See* Pub. L. No. 49-444, 56 Stat. 84 (1942). Since 1942, a company seeking to construct an interstate pipeline must obtain FERC's approval. 15 U.S.C. §717f. FERC must hold hearings and may issue a certificate of approval only if, among other things, it determines that the pipeline "is or will be required by the present or future public convenience and necessity." *Id.* §717f(e).

This new approval process proved insufficient to prevent some states from continuing to frustrate the development of interstate pipelines. States did so by imposing impractical and protectionist constraints on natural gas companies' ability to exercise eminent domain under state law to secure the necessary rights-of-way to build and operate pipelines. For example, Arkansas prohibited foreign corporations from condemning property; Wisconsin granted eminent-domain power only to Wisconsin-based companies; and Nebraska permitted pipeline companies to exercise eminent domain only if they distributed gas within the state. *See* S. Rep. No. 80-429, at 2-3 (1947). Other states narrowly defined "public use" as "the use of the public of the particular State conferring the right of eminent domain." *Id.* at 2.

Congress responded by amending the NGA again in 1947, this time to grant FERC certificate holders the federal government's eminent-domain power—specifically, the power 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 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 S. Comm. on Interstate and Foreign Commerce*, 80th Cong. 12 (1947) (statement of Sen. Moore). Section 717f(h) was modeled after, and tracked nearly verbatim, §814 of the FPA. *See* 16 U.S.C. §814; S. Rep. No. 80-429, at 1 (1947).

Under §717f(h), a natural gas company must have a FERC-issued certificate to exercise eminent domain. FERC may issue such a certificate only if the proposed pipeline "is or will be required by the present or future public convenience and necessity." 15 U.S.C. §717f(e). If the applicant fails to establish the project's necessity, its application "shall be denied." *Id.* FERC approves not just the necessity of the proposed pipeline *vel non*, but also the proposed route, which it does through a public process in which affected property owners may appear and object. *See, e.g.*, Pet.App.35-43. After receiving a certificate, the certificate holder can acquire rights-of-way on the approved route by eminent domain if it "cannot acquire [them] by contract" or was "unable to agree with the owner" on compensation. 15 U.S.C. §717f(h). While in most cases, the certificate holder and property owner voluntarily agree on an appropriate valuation, when negotiations fail, the certificate holder may "acquire" the necessary 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]

State and federal courts turned back the few initial challenges to this grant of federal eminent-domain power. For example, in *Thatcher*, the Fifth Circuit addressed various constitutional claims, including that the provision impermissibly allowed companies to take private property for private use and

[1] To proceed in federal court, the certificate holder must establish that the property's value exceeds $3,000. 15 U.S.C. §717f(h).

impermissibly invaded authority reserved to the states under the Tenth Amendment. 180 F.2d at 645. Courts uniformly rejected those challenges, explaining that "the grant by Congress of the power of eminent domain to a natural gas company … is clearly within the constitutional power of Congress." *Id.* at 647; *see also Parkes v. Nat. Gas Pipe Line Co.*, 249 P.2d 462 (Okla. 1952); *Williams v. Transcon. Gas Pipe Line Corp.*, 89 F.Supp. 485 (W.D.S.C. 1950).

Over the ensuing 70 years, the NGA's delegation of the federal eminent-domain power effectively ended state efforts to frustrate interstate infrastructure development. The provision redirected concerns over the pipeline route to FERC, which retains the power to approve the route that best serves the federal interest in the interstate pipeline. Once that route is approved, the very existence of the certificate holder's eminent-domain power facilitates negotiations and often obviates the need to initiate court proceedings. But when litigation has proven necessary, certificate holders have long invoked the power with respect to both private and state property. *See* Pet.App.30; *Transcon. Gas Pipe Line Co. v. 0.607 Acres of Land*, No. 3:15-cv-00428 (D.N.J. Feb. 23, 2015); *Transcon. Gas Pipeline Co. v. 2.705 Acres of Land*, No. 3:15-cv-00397 (D.N.J. Feb. 23, 2015); *Transcon. Gas Pipe Line Co. v. 2.163 Acres of Land*, No. 3:12-cv-07511 (D.N.J. Jan. 10, 2013). Those efforts rarely drew any objection from states (including New Jersey), and Congress has never made any effort to constrain the use of the §717f(h) eminent-domain power against state-owned property.

Congress' reticence on that score vis-à-vis the NGA stands in stark contrast with its actions concerning the FPA. In 1992, Congress amended the FPA—but not the NGA—to carve out a subset of state-owned properties from hydropower licensees' delegated eminent-domain power. In particular, the FPA now 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 comparable facilities established after that date, a licensee may exercise eminent-domain power, but only after a "public hearing held in the affected community," and after FERC finds that "the license will not interfere or be inconsistent with the purposes for which such lands or property are owned." *Id.*

The legislative history explained that this amendment was necessary because, "[u]nder current law, when the FERC issues a hydropower license, the license 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 square recognition, Congress withdrew the FPA's delegation of federal eminent-domain power only as to a specific subset of state-owned lands. And by preserving a modified eminent-domain power over newly designated public lands, Congress limited states' ability to block development by acquiring new

property interests along the route of a proposed development.

Congress did not take even these modest steps to trim the eminent-domain power conveyed by the NGA. The NGA instead continues to authorize certificate holders to exercise a federal eminent-domain power that "includes the power to condemn lands owned by States." *Id.*

C. Factual Background and Procedural History

1. In 2018, FERC granted PennEast a certificate to construct and operate a 116-mile natural gas pipeline that will transport gas from northern Pennsylvania to markets in eastern and southern Pennsylvania, New Jersey, and beyond. Pet.App.3. The certificate-approval process was extensive, drawing thousands of written public comments and hundreds of verbal comments from potentially affected landowners and others at several public meetings over a multi-year period.

The process began in October 2014, when FERC staff began a pre-filing environmental review. *See* J.A.88-89, ¶93. A few months later, FERC published in the Federal Register its notice of intent (NOI) to prepare an Environmental Impact Statement (EIS), which it sent to "more than 4,300 interested entities, including representatives of federal, state, and local agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners as defined in the Commission's regulations …; concerned citizens; and local libraries and newspapers." *Id.* FERC received more than 6,000 written comments in response and heard from 250

speakers at the ensuing public scoping meetings. Pet.App.4 n.1.

After considering those comments and conducting its own analysis, FERC issued a draft EIS that it published in the Federal Register and mailed to "over 4,280 stakeholders." J.A.90, ¶95. In response, FERC received more than 4,100 letters and heard from 420 attendees, many of them landowners, at six public meetings. Pet.App.4 n.1. New Jersey participated in that process, filing protests, comments, and other correspondence related to the pipeline route. Pet.11 n.2. PennEast endeavored to work cooperatively with New Jersey and others whose property interests were implicated. In the end, PennEast proposed 33 route modifications and various other changes in response to environmental and engineering concerns raised by New Jersey, property owners, and other members of the public. J.A.90-91, ¶96.[2]

FERC published its final EIS in April 2017. J.A.91-92, ¶97. The EIS concludes that "while the project will result in some adverse environmental impacts, these impacts will be reduced to less than significant levels with the implementation of PennEast's proposed impact avoidance, minimization, and mitigation measures, together with staff's recommended environmental conditions." J.A.92-93, ¶98. With respect to property in which New Jersey asserted an interest, FERC found that nearly all the parcels subject to "conservation or open space protective easements" would "retain their

[2] FERC issued a letter to newly affected landowners describing these route modifications and inviting any new comments. J.A.90-91, ¶96.

conservation and open space characteristics." Pet.App.4 n.1.

Meanwhile, PennEast filed its formal application to construct and operate the pipeline, notice of which was published in the Federal Register in October 2015. 80 Fed. Reg. 62,068 (2015). "Numerous entities, landowners, individuals, and New Jersey State representatives filed protests and adverse comments." J.A.40, ¶11. Some commenters, including New Jersey, raised arguments about the project's necessity. J.A.44, ¶19. Several commenters objected to the use of eminent domain for the project, but not on the ground that PennEast lacked that authority over state-owned land. They instead argued that PennEast could not properly exercise the federal government's eminent-domain power because "PennEast is a for-profit company, and has not shown that there is a genuine need for the project, or that the public it is intended to serve will benefit from it." J.A.59, ¶41.

In 2018, after careful consideration of PennEast's application and supplements, the public comments, the EIS, field investigations, an alternatives analysis, and other information, FERC determined that "the public convenience and necessity require[d] approval of PennEast's proposal" and granted PennEast the certificate. Pet.App.4. FERC concluded that PennEast took "appropriate steps to minimize impacts on landowners and the surrounding communities," including by holding over 200 meetings with public officials and 15 informational sessions for impacted landowners, and by incorporating 70 route variations "for various reasons, including landowner requests, community impacts, and the avoidance of sensitive

resources." J.A.58-59, ¶39. With respect to the eminent-domain objection, FERC explained that "Congress made no distinction between for-profit and non-profit companies" in the NGA. J.A.60, ¶42. The terms of the certificate ensure federal oversight of construction and operation of the pipeline. 3CA-J.A.295-309.

After FERC denied all petitions for rehearing, J.A.213, multiple parties, including New Jersey, petitioned for review in the D.C. Circuit. *See* Petition for Review, *New Jersey Dep't of Env't Prot. v. FERC*, No. 18-1144 (D.C. Cir. filed May 21, 2018). In those proceedings, New Jersey has challenged FERC's decision to issue the certificate, arguing that "FERC erred in finding that PennEast established a need for its new pipeline" and relied "on inadequate information to find the pipeline's benefits outweighed its adverse environmental impacts." Joint Brief of New Jersey Dep't of Env't Prot. et al. 4, *New Jersey Dep't of Env't Prot. v. FERC*, No. 18-1144 (D.C. Cir. filed December 21, 2018). But New Jersey has not argued there that lands in which it asserts an interest are off-limits for a potential pipeline route or that FERC lacks authority to approve a certificate for a pipeline that will cross such lands. Nor in those proceedings has New Jersey challenged PennEast's ability to exercise eminent domain as to such lands. The D.C. Circuit has held its proceedings in abeyance for this case.

2. PennEast successfully negotiated with most property owners to obtain the necessary rights-of-way for the pipeline, thus obviating the need for court proceedings. New Jersey, however, refused to grant

PennEast rights-of-way for the properties over which it asserts an interest. Eventually, PennEast was forced to bring a series of federal-court *in rem* actions pursuant to §717f(h) to establish just compensation and obtain rights-of-way to effectuate the FERC-approved pipeline route. This case consolidates a number of those actions and involves 42 of the 49 parcels in which New Jersey asserts an interest. The state claims a possessory interest in just two; the other 40 involve only non-possessory interests, principally easements granted by private fee-owners "requiring that the land be preserved for recreational, conservation, or agricultural use." Pet.App.5. New Jersey holds many of those non-possessory interests via programs like "Green Acres," which allows residents to use a two-page form to convey to New Jersey a conservation easement in exchange for financial and tax benefits. *See The Benefits of Leaving a Legacy… Selling Your Land to Green Acres*, Green Acres Program, NJ Dep't of Env't Prot. (Aug. 18, 2020), https://bit.ly/3b0tHwJ.

While New Jersey had acquiesced in NGA and FPA eminent-domain actions in the past, *see* Pet.App.66 n.30; *Halecrest Co.*, 60 FERC ¶61,121, 1992 WL 12567263 (1992), this time it came armed with a new theory: According to New Jersey, the Eleventh Amendment bars a certificate holder from using §717f(h) as to property in which a state holds any type of interest—whether possessory or non-possessory. The district court was "not persuaded." Pet.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 state property. Pet.App.65. Accordingly, the court concluded that the Eleventh Amendment has no role to play. Pet.App.66.

3. New Jersey appealed, contending that it has Eleventh Amendment immunity from §717f(h) actions. Pet.App.11. In the alternative, it argued that §717f(h) cannot be interpreted to delegate the power to exercise eminent domain against state property absent a clearer statement than the NGA provides.

The Third Circuit agreed with New Jersey. According to the court, when the federal government condemns state property, it exercises two federal powers, not one: 1) the federal eminent-domain power, and 2) the federal government's "exemption" from the Eleventh Amendment. *Id.* The court then concluded that it could not read §717f(h) to apply to state property unless Congress "clearly" delegated *both* the federal eminent-domain power *and* "the federal government's exemption from sovereign immunity." Pet.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 double-clear-statement rule unsatisfied. Pet.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." Pet.App.30-31. And while it suggested a "work-around" under which FERC could bring the condemnation proceedings itself and "then transfer the property to the natural gas company," the court acknowledged that it had not solicited FERC's views about the legality or feasibility 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 dismissed such concerns as "an issue for Congress." Pet.App.31. The court denied PennEast's petition for rehearing and its suggestion that the court solicit the federal government's views before acting on the petition.

D. FERC's Declaratory Order

PennEast filed a petition with FERC seeking a declaratory order on the scope of §717f(h). After obtaining comments and holding a hearing, FERC issued an order explaining that §717f(h) "does not limit a certificate holder's right to exercise eminent domain authority over state-owned land," and observing that the Third Circuit's contrary conclusion will have "profoundly adverse impacts on the development of the nation's interstate natural gas transportation system." J.A.390-91, 426 ¶¶25, 56. FERC explained that the Third Circuit's suggested "work-around" is not workable because although §717f(h) "requires the Commission's determination as to which land may be condemned for the public convenience and necessity," it delegates the power to initiate a §717f(h) action "solely to certificate holders." J.A.391-92, 419, 423, ¶¶26, 49, 53. Thus, the Third Circuit's rule would allow states "to block natural gas infrastructure projects that cross state lands by refusing to grant easements" and thus "impair the NGA's superordinate goal of ensuring the public has access to reliable, affordable supplies of natural gas." J.A.427, ¶58.

SUMMARY OF ARGUMENT

Under ordinary principles of statutory construction, there can be no serious dispute that §717f(h) authorizes actions concerning private and state property alike. The statutory text admits of no exception for state property, the statutory evolution forecloses any possibility of such an exception, and the statutory purposes are incompatible with one.

It is little surprise, then, that the decision below did not rely on anything like ordinary principles of statutory construction in concluding that §717f(h) does not authorize proceedings against state property. Instead, the court invented a new, double-barreled "clear statement" rule that requires Congress not just to clearly delegate the federal eminent-domain power, but to clearly abrogate the states' sovereign immunity from the follow-on proceedings necessary to obtain the right-of-way and to provide just compensation. But that rule requires Congress to clearly abrogate an immunity that does not exist. It has long been settled law that states surrendered any immunity from the federal government's eminent-domain power in the plan of the convention. Indeed, New Jersey does not contend otherwise. It has likewise long been settled law that the eminent-domain power may be delegated to private parties. Again, New Jersey does not contend otherwise. States thus simply do not have any immunity to invoke in this context.

New Jersey makes the peculiar argument that even though it lacks immunity from the federal eminent-domain authority, which may be delegated, it nonetheless has immunity from *in rem* proceedings initiated by the delegee to provide just compensation.

That position finds no support in law, logic, or history. The §717f(h) action to which New Jersey objects did not inflict some intrusion on state sovereignty distinct from FERC's approval of a pipeline route across state property. It is simply the means Congress has provided to effectuate FERC's certificate while ensuring compliance with the Constitution's just-compensation requirement. That follow-on proceeding augments the state fisc and raises no separate intrusion on state sovereignty whether it is initiated by FERC or its delegee.

New Jersey's contrary claim is particularly inexplicable given the *in rem* nature of the proceedings. Because *in rem* proceedings do not entail haling states into court or pose any threat to the state treasury, this Court has often found that states lack immunity from *in rem* proceedings. That logic fully applies here. The §717f(h) action is plainly *in rem*, any intrusion into state dignity occurred before FERC, and far from posing any threat to state finances, the §717f(h) action aims to augment the state treasury by providing just compensation.

The narrow and peculiar nature of New Jersey's objection dooms it to failure, but it also explains why the court of appeals had jurisdiction to consider it. Section 717f(h) has a very narrow office. It provides just compensation to a property owner adversely affected by a FERC certificate, but it does not permit any collateral attack on the underlying FERC certificate. New Jersey respected the narrow office of §717f(h) and did not collaterally attack PennEast's certificate. But that leaves New Jersey objecting to a proceeding designed to provide it with just

compensation, which is hardly an intrusion on sovereign dignity or a threat to the fisc. If, however, the Court construes New Jersey's argument as a collateral attack, then that would leave the courts below without authority to consider that argument, while leaving intact their Article III jurisdiction over the underlying §717f(h) action.

The decision below is profoundly wrong. It is also immensely consequential, as it not only upends 70 years of settled law, but empowers states to block interstate infrastructure that the federal government has deemed necessary. Congress certainly did not intend that result, and the Constitution does not command it.

ARGUMENT

I. The NGA Plainly Delegates The Federal Government's Eminent-Domain Power As To Private And State Property Alike.

"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 [FERC] 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). That language admits of no exception for state-owned property; it applies to *any* property "necessary … to construct, operate, and maintain a pipe line" authorized by a FERC-granted certificate. *Id.* Especially given the reality that states have

property interests in riverbeds and other lands that pipelines must cross to be effective, the plain language of the NGA makes clear that Congress authorized certificate holders to bring a §717f(h) action to obtain rights-of-way over *any* property on the approved route that cannot be obtained by consent, regardless of whether the property is in private or state hands (or both, as in the case of 40 of the 42 parcels at issue here). That inclusive authorization reflects the basic realities that it is virtually impossible to construct an interstate pipeline without exercising eminent-domain power over holdouts and without crossing property in which states hold some property interest.

That this grant of 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(a)(1)(A). Similarly, Congress amended the FPA's eminent-domain provision to carve out a subset of pre-existing state lands and to require special procedures when condemning some (but not all) state lands. 16 U.S.C. §814. And when amending the FPA in 2005 to give FERC siting and permitting authority over certain transmission facilities, 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." *Id.* §824p(e)(1). As these provisions confirm, when Congress wants to exempt state-owned land from a general delegation of the federal eminent-domain power, "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, both because §717f(h) was modeled on §814 and because the subsequent changes Congress made to §814 alone underscore the broader scope of the never-amended §717f(h). *See* S. Rep. No. 80-429. Section 814 did not contain any exception for state land when §717f(h) was enacted. Congress added an express proviso in 1992—and did so precisely because, "[u]nder current law" at the time (*i.e.*, the law on which §717f(h) was modeled), the eminent-domain power delegated by §814 "includes the power to condemn lands owned by States." H.R. Rep. No. 102-474, 99-100. Yet at the same time that Congress carved out exceptions for a subset of state-owned land in the FPA, it left alone the virtually identical NGA provision, even though it equally included "the power to condemn lands owned by States." *Id.* Moreover, even as to §814, Congress did not exempt *all* state land. It exempted only lands that were (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 unamended language—*i.e.*, the language in §717f(h)—did not reach state property. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013).

Particularly when read in conjunction with the revisions to its sibling provision in the FPA, 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 all property in which a state claims an interest, 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 §717f(h) was enacted eliminates it. When Congress added §717f(h) to the NGA in 1947, it was 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 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 S. Comm. on Interstate and Foreign Commerce*, 80th Cong. 12 (1947). Yet Congress forged ahead without adopting any exception for state property.

That is unsurprising, as the whole point of §717f(h) was to counteract state efforts to undermine federal efforts to select optimal routes for interstate pipelines by frustrating the exercise of eminent domain by interstate pipeline developers. *See supra* pp.12-13; S. Rep. No. 80-429, at 2-3. A decade of experience with an NGA that lacked a delegated federal eminent-domain power made clear to Congress that reliance on consensual efforts and state law was incompatible with the rational development of interstate pipelines. Having gone to the trouble of adding an eminent-domain provision to overcome state-erected obstacles, Congress understandably did not want to exempt state land or otherwise give states a *de facto* veto power over interstate pipeline routes.

That is not say that Congress was insensitive to state interests. The NGA "sets forth a highly reticulated procedure for obtaining, and challenging, a FERC certificate" that provides states (and private parties) with ample opportunity to voice concerns. *Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010). For example, the NGA allows states to interpose pre-filing objections, 18 C.F.R. §157.21, to intervene in FERC proceedings, *id.* §§157.6, 157.10, and—if dissatisfied with FERC's decisions—to petition the D.C. Circuit for review, 15 U.S.C. §717r(b). At each stage, the state can object to both the pipeline generally and the route in particular and may do so based on its sovereign-governmental concerns (such as environmental impact) or its interest as a landowner. States and other governments also enjoy a special channel to petition FERC if a natural gas company violates the NGA. *See* 15 U.S.C. §717*l*. Given that detailed process for state participation, it strains credulity to believe that Congress left a gaping back-end loophole allowing states to forgo that process and block pipeline projects simply by objecting to §717f(h) actions. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 339 (2013) (rejecting interpretation that was "inconsistent with the statute's design and structure").

History and practice confirm what plain text and context make clear. For 70 years, pipeline developers have been employing §717f(h) to obtain the rights-of-way FERC has determined they need to construct a FERC-approved interstate pipeline, without regard to whether the landowner is a private party or a state. For 70 years, FERC has condoned this practice, rejecting efforts to limit the exercise of eminent

domain over state-owned property. J.A.390-92, ¶¶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)). For 70 years, states (including New Jersey) have raised concerns about a pipeline route with FERC before a certificate issues and then obtained just compensation via §717f(h) 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) (§717f(h) action over state land in New Jersey 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, courts did not even hint that any of this poses a constitutional concern.

II. The Third Circuit's Contrary View Ignores Text To Avoid Perceived Constitutional Difficulties That Do Not Exist.

As the foregoing confirms, under ordinary principles of statutory interpretation, the question presented is not a close call. The Third Circuit created an exemption for state property only by applying a novel, double-barreled "clear statement" rule. In its view, a delegation of the federal eminent-domain power cannot be read to authorize the delegee to file an action concerning state property unless Congress delegates *two* things with "unmistakabl[e]" clarity: (1) the federal eminent-domain power and (2) "the federal government's exemption from Eleventh Amendment immunity." Pet.App.30. Because it believed that Congress delegated only the former with the requisite clarity, the court refused to read the NGA as authorizing certificate holders to initiate §717f(h)

actions to obtain rights-of-way and to provide just compensation for land in which the state claims an interest.

That approach and conclusion reflect fundamental misunderstandings of both eminent domain and sovereign immunity. New Jersey concedes (as it must) that states sacrificed immunity from the federal government's eminent-domain power in the plan of the convention. And New Jersey concedes (as it must) that the eminent-domain power may be delegated to private parties and was delegated to certificate holders in the NGA. When that federal power is delegated, it remains a distinctly federal power. Accordingly, there is no need to search the NGA for some separate delegation of an "exemption" from state sovereign immunity, much less an unmistakably clear one. To ask for a clear abrogation of sovereign immunity in this context is to ask Congress to clearly abrogate something that was surrendered long ago in the plan of the convention.

A. States Have No Sovereign Immunity From the Exercise of the Federal Government's Eminent-Domain Power.

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. The federal government is no exception: As this Court explained in *Kohl*, "[t]he right of eminent domain was … well known when the Constitution was adopted." 91 U.S. at 372. Accordingly, "[i]f the United States has determined its need for certain land for a public use that is within its federal sovereign powers, it must have the right to

appropriate that land." *United States v. Carmack*, 329 U.S. 230, 236 (1946); *see* U.S. Const. amend. V.

"The fact that land is owned by a state is no barrier to its condemnation by the United States." *Atkinson*, 313 U.S. at 534. Although forcing states to yield state-owned lands undoubtedly intrudes on state interests, the states surrendered any immunity from the federal government's eminent-domain power in the plan of the convention. *Kohl*, 91 U.S. at 368. That surrender follows directly from the Supremacy Clause: If states could interfere with the federal government's ability to exercise eminent domain, then they could "subordinate the constitutional powers of Congress." *Carmack*, 329 U.S. at 236; *see Stockton*, 32 F. at 17-18 ("If the consent of a state is necessary, such state may always, in pursuit of its own interests, refuse its consent, and thus thwart the plain objects and purposes of the constitution.").

That states surrendered their immunity from suits by the federal government over property is reinforced by the immovable-property exception to sovereign immunity. For "almost as long as there have been hornbooks," it has been hornbook law that "there is no immunity from jurisdiction with respect to actions relating to immovable [*i.e.*, real] property." *Upper Skagit Indian Tribe v. Lundgren*, 138 S.Ct. 1649, 1657 (2018) (Thomas, J., dissenting); *see* Restatement (Second) of Foreign Relations Law §68. Sovereign immunity has therefore never barred a territorial sovereign from exercising eminent domain over property within its domain owned by another sovereign. *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 200 (2007)

("[F]or an eminent-domain proceeding, the foreign sovereign could not claim immunity."). While New Jersey obviously retains an interest over lands in which it has a property interest (and a residual sovereign authority over privately held land within its boundaries), it has no sovereign immunity to assert against an eminent-domain action concerning that property authorized by the federal government, the superior sovereign.

When the states consented to the federal government's eminent-domain power in the plan of the convention, they were consenting to that power as it was then "known." *Kohl*, 91 U.S. at 372; *cf. Hans v. Louisiana*, 134 U.S. 1, 18 (1890). And at the Founding, eminent domain was universally known as a power that could be delegated to private parties. Indeed, delegation of the power to bring condemnation actions "has been the common practice since the Revolution, and the right to do so has never been a matter of serious question." Lewis §242. Colonial governments regularly delegated that power to private parties, *see supra*, pp.6-7; Lewis §§178-79; Nichols §1.22[7], and delegations continued unabated after the Founding, as "every state in the union delegated the power of eminent domain to turnpike, bridge, canal, and railroad companies." *Private Takings*, 76 U. Chi. L. Rev. at 545. Delegating the power to private entities for those kinds of public improvements made particular sense because the operator of the new facility was well-positioned to provide just compensation. Congress likewise delegated eminent-domain power in the early years of the Nation. *See* Act of Mar. 3, 1809, ch. 31, §7, 2 Stat. 541-42; *Stockton*, 32 F. at 17. In short, it has long been

"universally accepted" that the eminent-domain power may be delegated to private entities who then provide just compensation. *Olcott*, 83 U.S. at 694.

Given that universal acceptance—and the absence of any indication that states qualified their consent to that power—the states plainly understood that they were consenting to a power that the federal government could exercise either itself or through delegations to private parties. Indeed, while the states and the people demanded certain constraints on the federal eminent-domain power, *see* U.S. Const. amend. V, their focus was on ensuring just compensation, not on restricting who would provide it or otherwise precluding delegation. Instead, the historic practice of delegating eminent-domain power to a private entity overseeing a public improvement was one of the elements of sovereignty reserved to the states in their realm, but surrendered to the new federal government as part of its new enumerated and distinctly federal responsibilities. By surrendering their sovereign immunity from the new federal government, states necessarily surrendered their immunity from the exercise of the eminent-domain power by the new government, whether exercised by the federal government itself or by its delegee. *See Kohl*, 91 U.S. at 374 ("If the United States have the power, it must be complete in itself."). There is thus no need to search for any clear statement abrogating state sovereign immunity when the federal government delegates its eminent-domain power (as it plainly did in §717f(h)), as states have no immunity from the federal eminent-domain power to abrogate.

B. New Jersey's Effort to Bifurcate the Eminent-Domain Power and the Power to Bring Court Actions to Effectuate It Has No Grounding in Law or Logic.

New Jersey agrees with most of this. It concedes that the federal government has eminent-domain power; that the federal eminent-domain power may be exercised against state and private property alike; that the federal government may delegate its eminent-domain power to private parties; and that Congress did so in §717f(h). It does not suggest that the delegation was excessive or that the federal government played an insufficient role in the decision that the pipeline route should cross state land. Indeed, the state concedes that there would be no constitutional concern if FERC itself initiated the same action to effectuate the FERC-issued certificate. Opp.19-20; NJ.CA3.24. New Jersey's contention is simply and solely that its sovereign dignity is offended because the certificate holder, and not FERC, initiated the judicial proceeding designed to confer the rights-of-way and to provide New Jersey with just compensation.

That is a singularly peculiar claim. Section 717f(h) specifically authorizes the certificate holder, and not FERC, to initiate the judicial action. And if there is any sovereign injury from having a pipeline cross state lands over the state's objection, that injury results from FERC's issuance of the certificate for such a pipeline, not from the initiation of the follow-on proceeding to effectuate that decision by securing rights-of-way and *augmenting* the state treasury by providing just compensation. While a state could

sensibly (but hopelessly) invoke its sovereign interests to argue that FERC lacks authority to approve a pipeline route that crosses state land without consent, or more realistically try to persuade FERC not to approve such a route, once FERC has approved that route, any sovereign indignity has been wrought by FERC; the ensuing federal-court action *mitigates* that indignity by providing just compensation. It is thus more than passing strange (and a clear indication that New Jersey's goal is more to interfere with federal prerogatives than to protect any true sovereign right) that New Jersey claims sovereign offense not from FERC's certification of a pipeline crossing its land, but from the certificate holder's initiation of an action to provide just compensation for the FERC-authorized crossing. That judicial action ensures the absence of a Fifth Amendment violation; it does not implicate any state sovereign interest not surrendered in the plan of the convention.

The oddity of New Jersey's sovereignty-based objection to the §717f(h) action, but not to the far more serious affront to state dignity worked by FERC's approval of the pipeline route, is underscored by the possibility that Congress could have forced New Jersey to file an inverse-condemnation action to obtain compensation. *See United States v. Dow*, 357 U.S. 17, 21 (1958); 28 U.S.C. §1491(a)(1). If Congress had plainly authorized the taking of state property to build a pipeline without providing a specific mechanism for ensuring just compensation, the onus would be on the state to file an inverse-condemnation action. And New Jersey plainly would not have any sovereign immunity from a suit it initiated itself to obtain just compensation to remedy an otherwise

unconstitutional taking. By putting the onus to file suit on the delegee of the federal eminent-domain power and providing a mechanism for ensuring just compensation, §717f(h) is more respectful of states (and other property owners) and constitutional values. Simply put, §717f(h) does not create an Eleventh Amendment problem; it avoids a Fifth Amendment violation.

The Third Circuit's contrary view is premised on a mistaken understanding of a §717f(h) action. While the court seemed to view a §717f(h) action as an ordinary lawsuit by a private party haling a state defendant into court without authorization from "an accountable federal official," Pet.App.30, that ignores the requirement for a FERC certificate and the nature of the eminent-domain power more broadly. An action to effectuate the eminent-domain power is never a truly "private" action. The eminent-domain power may be delegated to private parties, but it is still an inherently and exclusively governmental power. There is no such thing as a purely "private" condemnation action. A private party may condemn land if and only if the government empowers it to do so. *See California v. Cent. Pac. R.R. Co.*, 127 U.S. 1, 40-41 (1888) ("[T]he right of eminent domain can only be exercised by virtue of a legislative grant."). Here, that empowerment occurs when FERC issues the certificate. When the certificate holder then brings a §717f(h) action, it is not acting as a private party; it is a federal delegee bound by the same strictures as the government: It may condemn land only for public use, and it must pay just compensation. *See Luxton*, 153 U.S. 525; *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974); *Private Takings*, 76 U. Chi. L. Rev. at 545.

That is particularly obvious in a §717f(h) action because, unlike in an ordinary eminent-domain action, public use is not at issue in a §717f(h) action, but is settled first by FERC. Under the NGA, *FERC* decides whether particular lands should be included in the pipeline route when it issues the certificate, 15 U.S.C. §717f(e), and any challenge to the certificate must be raised in the D.C. Circuit. *See infra* Part III. Thus, far from empowering private parties to unilaterally select which parcels should be taken for public use, the NGA delegates the eminent-domain power only for purposes of negotiating the rights-of-way and providing just compensation. In other words, while §717f(h) plainly delegates the federal government's "right of eminent domain" *en haec verba*, because FERC must first approve the pipeline route, the §717f(h) action is principally a mechanism to provide just compensation.

Section 717f(h) proceedings thus do not present the affront to sovereign dignity or the threat to the state fisc posed by ordinary suits by private parties. Private parties have no power to bring §717f(h) actions on their own accord, or to dictate the routes of their pipelines. No party can bring a §717f(h) action without a FERC certificate, and FERC's close control over the lengthy and detailed siting process ensures "the exercise of political responsibility for each [condemnation] suit" the certificate authorizes. *Alden v. Maine*, 527 U.S. 706, 755-56 (1999). Accordingly, to the extent a state takes issue with the decision to take its property to accomplish federal ends, its beef is with FERC, not with the private party who initiates the §717f(h) proceedings. And since the whole point of the

§717f(h) action is to augment the state treasury, there is zero threat to the state fisc.[3]

That reality underscores the absence of any Eleventh Amendment problem here. As noted, the fundamental problem with invoking the Eleventh Amendment as a defense to the exercise of delegated federal eminent-domain power is that any state sovereign immunity in this context was surrendered in the plan of the convention. But even where applicable, the Eleventh Amendment principally protects the dignity and fiscal interests of the states. There is obviously no threat to the fisc from a suit designed to augment the state treasury. And, as noted, any indignity here comes from FERC's decision to approve a route across the land of an unconsenting state for the public use of an interstate pipeline route. Any complaint about that indignity would need to be raised before FERC and the D.C. Circuit (or perhaps in Philadelphia in the summer of 1787). But there is no independent indignity from a suit designed to provide just compensation when the parties cannot agree on the value of a right-of-way for a crossing authorized by a FERC certificate.

If anything, the notion that §717f(h) actions inflict some sovereign injury distinct from the FERC

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[3] That readily distinguishes §717f(h) from efforts to "delegate" the federal government's power to sue states for money damages. *Cf. Blatchford v. Native Village of Noatak*, 501 U.S. 775, 776 (1991). Section 717f(h) does not empower private parties to sue anyone—let alone to sue anyone for money damages, as was the case in *Blatchford*. It empowers them to effectuate a government-approved taking through an *in rem* proceeding that puts money in the property owner's hands.

certificate gets matters backward. There may well be a need for meaningful constraints on the government's ability to delegate its power to decide to take land. A broad delegation to a private infrastructure company to condemn land for any project the company deems useful might well raise delegation concerns for private and state landowners alike. But where Congress or a federal agency itself authorizes the taking of a specific parcel and then delegates to a private entity the essentially ministerial duties of obtaining the right-of-way for the parcel and furnishing just compensation for the landowner, there is no delegation problem and no Eleventh Amendment problem as to state land if the delegee initiates the follow-on suit.

Nor would anything of constitutional value be accomplished by forcing FERC to initiate the follow-on suit itself. Indeed, forcing FERC to bring the §717f(h) action itself would skew the negotiation process against the interests of states by eliminating the certificate holder's powerful incentives to pay fair value in order to avoid litigation costs and move forward with the project expeditiously. After all, few (if any) litigants have a lower marginal cost of litigating or a greater vested interest in condemning property on the cheap than the federal government. More fundamentally, forcing FERC itself to bring §717f(h) actions would preclude certificate holders from doing the one thing Congress most wanted them to be able to do: relieve FERC of the burden of effectuating its certificate decision by initiating numerous negotiations and judicial actions only to transfer the right-of-way to the certificate holder in the end. *But see Cherokee Nation*, 135 U.S. at 658 ("[I]t would clearly be pressing a constitutional maxim

to an absurd extreme if it were to be held that the public necessity should only be provided for in the way which is least consistent with the public interest.").

C. The *In Rem* Nature of §717f(h) Actions Confirms That They Raise No Distinct Sovereign Immunity Concerns.

New Jersey's insistence that §717f(h) actions impose some sovereign injury distinct from the concededly permissible FERC authorization for the pipeline to cross state lands is all the more inexplicable given the *in rem* nature of §717f(h) actions. An *in rem* action does not hale an unconsenting state into court, but rather hales the property into court. The judgment in an *in rem* suit "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, the exercise of *in rem* jurisdiction "does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction." *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 378 (2006). This Court has therefore rejected claims of sovereign immunity from *in rem* actions that do not implicate the interests underpinning sovereign immunity.

In *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), for example, the Court held that sovereign immunity does not bar *in rem* bankruptcy actions seeking to discharge debts owed to a state. *Id.* at 450-51. The Court explained that such actions are "not an affront to the sovereignty of the State" because the debtor "does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor does he subject an unwilling State to a

coercive judicial process." *Id.* at 450-51 & n.5. Likewise, in *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506 (1998), the Court held that sovereign immunity does not bar federal jurisdiction over *in rem* admiralty actions when the state is not in possession of the *res*, as a judgment in such a case would not require "property of the sovereign … to be seized." *Id.* at 505, 507-08. In both cases, the *in rem* nature of the action and the specific features of the requested relief defeated any claim that federal jurisdiction would be "threatening to state sovereignty." *Hood*, 541 U.S. at 451.

A §717f(h) action is the archetypal *in rem* action that does not implicate any special sovereignty interests. To be sure, states undoubtedly have an interest in whether property they own is subjected to a right-of-way. But the states surrendered *that* sovereign interest to the federal government in the plan of the convention. And as to the specific parcels at issue here, the intrusion on *that* sovereign interest took place in Washington, D.C., before FERC. The federal *in rem* lawsuit filed in New Jersey, by contrast, poses no distinct affront to state sovereignty. It did not hale New Jersey into court seeking monetary relief. Just the opposite: The principal purpose of a §717f(h) action is to provide affirmative relief *to* the property owner in the form of just compensation for a right-of-way for a crossing that FERC has already authorized. That is particularly true of §717f(h) actions since any issue beyond transferring the right-of-way and valuing the property interest is jurisdictionally foreclosed. Far from "seeking to impose a liability which must be paid from public funds in the state treasury," *Edelman v. Jordan*, 415

U.S. 651, 663 (1974), §717f(h) actions aim to augment the state treasury by paying "fair market value" for the property interests being taken, *United States v. 50 Acres of Land*, 469 U.S. 24, 25 (1984). It is difficult to imagine how state sovereign interests could be offended by an action whose purpose is to make good on the Fifth Amendment's promise of just compensation, especially when the state concedes the federal government's power to authorize the crossing.

The fact that §717f(h) actions provide affirmative relief *to* the state is enough to defeat any claim that they are "threatening to state sovereignty." *Hood*, 541 U.S. at 451. But such actions also do not threaten any of the other interests sovereign immunity protects. A §717f(h) action does not "subject an unwilling State to a coercive judicial process," *Hood*, 541 U.S. at 450, as there are no indispensable parties to an eminent-domain action. A state in theory could refuse to appear and retain its right to compensation. *See A.W. Duckett & Co. v. United States*, 266 U.S. 149, 151 (1924). And a §717f(h) action certainly does not require a state "to defend itself" against charges of wrongdoing, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002), as such an action "is merely an inquisition to establish a particular fact," *i.e.*, "the value of the property," so that the state can be made whole. *United States v. Jones*, 109 U.S. 513, 519 (1883).

The conclusion that §717f(h) actions do not impose any sovereign injury distinct from the FERC certificate is reinforced by the immovable-property doctrine, which, as noted, generally provides that a sovereign has no sovereign immunity from a lawsuit

concerning real property in the jurisdiction of another sovereign. *See supra* p.32. As that doctrine reflects, a foreign government cannot get around the superior sovereign's exercise of eminent domain over its land by claiming that the condemnation proceeding itself inflicts some sovereign injury distinct from the permissible taking. If a foreign sovereign happened to own land in New Jersey crossed by a FERC-approved pipeline, it would not be able to assert an immunity either before FERC or as a defense to a §717f(h) action. The immovable-property doctrine thus reinforces the conclusion that states have no distinct immunity from the proceeding through which an exercise of the superior federal government's eminent-domain power is effectuated.

III. The Court Of Appeals Properly Exercised Jurisdiction Over This Case.

This Court directed the parties to brief whether the "Court of Appeals properly exercise[d] jurisdiction over this case." Order Granting Certiorari, *PennEast Pipeline Co., LLC v. New Jersey*, No. 19-1039, 2021 WL 357257, at *1 (U.S. Feb. 3, 2021). The answer is yes, but only because of the limited scope of what can be litigated in §717f(h) actions and the peculiar and limited nature of New Jersey's objection.

The NGA vests "exclusive" jurisdiction to "affirm, modify, or set aside" FERC-issued certificates of public necessity and convenience in the D.C. Circuit or the circuit in which the natural gas company is located has its principal place of business. 15 U.S.C. §717r(b). To obtain judicial review under that provision, a party to the administrative proceeding must seek rehearing from FERC and then petition for review in the

appropriate court of appeals within 60 days of FERC's decision on the rehearing petition. *Id.* "Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part." *Id*.

In C*ity of Tacoma v. Taxpayers*, 357 U.S. 320 (1958), this Court held that a substantively identical provision of the FPA, 16 U.S.C. §825*l*, prohibited the state of Washington from collaterally attacking a license granted to the City of Tacoma by FERC's predecessor, the Federal Power Commission. Washington, after unsuccessfully challenging the license before the Commission and on direct review, argued in a subsequent state-court proceeding that the federal license was invalid because it improperly authorized the city to exceed its statutory capacity under state law. *City of Tacoma*, 357 U.S. at 332. This Court held that Washington's collateral attack was barred by the FPA's judicial review provision, which vested "exclusive jurisdiction to affirm, modify, or set aside the Commission's order" in the court of appeals on direct review from the Commission proceedings. *Id.* at 339.

City of Tacoma and §717r(b) would have plainly precluded New Jersey from resisting PennEast's §717f(h) action on any basis that collaterally attacked the FERC certificate. Thus, as noted, any argument that the pipeline was not for a public use, or that its route was imprudent, would need to be brought before FERC and the D.C. Circuit or not at all. But that is not how PennEast has understood New Jersey's objection here. New Jersey has repeatedly made clear

that it is not challenging here either FERC's decision to grant PennEast's certificate or PennEast's status as a valid certificate holder. *See, e.g.*, NJ.Supp.Br.3. Likewise, New Jersey concedes that it would have no objection if FERC itself were to file the same judicial action, for the same right-of-way across the same land, for the same pipeline. NJ.CA3.24. In other words, at least for purposes of this proceeding, PennEast understands New Jersey to have no beef with the certificate or with the fact that the pipeline it authorizes crosses state lands; it challenges only PennEast's ability to initiate a §717f(h) action for a right-of-way across lands in which New Jersey has an interest.

The limited nature of New Jersey's challenge underscores why it is meritless: Section 717f(h) plainly authorizes a certificate holder (and not FERC) to initiate an eminent domain action to obtain rights-of-way and just as plainly does not exempt state land. *See supra* Part I. But it also explains why PennEast has never understood New Jersey's challenge to be a collateral attack. Consistent with the very narrow office of §717f(h) actions, New Jersey has not collaterally attacked the certificate. And while it *is* making arguments that go to the validity of the certificate in the D.C. Circuit (subject to review that is appropriately deferential to FERC's decision), it is not challenging FERC's authority to approve a pipeline that crosses state law *vel non*. *See* Joint Brief of New Jersey Dep't of Env't Prot. et al. 3-4, *New Jersey Dep't of Env't Prot. v. FERC*, No. 18-1144 (D.C. Cir. filed December 21, 2018).

To be sure, if New Jersey *were* collaterally attacking the certificate in these proceedings—or if this Court viewed its challenge as amounting to a collateral attack—then the courts below would have lacked jurisdiction to consider that challenge. Like the FPA provision in *City of Tacoma*, the NGA's judicial-review provision requires challenges to a FERC certificate to be brought on direct review from the FERC proceedings "or not at all." 357 U.S. at 336. Thus, if New Jersey's argument here were construed as a collateral attack on the certificate, §717r(b) would bar it from making that argument.

But even if §717f(h) barred New Jersey's collateral attack, that would not mean that either the District of New Jersey or the Third Circuit lacked "jurisdiction over this case." The district court had jurisdiction over PennEast's *in rem* action under 15 U.S.C. §717f(h), and the court of appeals had jurisdiction over New Jersey's appeal under 28 U.S.C. §1292(a) and the collateral-order doctrine, *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). To the extent New Jersey raised a collateral attack, it would not divest the courts below of their Article III jurisdiction over the condemnation action or the appeal therefrom; those courts would simply be unable to consider the improper collateral attack. In other words, while the NGA's judicial review provision channels challenges to FERC certificates to a specific court, a party's attempt to assert such a challenge as a defense in some other court does not strip that court of its jurisdiction over the plaintiff's action. The court can proceed to adjudicate the dispute as if the improper argument were never raised. Accordingly, if this Court were to

construe New Jersey's challenge as a collateral attack, then it should vacate and remand with instructions for the lower courts to award PennEast the rights-of-way it seeks and to resolve the one issue that is indisputably properly before them—namely, the amount of just compensation due New Jersey for those rights-of-way.

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

The NGA has supported the energy needs of this country for nearly a century, but it cannot continue to do so if every state can exercise an effective veto power over interstate pipelines. The Third Circuit's reading of the NGA creates exactly such a power, allowing New Jersey to stymie a pipeline project that FERC found to be in the national interest through the simple expedient of objecting to a follow-on proceeding designed to provide it with just compensation. That not only gives states a veto power over federally approved pipelines, but creates gravely misaligned incentives, as a private property owner seeking to preclude construction of a pipeline could do so by granting an easement to a state that shares its opposition. That is not the system Congress created; it is more akin to the one Congress abandoned when it decided to equip certificate holders with the eminent-domain power. No sensible regime for interstate pipelines would give one state unfettered power to block a pipeline project that will benefit many others. Interstate pipelines are classic channels of interstate commerce. They are the last place states should enjoy

a veto power, and it is utterly implausible that Congress granted them one in the NGA.

That is particularly true given how extensive such a power would be. It is the rare project that does not cross at least some property in which a state holds at least some interest. In fact, 44 states (including every state east of the Mississippi River) have fee interests in riverbeds that form state boundaries. The Third Circuit's reading converts those state boundaries into potential barriers to pipeline development, frustrating the federal interest in the interstate transport of natural gas. The problems would not necessarily end with state lands, as the logic of New Jersey's position would extend equally to an effort bring a §717f(h) action against land owned by tribe, even if the tribe owned the land only in fee. And the problems with state property interests would extend well beyond the state's fee interests as this case well illustrates. New Jersey, for instance, claims a property interest in more than 1,300 square miles—more than 15% of all land in the state—including through recently conveyed non-possessory easements. *See* J.A.429, ¶60 & n.228. 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 power, and they *a fortiori* vindicate the wisdom of Congress' approach in the NGA of not exempting state lands at all.

The disruptive effects of the Third Circuit's interpretation are difficult to overstate. 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 Admin., U.S. Dep't of Transp., https://bit.ly/36Ztu7L (last visited March 1, 2021). 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. Indeed, 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, https://bit.ly/2Uuw1Ee (last visited March 1, 2021).

The Third Circuit's only answer was to suggest a "work-around" whereby FERC would bring the condemnation action itself and then transfer the rights-of-way to the certificate holder. Pet.App.31. But that "work-around" is merely theoretical. No one—not even the Third Circuit—has ever understood FERC to possess that power, and FERC has conclusively determined that it does not. J.A.391-92, ¶26; J.A.460, 468-69, ¶¶2, 15. Instead, under the system Congress actually designed, FERC is tasked with determining whether a pipeline is appropriate and approving its route, and the certificate holder is tasked with implementing that determination, securing rights-of-way, 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 §717f(h) action if

necessary. Nothing in New Jersey's exceedingly peculiar sovereign immunity argument provides any basis to disrupt that sensible and settled order.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
KASDIN M. MITCHELL
MICHAEL D. LIEBERMAN
MARIEL A. BROOKINS
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

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