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 OF RESPONDENT NEW JERSEY CONSERVATION FOUNDATION

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QUESTIONS PRESENTED

1. Whether a private, out-of-state corporation can hale a State into federal court pursuant to 15 U.S.C. § 717f(h) to condemn the State's property for possible use in interstate commerce.

2. Whether the court of appeals properly exercised jurisdiction over this case.

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PROVISIONS INVOLVED

Article I, section 8 of the U.S. Constitution provides, in relevant part:

> The Congress shall have Power …
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; …
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer.

The Eleventh Amendment to the U.S. Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The pertinent provisions of the Natural Gas Act, 15 U.S.C. §§ 717–717z, are reproduced at Pet. App. 103–166.

STATEMENT

This dispute stems from a business decision by Petitioner PennEast Pipeline Company, LLC, a private company "organized and existing under the laws of the State of Delaware." JA 36. PennEast is a joint venture of several affiliated corporations engaged in the natural-gas business. *Ibid.* PennEast proposed to build "a new 116-mile, 36-inch-diameter greenfield pipeline system" (Pipeline) to

transport gas from northeastern Pennsylvania to central New Jersey. Pet. App. 37. The Pipeline would cross several dozen parcels of land in which Respondents State of New Jersey and various arms of the State (collectively, State) hold interests.[1] PennEast filed these suits in federal court to condemn the parcels, naming the State as a defendant in each case.

Respondent New Jersey Conservation Foundation (NJCF) is also a named defendant, and it holds interests in some of the same parcels. For instance, NJCF holds a conservation, agricultural, and public right-of-way easement in one parcel "for the purpose of protecting, preserving and retaining the Property as conservation and agricultural lands and open space." Compl. exh. E at 1, *PennEast v. A Permanent Easement for 1.41 Acres*, D.N.J. No. 3:18-cv-01699 (Feb. 7, 2018). In 1998, for $310,501 in consideration, NJCF deeded the State part of its interest. *Id.* at 2. The State has spent more than one billion dollars to acquire properties like this under a 60-year-old program (called Green Acres) "to purchase, and help local governments purchase, land for recreation and conservation." Pet. App. 5 n.4; see N.J. Const. art. VIII, § 2, ¶¶ 6–7.

A. Statutory and Regulatory Background

1. Congress enacted the Natural Gas Act of 1938 (NGA), Pub. L. No. 75-688, 52 Stat. 821, pursuant to the Interstate Commerce Clause. See 15 U.S.C. § 717(a). The NGA's "overriding … purpose was to plug the 'gap' in regulation of natural-gas companies resulting from judicial

[1] Forty-two such parcels are at issue here. Pet. App. 2. Several other State-owned parcels are the subject of separate litigation that has been stayed pending the disposition of this case. Abeyance Order, *PennEast v. A Permanent Easement for 0.21 Acres*, D.N.J. No. 3:19-cv-01097 (Mar. 2, 2020).

decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business." *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682–683 (1954).

Section 7 of the NGA prohibits "the construction … of any facilities" for an interstate gas pipeline without permission from the Federal Energy Regulatory Commission (FERC). 15 U.S.C. § 717f(c)(1)(A). A successor to the Federal Power Commission, 42 U.S.C. § 7172(a)(1)(D), FERC is "an independent regulatory commission" housed within the U.S. Department of Energy, *id.* § 7171(a), but "not … responsible to or subject to [its] supervision or direction," *id.* § 7171(d). Neither Congress nor the President exercises control over FERC proceedings. See *id.* § 7175 (allowing Secretary of Energy to "participate" in FERC proceedings on equal procedural footing with other parties).

FERC's role in gas-pipeline siting is reactive. It does not site or build pipelines. Nor does it, absent circumstances not relevant here, order anyone to build a pipeline.[2] FERC does not identify areas of the Nation that would benefit from new pipelines. JA 51, 308.[3] Even when presented with a specific route for a proposed pipeline, the NGA does not direct FERC to explore alternate routes that could better serve the public interest. See JA 228;

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[2] Compare 15 U.S.C. § 717f(a) (authorizing FERC to direct regulated company to extend pipeline to serve new customers where extension would not unduly burden the company or impair service to existing customers); Emergency Natural Gas Act, Pub. L. No. 95-2, §§ 4(a)(1)(C), 6(c)(1), 91 Stat. 4, 5, 8 (Feb. 2, 1977) (authorizing President to require gas pipeline construction during national emergency).

[3] Compare 16 U.S.C. § 824p(a)(2) (Federal Power Act provision directing Secretary of Energy to identify "national interest electric transmission corridor[s]" in "geographic area[s] experiencing … capacity constraints or congestion that adversely affects consumers").

FERC, *Certification of New Interstate Natural Gas Pipeline Facilities; Statement of Policy*, 64 Fed. Reg. 51,309, 51,315 (Sept. 22, 1999) (*Policy Statement*) ("[T]he choice of how to structure the project … is left to the applicant's discretion."). As FERC explained in this case, it "does not direct the development of the gas industry's infrastructure regionally or on a project-by-project basis, or redefine an applicant's stated purpose." *PennEast Pipeline Project: Final Environmental Impact Statement: Vol. I* (*FEIS*) 1-42 (Apr. 2017), https://tinyurl.com/73cb3fk.

FERC simply conducts individual adjudications at the behest of companies that wish to construct gas pipelines in locations they specify, for their own reasons. A Section 7 certificate proceeding is initiated by a person applying to build or extend a pipeline. 15 U.S.C. § 717f(d). FERC and the applicant are the only necessary parties, 18 C.F.R. § 385.102(b), though FERC "*may* admit … any interested State" as an intervenor, 15 U.S.C. § 717n(e) (emphasis added). Only parties that sought and obtained intervenor status before FERC are eligible to seek judicial review of its certificate order. 15 U.S.C. § 717r(a), (b). Cf. 18 C.F.R. § 385.214(a)(2) (allowing FERC to deny intervention, and judicial review, to State whose appearance is untimely).

At the end of the adjudication, FERC "shall issue[ ]" a certificate if the applicant's pipeline "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). That does not mean a pipeline is "indispensably requisite" or "an absolute necessity." *In re Kansas Pipe Line & Gas Co. & North Dakota Consumers Gas Company*, 2 Fed. Power Comm'n 29, 56 (Oct. 24, 1939). Rather, FERC uses a "sliding scale approach" to determine if "project benefits will outweigh adverse impacts on economic interests." FERC, *Certification of New*

Interstate Natural Gas Facilities, 83 Fed. Reg. 18,020, 18,027 (Apr. 25, 2018) (*Policy Review*); see also *Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 23 (1961).

A certificate removes Section 7 of the NGA as a legal impediment to the "acts or operations" of pipeline "construction." 15 U.S.C. § 717f(c)(1)(A). But a certificate is not the Federal government's last word on whether a gas pipeline may be built. FERC typically issues "conditional" certificates before applicants receive the many other "permits, special use authorizations, certifications, opinions, [and] other approvals" that typically are "required under Federal law" before a pipeline can be built or operated. *Id.* § 717n(a)(2); see JA 181. Securing a Section 7 certificate is thus "merely a first step for [an applicant] to take in the complex procedure [for] actually obtaining construction approval." *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 398 (D.C. Cir. 2017).

2. Nonetheless, Section 7(h) of the NGA provides that the certificate *alone* imbues its holder with a condemnation cause of action. The holder "may" at its discretion—and without notice to the Federal government—file suit to condemn a "right-of-way," "land or other property" that is "necessary … to construct, operate, and maintain a pipe line." 15 U.S.C. § 717f(h). If "the owner of the property" values it at more than $3,000, Section 7(h) confers jurisdiction over such a suit on the federal district court for the district where the property is located. *Ibid.*[4]

"The Commission itself does not grant the use of eminent domain across specific properties." *Policy Review*, 83 Fed. Reg. at 18,031. Indeed, when it issues a certificate,

[4] The courts of the situs State have jurisdiction over Section 7(h) suits irrespective of the amount in controversy. 15 U.S.C. § 717f(h).

FERC may not even know who holds title to properties in a pipeline's path.[5] FERC has long maintained that it "is not the appropriate forum in which to adjudicate property rights." *Californians for Renewable Energy, Inc. v. Williams*, 135 FERC ¶ 61,158, at P19 (2011). FERC "encourage[s]" applicants to "minimize the adverse impact" of pipelines on landowners. *Policy Statement*, 64 Fed. Reg. at 51,316. But so long as an applicant takes steps toward that end, FERC may issue a certificate if, in its view, a pipeline's projected economic benefits outweigh losses to other "economic interests," including "property rights of landowners." *Id.* at 51,318.

Once a certificate issues, FERC does not participate in or "oversee the acquisition of property rights through eminent domain proceedings." *Rover Pipeline LLC*, 158 FERC ¶ 61,109 at P70 (2017); see JA 375 n.47. That process is entirely within the control of the private party holding the Section 7 certificate. FERC does not limit a pipeline company's use of eminent domain. JA 239. It does not decide when condemnation suits are filed, whether the company has made sufficient effort to acquire property consensually, or what compensation is just. JA 375 n.47. And it does not control what the certificate holder does with the property once condemnation is effected. There is no mechanism for a landowner to recover title transferred in a Section 7(h) suit, even if the certificate holder proves unable or unwilling to construct a gas pipeline.[6]

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[5] See FERC Off. of Energy Projects, Guidance Manual for Environmental Report Preparation for Applications Filed Under the Natural Gas Act: Vol. 1," p. 4-19 (Feb. 2017) (explaining that applicants are "not required" to "provide a means for" FERC "to match landowners to property tracts"), https://tinyurl.com/2b2a8nx8.

[6] This problem is not abstract. Weeks after withstanding a legal challenge to a distinct federal approval required for a gas pipeline—a

3. A Section 7 certificate is not subject to immediate judicial review because the NGA has a "virtually unheard-of" "mandatory petition-for-rehearing requirement." *ASARCO, Inc. v. FERC*, 777 F.2d 764, 774 (D.C. Cir. 1985) (Scalia, J.). Only a party to the original proceeding may petition FERC to rehear a certificate order. 15 U.S.C. § 717r(a). And, whereas most mandatory administrative-exhaustion schemes render agency action "inoperative pending [further] review," *Darby v. Cisneros*, 509 U.S. 137, 154 (1993), the Section 7 certificate remains in effect while FERC rehears it unless FERC says otherwise, 15 U.S.C. § 717r(c). Owing to a recently enacted regulation, see U.S. Br. 18, a certificate holder may not engage in "construction activities" pending FERC's rehearing. 18 C.F.R. § 157.23. But it *can* proceed with condemnation.

The NGA thus "split the atom of finality." *Allegheny Def. Proj. v. FERC*, 964 F.3d 1, 10 (D.C. Cir. 2020) (en banc). Section 7 certificates "are not final enough for aggrieved parties to seek relief in court, but they are final enough for private pipeline companies to go to court and take private property by eminent domain." *Ibid.* In a case like this one, where other required approvals remain outstanding, Section 7(h) entitles a private corporation "to exercise eminent domain while the Commission waits to

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permit to cross the Appalachian Trail within a national forest, see *U.S. Forest Serv. v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837 (2020)—Section 7 certificate holder Atlantic Coast Pipeline, LLC cancelled a proposed 600-mile pipeline from West Virginia to North Carolina. See FERC, *Atlantic Coast Pipeline, LLC, Eastern Gas Transmission & Storage, Inc.; Notice of Amendment of Certificates and Opening of Scoping Period*, 86 Fed. Reg. 13,360 (Mar. 8, 2021). Atlantic Coast has declined to surrender property that it condemned upon receiving FERC's certificate. See Elizabeth McGowan, "No longer in Atlantic Coast Pipeline's path, landowners consider next steps," Energy News Network (July 30, 2020), https://tinyurl.com/yeshveps.

confirm that the pipeline is in the public interest," JA 210 (dissent of Comm'r Glick), before State and federal agencies have determined the project's lawfulness, and before FERC's certificate has received any judicial scrutiny.

After FERC disposes of the rehearing petition(s), a landowner that has *both* been party to the Section 7 proceeding *and* sought rehearing of FERC's order may obtain judicial review of the Section 7 certificate in the federal courts of appeals. 15 U.S.C. § 717r(a), (b). Such review normally is restricted to issues raised in a rehearing petition. *Id.* § 717r(b). The Administrative Procedure Act supplies the standard of review, see 5 U.S.C. § 706(2)(A), and FERC's factfinding, "if supported by substantial evidence, shall be conclusive," 15 U.S.C. § 717r(b).

B. Procedural History

1. PennEast initiated a Section 7 proceeding in 2015 by applying to FERC for a certificate to construct and operate the Pipeline. FERC permitted the State and NJCF to intervene in the proceeding. See Pet. App. 38.

As evidence of "need" for the Pipeline, PennEast proffered commitments by corporate affiliates to ship enough gas through the Pipeline to fill two-thirds of its capacity, and smaller commitments by other parties. JA 36, 38–39. Based on those commitments, FERC found that the Pipeline would have "economic benefits" and therefore, under FERC's approach, was "needed," JA 44 n.16, 57.

During the certificate proceeding, PennEast rerouted the Pipeline in New Jersey around all property, including conservation easements, held by the United States, *FEIS* p. 4-164, but not all property held by the State. PennEast rejected several alternate routes that would have reduced or eliminated the need to acquire State-owned property. *E.g.*, *id.* p. 3-22, app. F-66 (depicting PennEast's rejection

of reroute around State's Gravel Hill Preserve); see also Cert. of Kevin Appelget ¶¶ 18–19, *PennEast v. A Permanent Easement for 0.21 Acres*, D.N.J. No. 3:19-cv-01097 (filed Apr. 15, 2019) (noting that State paid over $2 million to acquire property for this Preserve in 2009 and 2013).

FERC recognized that PennEast had not "acquire[d] easements for the portions of its proposed pipeline route that would cross land in which [the State of] New Jersey holds a property interest," JA 365, but FERC decided the company had taken "sufficient steps to minimize adverse impacts" on the State, JA 58, citing its meetings with public officials and "'informational sessions' for impacted landowners," and the fact that *some* changes had been made to the Pipeline route "for various reasons," JA 59.

In January 2018, FERC issued PennEast a Section 7 certificate (Certificate). JA 170–172. FERC found "that the public convenience and necessity requires approval" due to "the benefits the project will provide to the shippers, the lack of adverse effects on existing customers, other pipelines and their captive customers, and effects on landowners and surrounding communities." JA 59.

Other required approvals remained outstanding, and still do. The State had not certified that "discharge[s] into the navigable waters" from PennEast's project "will comply with" the Clean Water Act, 33 U.S.C. § 1341(a)(1); see JA 255. Neither had the U.S. Army Corps of Engineers. See 33 U.S.C. § 1344(a); JA 113–114. The Delaware River Basin Commission had not provided necessary authorizations for the Pipeline. See Delaware River Basin Compact, Pub. L. No. 87-328, art. 10, 75 Stat. 688, 699 (1961); see JA 188. And FERC itself had yet to determine the project's effect on historic properties. 54 U.S.C. § 306108; see JA 138–139, 196–197.

Even the Pipeline's route remained subject to change. The Certificate allowed PennEast to make certain "route realignments or facility relocations" not "previously identified in filings." JA 175. And, separate from the Certificate, FERC issued PennEast a "blanket construction certificate" for use in locations outside the Pipeline route not yet disclosed to FERC. JA 171; see 18 C.F.R. § 157.208.

A majority of FERC's Commissioners filed separate statements. Commissioners LaFleur and Chatterjee supported the order despite the project's "momentous effect" on landowners. JA 204; see also JA 202. Commissioner (now Chair) Glick dissented and amplified that concern. He perceived PennEast "us[ing] the pipeline certification process as an end run around states and landowners." JA 210. And he decried the lack of "restriction on a pipeline developer's ability to exercise eminent domain while the Commission waits to confirm that the pipeline is in the public interest." *Ibid.*

2. Less than three weeks after receiving the Certificate, PennEast filed suits in federal district court in New Jersey to condemn more than 100 parcels. Pet. App. 4, 50.

PennEast proceeded under Federal Rule of Civil Procedure 71.1, see Pet. App. 73, under which a condemnor "need join as defendants … persons who have or claim an interest in the property and whose names are then known," Rule 71.1(c)(3). PennEast named the State as a defendant "in over twenty [consolidated] cases." Pet. App. 53. In each case, the State "appeared of record to have an interest in the said land." Compl. 6, *PennEast v. A Permanent Easement for 1.92 Acres*, D.N.J. No. 3:18-cv-01597 (filed Feb. 6, 2018); see, *e.g.*, *id.* at 144–166 (attaching copy of encumbrance recorded in favor of the State). The State was served with process.

PennEast simultaneously applied to the district court for an order confirming the company's authority to take the subject parcels and granting it immediate possession. Pet. App. 34. The court "ordered the affected property owners," including the State, "to show cause why the [c]ourt should not grant the relief sought." *Id.* at 6. The State objected, contending that the Eleventh Amendment prohibited PennEast's suits against it—because they were subject to a sovereign-immunity bar, and the NGA could not, consistent with this Court's precedents, be construed as displacing that immunity. *Ibid.* NJCF also objected and joined in the State's arguments. *Id.* at 55.

3. While PennEast's application for preliminary relief was pending in the district court, the State, NJCF, and other landowners petitioned FERC to stay and rehear the Certificate. JA 222, 334; see 15 U.S.C. § 717r(a), (c). The State argued "that it [was] 'premature' to grant PennEast eminent domain authority," JA 235, and asked FERC to, at a minimum, amend the Certificate "to avoid impacts on state-owned or preserved lands," JA 330.

The NGA provides that "[u]nless the Commission acts upon" a rehearing petition "within thirty days," it will be "deemed … denied," 15 U.S.C. § 717r(a), paving the way for judicial review of a certificate. To further delay that review, however, FERC "tolled" its rehearing of the Certificate indefinitely to "afford [FERC] additional time for consideration," JA 212, as condemnation of State-owned and privately-owned property proceeded. FERC later issued an order tolling rehearing of the order tolling rehearing of the Certificate; and, thereafter, an order tolling rehearing of the order tolling rehearing of the order tolling

rehearing of the Certificate. See *PennEast*, 163 FERC ¶ 61,159 at P5 (May 30, 2018).[7]

4. In an abundance of caution, the State petitioned the D.C. Circuit to review the FERC order granting the Certificate and the recursive tolling orders. Pet. App. 4 n.2. FERC moved to dismiss the petition as "incurably premature" because there could be no "final decision" on the Certificate until FERC concluded its rehearing. Resp. Mot. to Dismiss 6, *N.J. Dep't of Envtl. Protection v. FERC* (*NJDEP*), D.C. Cir. No. 18-1144, ECF 1733006 (May 29, 2018). FERC insisted that "Congress designed the [NGA] to produce th[e] default outcome" that appropriation of State lands occur in advance of judicial review of a certificate. Resp. Reply to Mot. to Dismiss 9, *NJDEP*, *supra*, ECF 1735803, (June 13, 2018). FERC further asserted that "[a]ny challenge … as to eminent domain proceedings" was "not properly before" the D.C. Circuit because "[d]istrict courts or state courts, not the Commission, have jurisdiction over [those] proceedings." *Id.* at 11. PennEast joined FERC's arguments for dismissal. PennEast Mot. to Dismiss 1, *NJDEP*, ECF 1737664 (June 25, 2018).

5. In May 2018, FERC denied petitions for rehearing of its nested tolling orders but did not dispose of petitions to rehear the Certificate itself. *PennEast*, 163 FERC ¶ 61,159. In so doing, FERC pronounced the "mere postponement of the judicial enquiry" into its Certificate to be unproblematic because only "property rights [were] involved.'" *Id.* at P11 (quoting *Phillips v. C.I.R.*, 283 U.S. 589, 596 (1931)).

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[7] After the relevant events in this case, the D.C. Circuit, sitting en banc, held "that the Commission cannot use tolling orders to change the statutorily prescribed jurisdictional consequences of its inaction" on a rehearing petition after thirty days. *Allegheny*, 964 F.3d at 16.

6. Finally, in August 2018—seven months after issuing the Certificate—FERC, by a 3–2 vote, "rejected, dismissed, or denied" the petitions to rehear the Certificate, JA 214, and denied as moot the requests for a stay, JA 222.

In its rehearing order, FERC "recognize[d] that the [Pipeline] cannot proceed until it receives all other necessary federal authorizations," and that other agencies "retain full authority to … deny" the authorizations. JA 255–256. FERC found, however, that "regardless of" whether the Pipeline could or would be built, JA 237, condemnation of State-owned and privately-owned lands along its *tentative* route would "serve a 'public purpose,'" JA 236 (quoting *Kelo v. City of New London*, 545 U.S. 469 (2005)); see also JA 285 (observing that FERC "ha[d] yet to reach a decision" on the final Pipeline route).

Although title to lands would irrevocably pass to PennEast in a condemnation suit, FERC assured that "impacts on landowners will be minimized" by their receipt of just compensation and PennEast's inability to begin *construction* without required approvals. JA 238. In FERC's estimation, "states' rights … are fully protected" under this regime. JA 256. FERC again declined to engage with "[i]ssues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h)," which "are matters for the applicable state or federal court." JA 239–240.

7. After FERC disposed of their rehearing petitions, the State, NJCF, and other parties petitioned for review of the Certificate by the D.C. Circuit, which is now holding the petitions in abeyance pending disposition of this case. Order, *NJDEP*, *supra*, ECF No. 1808931 (Oct. 1, 2019).

C. Decisions Below

1. In December 2018, the district court granted PennEast's application for orders of condemnation and immediate possession. Pet. App. 99.

As a threshold matter, the court rejected the State's claim of sovereign immunity. The court deemed the Eleventh Amendment "inapplicable" here because "PennEast has been vested with the federal government's eminent domain powers and stands in the shoes of the sovereign." Pet. App. 64–66. The court then held that Section 7(h) authorized condemnation of State property. *Id.* at 76–87.

The court granted PennEast's application for immediate possession of all the subject parcels. Pet. App. 99. The court found that landowners would "not be harmed" by PennEast's possession of the parcels because "the taking of property can be monetarily compensated." *Id.* at 95–96. The court further "ordered that the U.S. Marshals could investigate, arrest, imprison, or bring to [c]ourt any property owner," including the State, that attempted to interfere with PennEast's possession. *Id.* at 8 n.7; see *id.* at 95.

2. Although the district court's ruling did not end the case, the State took an interlocutory appeal to vindicate its "immunity from suit." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.* (*PRASA*), 506 U.S. 139, 144 (1993). The Third Circuit, after confirming its appellate jurisdiction (which no one contested), Pet. App. 9–10, vacated the orders of condemnation and possession and remanded to the district court with instructions to dismiss PennEast's claims against the State on sovereign-immunity grounds, *id.* at 31. The court held that "New Jersey's sovereign immunity has not been abrogated by the NGA, nor has there been … a delegation of the federal government's exemption from the State's sovereign immunity."

Id. at 2. It explained that "PennEast's condemnation suits are thus barred by the State's Eleventh Amendment immunity," *id.* at 3, meaning that "the District Court lacked subject matter jurisdiction over the suits insofar as they implicated the State's property interests," *id.* at 9.[8]

SUMMARY OF ARGUMENT

I. The court of appeals properly directed the district court to dismiss the State of New Jersey as a defendant in PennEast's suits to condemn the State's property.

A. The Eleventh Amendment forecloses these suits by its terms. An action to condemn property is a "suit in law." PennEast, a "Citizen of another State," "commenced" and "prosecuted" these suits in its own name, at its own pace, and for its own relief. The Federal government played no role beyond FERC's issuance of the Certificate, which did not order condemnation of property or otherwise control the conduct of litigation. And these suits are "against" the State, both in name and in effect.

B. 1. The Constitution does not authorize Congress to subject States to private suits to condemn their property

[8] After the Third Circuit ruled, PennEast petitioned FERC to issue a declaratory order construing the NGA as authorizing Section 7 certificate holders to condemn State property. JA 368. FERC denied the petition insofar as it sought an opinion on "the 'sufficiency' of NGA section 7(h) for purposes of abrogating state sovereign immunity or delegating federal authority under the Eleventh Amendment." JA 393; see also JA 469. FERC granted the petition in part and issued an order ostensibly "declaring" that Section 7(h) authorizes condemnation of State property, JA 435—but refusing to decide whether or not a clear-statement rule governed, see JA 480. FERC thereafter denied rehearing of that order and reiterated its reading of Section 7(h), despite acknowledging "the statute's ambiguity and silence with respect to lands in which states hold an interest." JA 471; see also JA 501 & n.34 (dissent of Comm'r Glick).

for (possible) use in interstate commerce. The Commerce Clause does not permit it. Nor the Necessary and Proper Clause, the ultimate source of any eminent-domain power adduced by PennEast. Because countermanding the Eleventh Amendment is an *im*proper means for Congress to carry into execution its commerce power, the NGA could not have overridden New Jersey's sovereign immunity.

2. In any case, the NGA did not authorize private suits to condemn State property. Its text is silent on the issue, and silence can never overcome the privilege of States (or, for that matter, the United States) not to be sued. Legislative history confirms that Congress did not contemplate, much less debate, the issue whether States' own property could be condemned. Lastly, Congress's decision—in a wholly different setting, and nearly a half-century after enacting Section 7(h)—to carve out of the Federal Power Act's hydropower title an exemption from condemnation for certain State property cannot bear the decisive weight PennEast places on it.

PennEast and its amici urge that Congress *must* have intended to authorize private suits to condemn State land because otherwise pipelines would be too hard to build. "It must be in there somewhere" arguments have even less purchase than usual where the elusive words carry mighty constitutional significance. Regardless, the evidence cuts against the company's dire predictions. Gas-pipeline construction did not crater in the 18 months since the court of appeals' decision, and interstate *oil* pipelines have been built for decades without the exercise (or even the threat) of condemning State property. No State has attempted, let alone managed, to assemble the impenetrable barrier to pipelines PennEast conjures. But were such imaginary interference ever to be tried, the powers the Constitution

actually *does* grant the Federal government are more than enough to deal with it, without having to throw the Eleventh Amendment overboard.

3. Hemmed in by text and a batting of precedent, PennEast and the Solicitor General insist that none of it matters because the States surrendered immunity to private suits to condemn their property as part of "The Plan of the Convention." That invites the Court to ignore everything relevant that happened—and did not happen—at the Convention, during ratification, and *in the following seven decades*. PennEast supplements its history-free "historical" argument with a syllogism: If the Federal government has power to bring condemnation suits against States directly and also has power to authorize private parties to condemn private property, it insists, then the Federal government must have power to authorize a private condemnation suit against a State. That is faulty logic, and it is even worse constitutional law. The States surrendered to the Federal government the power to regulate interstate commerce, but they did not, at the Convention, cede their immunity to private suits that Congress believes may advance a valid legislative purpose.

II. The court of appeals properly exercised jurisdiction over this case. The Solicitor General argues that New Jersey was limited to half its sovereign-immunity defense in the district court, while the other half—the State's claim that the NGA does not authorize private condemnation of its property—must await the D.C. Circuit's long-delayed, "exclusive" review of FERC's certificate order. This passes reason. Congress cannot, and did not, force a State to participate in a second federal suit in order to vindicate its sovereign privilege *not to be sued* in the first suit—particularly when the second suit cannot even begin until the

State has been ordered to surrender possession of its land. Nor, for that matter, can a State be coerced into participating in FERC's certificate adjudication *and* its ensuing rehearing proceeding just to retain a complete Eleventh Amendment defense against private condemnation suits.

ARGUMENT

I. PENNEAST CANNOT CONDEMN STATE PROPERTY

A. The Eleventh Amendment Expressly Prohibits These Suits

The Eleventh Amendment instantiates the particular strand of sovereign immunity applicable here. It reads, in relevant part: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." That text operates to bar a federal court from entertaining a suit by an out-of-state corporation to condemn a State's property interest.

1. A condemnation is "a suit in law or equity." "The right of eminent domain always was a right at common law," and a condemnation action a "suit at common law." *Kohl v. United States*, 91 U.S. (1 Otto) 367, 376 (1875); accord *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959). Indeed, were it not "a suit in law or equity" within the meaning of the Eleventh Amendment, a private condemnation action would not be one of the "cases, in law and equity," U.S. Const. art. III, § 2, within the cognizance of the judicial power of the United States.

2. These condemnation suits were "commenced" and "prosecuted" by PennEast alone. Acting of its own volition, the company filed suit in its own name, to acquire title to property interests in its own name, in exchange for

payments the company would make to property owners from its own coffers. PennEast's title to the properties, once acquired, would not be subject to anyone's direction or control. See *supra*, at 6.

Conversely, these suits were not by any stretch "commenced" or "prosecuted" by the United States. PennEast did not pray for title or other relief on behalf of the United States, nor would any relief accrue to the United States by operation of law. The United States was not an indispensable, necessary, or even a proper plaintiff. Cf. JA 421; *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 285–286 (1888). It played zero role in this litigation until this Court invited its participation as amicus curiae.

The United States did not exercise control over these suits. It did not direct or coerce PennEast to commence the suits or constrain the manner of their prosecution. FERC did not "grant the use of eminent domain across specific properties," *Policy Review*, 83 Fed. Reg. at 18,031, or "oversee the acquisition of property rights through eminent domain proceedings," *Rover Pipeline*, 158 FERC ¶ 61,019, at P70. Even when it issued the Certificate, FERC did not approve a pipeline "route that best serves the federal interest," Pet. Br. 14, only a route proposed by PennEast that met minimum statutory criteria.

"A private party may condemn land if and only if the government empowers it to do so." Pet. Br. 37. And, in this case, PennEast claimed "authority for the taking," Rule 71.1(c)(2)(A), under a federal license (the Certificate) issued pursuant to a federal statute (the NGA). But there is a chasm between a suit *authorized* by the United States and one to which "the United States shall be a *party*." U.S. Const. art. III, § 2 (emphasis added). If every suit author-

ized by federal law were a "Federal" suit, then the century-long battle to carve out a "federal question" exception to state sovereign immunity would finally have been won. Cf. *Alden v. Maine*, 527 U.S. 706, 732 (1999).

The prospect that PennEast's future activities on the condemned property will be subject to Commerce Clause regulation does not change the outcome. The property will not be Federal property, and the company's actions will not be Federal actions. Cf. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 145 (2007) (holding that company does not "act[ ] under [a Federal] officer" for purposes of removal statute, 28 U.S.C. § 1442(a)(1), merely because "a federal regulatory agency directs, supervises, and monitors a company's activities in considerable detail"). PennEast in fact could opt not to construct the Pipeline at all and never become subject to federal regulation. See JA 364–365.

Even when faced with a *qui tam* suit filed by a relator in the name of the United States, alleging injury to the United States, praying for relief the majority of which the United States would receive, and subject to the unconditional right of the United States to intervene and assume prosecution of the suit, this Court has expressed "serious doubt" whether the relator could maintain the suit against a State consistent with the Eleventh Amendment. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000).[9] If the Amendment's protection arguably extends to *qui tam* suits—and firmly extends to suits filed by *federally chartered corporations*,

[9] PennEast invoked the district court's equitable powers to obtain immediate possession, which would have been unnecessary if its suits had been, like a *qui tam* suit, "brought by and in the name of the United States." 40 U.S.C. § 3114(a); see Pet. App. 70–72.

Smith v. Reeves, 178 U.S. 436, 449 (1900)—it surely must encompass private condemnation suits.

3. PennEast brought these suits "against" the State of New Jersey. U.S. Const. amdt. XI. Rule 71.1 governs these proceedings, and it provides that a condemnor "need join as defendants" all affected titleholders of record. Rule 71.1(c)(3).[10] New Jersey and various arms of the State are titleholders of record in these suits. Because federal law required that a sovereign state be "a party on the record," the applicability of the Eleventh Amendment to these suits can be "decided by inspection." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 852 (1824).

That the State is named as a defendant is sufficient but not necessary to conclude that the Eleventh Amendment applies. A suit nonetheless may be barred if "the state is the real, substantial party in interest, … as when the judgment sought would expend itself on the public treasury or domain." *Va. Off. for Protection & Advocacy v. Stewart* (*VOPA*), 563 U.S. 247, 255 (2011) (cleaned up). That description fits this case to a T. The State has "undoubted" power "to regulate the tenure of real property within her limits," especially her *own* property. *United States v. Fox*, 94 U.S. (4 Otto) 315, 320 (1876). Any "control of Federal authority" over the "acquisition and transfer" of State property "seriously embarrass[es] the landed interests of the State." *Id.* at 321. Moreover, compelling a State to surrender a public-use property that it, by definition, values at more than the clearing price in the private market is every bit as (if not more) offensive to sovereignty as a direct incursion on the public fisc. Cf. Pet. Br. 38–39. States

[10] New Jersey law likewise requires that "persons appearing of record to have any interest in the property … shall be made parties" to a condemnation suit. N.J. Ct. R. 4:73-2(a).

accordingly are immune to a private suit whose object is to "acquire state lands." *VOPA*, 563 U.S. at 258.

In sum, the Eleventh Amendment by its terms bars an out-of-state corporation from invoking the federal judicial power to condemn State property. Because the Amendment renders New Jersey immune to PennEast's condemnation suits, and these suits cannot proceed without the State's participation, they must be dismissed unless the NGA abrogated Eleventh Amendment immunity.[11]

B. The NGA Did Not Subject States to Private Condemnation Suits

Congress can subject an unconsenting State to suit only if two distinct conditions are satisfied: (1) "some constitutional provision must allow Congress to have … encroached on the States' sovereignty," and (2) "Congress must have enacted 'unequivocal statutory language'" to overcome States' Eleventh Amendment immunity. *Allen v. Cooper*, 140 S. Ct. 994, 1000–1001 (2020). Neither condition is satisfied here.

1. Commerce Clause legislation cannot abrogate Eleventh Amendment immunity

Congress enacted the NGA pursuant to its Commerce Clause power. See U.S. Const. art. I, § 8, cl. 3; 15 U.S.C. § 717(a); *Panhandle Eastern Pipe Line Co. v. Pub. Serv.*

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[11] Condemnation of parcels in which a State holds an interest—including those in which NJCF also holds an interest—cannot occur if the State cannot be joined as a defendant. Cf. Pet. Br. 43. "[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) (interpreting Rule 19(b)). New Jersey's claims of title to these properties are undisputed, and the injury to its interest from condemnation is manifest.

Comm'n, 332 U.S. 507, 516–524 (1947). And Congress cannot use an Article I power to erode limits the Eleventh Amendment places on federal courts' Article III jurisdiction. *Seminole Tribe v. Florida*, 517 U.S. 44, 65–66 (1994).[12]

Section 7(h), the provision of the NGA that authorizes certificate holders to file condemnation suits, is likewise Commerce Clause legislation. Section 7(h) does not carry out some independent, unenumerated federal power of eminent domain, for none exists. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 681 (1896). The Takings Clause impliedly recognizes that "private property" may "be taken for public use." U.S. Const. amdt. V. But that Clause surely does not "presuppose[ ]," Pet. Br. 5, an untethered federal power to take property already dedicated to public use, let alone a further power to authorize State property to be taken by private parties.

Congress wields the power of eminent domain only insofar as is "necessary and proper for carrying into Execution," U.S. Const. art. I, § 8, cl. 18, enumerated powers. See *Gettysburg*, 160 U.S. at 681. Put differently, the "great substantive and independent power" that underlies Section 7(h), *McCulloch v. Maryland*, 17 U.S. (8 Wheat.) 316, 411 (1819), is not the power of eminent domain but the power to "regulate commerce … among the several States," U.S. Const. I, § 8, cl. 3. *Any* exercise of eminent domain under Section 7(h) is sustainable only as a necessary-and-proper incident of the commerce power.

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[12] Article I empowers Congress to enact bankruptcy laws that authorize private suits against states, but only because "*the Bankruptcy Clause itself* did the abrogating" of state sovereign immunity. *Allen*, 140 S. Ct. at 1003. Likewise, the Eleventh Amendment is "necessarily limited by the enforcement provisions [in Section 5] of the Fourteenth Amendment." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). But the Commerce Clause does not similarly function to abrogate immunity.

Congress has ample discretion to find that the exercise of eminent domain, even by private parties, is "necessary" to promote interstate commerce. See, *e.g.*, *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 657–658 (1890). But the Eleventh Amendment's edict "is not so ephemeral as to dissipate when the subject of the suit is an area … that is under the exclusive control of the Federal Government," *Seminole Tribe*, 517 U.S. at 72, let alone when the subject is an area where the States retain "a residuum of power," *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945). Thus, it cannot be a *proper* "means of achieving objectives otherwise within the scope" of Congress's commerce power "to subject the States to private suits" prohibited by the Eleventh Amendment. *Alden*, 527 U.S. at 732. Cf. *Nat'l Fed'n of Indpt. Business v. Sebelius*, 567 U.S. 519, 559 (2012) (opinion of Roberts, C.J.); *id.* at 653 (Scalia, J., dissenting).

Because Congress cannot "properly" deploy the power of eminent domain incidental to its commerce power in a manner that entitles a Citizen of another State to hale one of the United States into federal court against its will, the NGA could not validly have abrogated New Jersey's sovereign immunity to PennEast's condemnation suits.

2. The NGA did not unequivocally express intent to subject States to private condemnation suits

Even assuming Congress could authorize private parties to condemn State property pursuant to its commerce power, it did not exercise that power here. Congress may subject unconsenting States to suit notwithstanding their "constitutionally secured immunity … only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). The language of the NGA is not unmistakably clear

as to whether the "necessary right-of-way[,] … land [and] other property" to build a pipeline, 15 U.S.C. § 717f(h), includes State property. That ends the inquiry: The NGA does not override Eleventh Amendment immunity. In any event, the pre- and post-enactment history on which Penn-East and its amici rely does not suggest otherwise.

a. The text of the NGA does not unmistakably subject States to condemnation suits

"[I]n this area of the law, evidence of congressional intent must be both unequivocal and textual." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). Yet the text of the NGA is utterly silent on the question whether States are suable.

Section 7(h), the condemnation provision, says nothing of States, their property, or their susceptibility to suit—as FERC has acknowledged, JA 471. The word "property" itself (not "*any* property," Pet. Br. 25–26; U.S. Br. 19) is precisely the sort of generic reference found wanting in this Court's cases. *E.g.*, *Atascadero*, 473 U.S. at 242. The qualifier that property be "necessary" to construct or operate a pipeline, 15 U.S.C. § 717f(h), does not aid Penn-East. Whether property is necessary depends on the route memorialized in a FERC certificate, which in turn depends on what route its holder proposed. One certainly *could* propose to route a pipeline through the property of an unconsenting State, in which case that State would be a "logical defendant[]" in a condemnation suit. *Dellmuth*, 491 U.S. at 232. Mere indeterminacy, however, falls short of "the unequivocal declaration" required to abrogate state sovereign immunity. *Ibid.*

Applying the same clear-statement rule, the Tenth Circuit has construed the NGA not to authorize condemnation suits against property in which the *United States* holds an interest. In *Transwestern Pipeline Co. v. Kerr-McGee*

Corp., 492 F.2d 878 (10th Cir. 1974), cert. dismissed, 419 U.S. 1097 (1975), the court agreed with the United States that Section 7(h) "could not—in the absence of *express* terms to the contrary—be applied to the United States." U.S. Br., 10th Cir. No. 73-1521, at 30 (Oct. 29, 1973). That meant "the power of eminent domain afforded holders of certificates of public convenience and necessity under Section 7(h) of the Natural Gas Act does not extend to lands owned by the United States," 492 F.2d at 883–884, regardless whether the government *possesses* the land, see *id.* at 880 (noting Federal government's "easements or rights of way" and reversionary interest in the property).

If *Transwestern* was rightly decided, PennEast must defend a "plain" (Pet. Br. 26) meaning of *property* that includes property in which no sovereign has an interest and property in which a State has an interest but not property in which the United States has an interest. Excluding federal land from the reach of Section 7(h) is far more significant than excluding State land: The Federal government's fee holdings alone cover 28% of the Nation. See Cong. Research Serv., Federal Land Ownership, Rep. No. 42346, at 1 (Feb. 20, 2021), https://tinyurl.com/uzx4p8nw. Placing Federal property beyond the ken of Section 7(h) surely stops some pipelines from being built, as *Transwestern* shows. FERC's certificate, after all, does not carry with it an overarching consent to acquisition of Federal property. FERC issues certificates while it and other federal agencies continue to review a project and decide whether it may be built. See, *e.g.*, 30 U.S.C. § 185(a).

There is no textual basis for treating States differently than the United States under Section 7(h). Cf. *Belknap v. Schild*, 161 U.S. 10, 18 (1896) ("[A] state … is as exempt as the United States [is] from private suit."). Any claim

that a clear-statement rule applies only to the sovereign enacting the legislation fares no better here than it did in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). See *id.* at 73 (Brennan, J., dissenting). And construing "property" to exclude *all* sovereign property does not sap Section 7(h) of meaning. Certificate holders can still use it to take private property to build and operate pipelines.

If Section 7(h)'s silence were not enough (and it is) to decide the issue, the NGA's other provisions also evince no intent to override state sovereign immunity. "The Act was drawn with meticulous regard for the continued exercise of state power." *Panhandle*, 332 U.S. at 517–518. There is no reference to pipelines that must traverse State property, and the only mention of States' being sued is in a provision, added by the Energy Policy Act of 2005, subjecting to suit "State administrative agenc[ies]" that waive immunity by "acting pursuant to Federal law to issue, condition, or deny" requisite approvals for pipelines. 15 U.S.C. § 717r(d)(1); see also *id.* § 717r(d)(2). That provision, if anything, supports the conclusion that States are *not* proper defendants in suits filed under Section 7(h).

b. Negative implications from other, later-enacted statutes do not, and cannot, establish that the NGA subjected States to condemnation suits

The closest PennEast and the Solicitor General get to a textual argument is that *other* statutes, enacted half a century after Section 7(h), expressly carve out State land from provisions that authorize private parties to condemn property for energy infrastructure. But the presumption that condemnation provisions without a carveout abrogate state sovereign immunity would eviscerate this Court's precedent. *E.g.*, *Dellmuth*, 491 U.S. at 229. And a holding

that sovereign immunity can be abrogated by a carveout in a *later* amendment to a *different* statute would have world-upending consequences. Cf. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 35 (1989) (Scalia, J., concurring in part and dissenting in part), overruled by *Seminole Tribe*, 517 U.S. at 66. That is just one reason why this Court has held that, in ascertaining statutory meaning, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988); see also *Rainwater v. United States*, 356 U.S. 590, 593 (1958).

The danger of this interpretive approach should be evident to the Court, and certainly to the Solicitor General. Some of the condemnation statutes cited by PennEast explicitly exclude properties of the United States as well as those of States. Pet. Br. 26 (citing 16 U.S.C. § 824p(e)(1) and 49 U.S.C. § 24311(a)(1)(A)). If later enactments mean that silence can be construed as abrogation, then Section 7(h) equally abrogates *federal* sovereign immunity.

PennEast and the Solicitor General rely most heavily on Congress' amendment of the condemnation provision in the hydroelectric-power title of the Federal Power Act (FPA), forty-five years after enacting Section 7(h). This amendment excluded from condemnation for hydropower projects "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. Property so established at a later date cannot be condemned unless doing so "will not interfere or be inconsistent with the purposes for which such [later-acquired] lands or property are owned. *Ibid.* PennEast seizes (Br. 27) on Congress' failure to *also*

amend Section 7(h), the parallel provision of the NGA that was modeled on the original version of the FPA provision.

Aside from the aforementioned flaws in this approach to abrogation, this specific example has a threshold problem. The FPA amendment took place in the interregnum when Congress's commerce power was thought to authorize abrogation of state sovereign immunity. See *Seminole Tribe*, 517 U.S. at 66 (overruling *Union Gas*). Even assuming (without evidence) that legislators contemplated the scope of Section 7(h) in 1992 and deliberately chose not to alter it, the legal backdrop against which they legislated was wholly different than the backdrop against which that statute was enacted through bicameralism and presentment. See *United States v. Wells*, 519 U.S. 482, 495 (1997).

Further, while this Court has read some provisions of the FPA and NGA *in pari materia*, see *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 n.10 (2016), it has never read their respective condemnation provisions that way, much less with abrogation at stake. "[I]n this area of the law," where "evidence of congressional intent must be both unequivocal and textual," *Dellmuth*, 491 U.S. at 230, the *in pari materia* canon must yield insofar as it blesses implied retroactive amendment of the NGA.

These two condemnation provisions should not be read *in pari materia* anyway, given "the different settings" of pipelines and hydroelectric dams. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004). Dams must be tethered to "navigable waters," which circumscribes the universe of property susceptible to condemnation. 16 U.S.C. §§ 797(e), 817(1). More importantly, a State could take over a hydropower project at any point and condemn the requisite property. *Id.* § 807(a). Thus, insofar as it applies to State property, the FPA's condemnation provision

is more akin to a facility-siting directive than a command that States relinquish their property to a private party. Indeed, when Congress actually contemplated the issue of condemnation of State property in an FPA context closer to this one (electricity-transmission lines), it made clear State property could *not* be condemned. *Id.* § 824p(e)(1).

Moreover, closer inspection of the 1992 amendment to the FPA shows it to be implausible that Congress ratified an interpretation of Section 7(h) authorizing State land to be condemned. This FPA amendment targeted a problem brought to Congress's attention by Pennsylvania officials. See H.R. Rep. No. 102-474 pt. 8, at 99 (1992). Over their objection, FERC had licensed two hydropower projects affecting State parks. *National Energy Strategy Oversight Hearing on Energy Facility Siting of April 30, 1991*, Subcomm. on Energy & the Env't of H.R. Comm. on Interior & Insular Affairs, Serial No. 102-11 pt. I 176–177 (1991) (Siting Hearing) (testimony of John McSparran). Because neither project came to fruition, the licensees had never sued to condemn State property, but the officials urged Congress "to make it clear that states have primary authority over state-owned property." *Id.* at 179 (same); see *id.* at 184 (proposed amendment to 16 U.S.C. § 814).

Later in the same congressional hearing, counsel for a gas company testified as to a Section 7 certificate FERC had issued the company for a pipeline traversing "State reforestation lands" in New York. Siting Hearing at 214 (testimony of Frederick Loewther). He explained that the company's "eminent domain authority was problematic" because "under the 11th amendment to the Constitution a private citizen can't sue a State in Federal court." *Ibid.* The company thus had returned to FERC for an amended Section 7 certificate "routed around" State land. *Ibid.*

In short, Congress amended the FPA after being told it could subject States to private suits. Congress did not amend the NGA after being told (and perhaps *because* it had been told) that Section 7(h) did not subject States to such suits. Cf. *Schneidwind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). PennEast claims the FPA amendment evinces a *rejection* of State immunity to NGA condemnation suits, but the sole reference to that immunity in the legislative debate affirms its *retention*. If anything can "be said with perfect confidence" about this legislation, *Dellmuth*, 491 U.S. at 231, it is that it did not abrogate the States' immunity to Section 7(h) condemnation suits.

c. The NGA's history and purpose do not, and cannot, establish that States are subject to condemnation suits

Lacking unequivocal and textual proof that Congress overrode sovereign immunity, PennEast resorts to arguing about legislative history and purpose. Those subjects are not "the proper focus of an inquiry into congressional abrogation of sovereign immunity." *Dellmuth*, 491 U.S. at 231. But even if they were, legislative history and purpose only confirm that Section 7(h) did not abrogate immunity.

1. PennEast and its amici cannot find any reference to State sovereign immunity or suits against States in the legislative history of Section 7(h), because there is none. That alone ends debate over whether "Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter." *Sossamon v. Texas*, 563 U.S. 277, 290 (2011). It plainly did not.

To the extent legislators discussed States writ large, their focus was States' "constitutions and statutes," which did not grant gas companies authority to condemn *private*

land. S. Rep. No. 80-429, at 2 (1947). Section 7(h) was designed to remedy *that* problem, not a lack of authority to condemn *State-owned land*—which State constitutions and statutes of course never would have allowed. Sponsors of the legislation inveighed against the "private interests" of an individual "person or corporation" that "refus[ed] to grant a right-of-way for a reasonable compensation," in service of "a recalcitrant or selfish private concern."[13] Congress solved that problem entirely by authorizing Section 7 certificate holders to condemn private property.

2. PennEast is left to complain (Br. 23) that the NGA's "statutory purposes are incompatible with" a construction that does not permit Section 7 certificate holders to condemn State property. The company does not here invoke any traditional tool of statutory construction, with the possible exception of the absurdity canon. PennEast does not argue, nor could it, that interpreting Section 7(h) in this manner renders it a nullity. The provision remains fully effective against the problem that motivated its 1947 enactment—the fact that gas companies were forced to rely on the vagaries of state eminent-domain laws. Section 7(h) plainly now authorizes condemnation of the vast corpus of private property in which no sovereign holds an interest.

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[13] *Amendments to the Natural Gas Act: Hearings of April 29 and July 1, 1947, on S. 734 and S. 1028: Bills to amend the Natural Gas Act, Approved June 21, 1938, as amended*, Subcomm. of S. Comm. on Interstate & Foreign Commerce, 80th Cong., 1st Sess. 12, 14 (1947) (statement of Sen. Moore); *Amendments to the Natural Gas Act: Hearings of April 14, 15, 16, 17, 18, and May 28 and 29, 1947, on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569, and H.R. 2956: Bills to amend the Natural Gas Act, Approved June 21, 1938, as amended*, H.R. Comm. on Interstate & Foreign Commerce, 80th Cong., 1st Sess. 379 (1947) (statement of Rep. Schwabe); see also, *e.g.*, *id.* at 555–556 (testimony of Francis L. Daily discussing private-landowner holdouts).

a. PennEast frets (Br. 48) that now "every state can exercise an effective veto power over interstate pipelines," closing the "channels of interstate commerce." First of all, "dire warnings are just that, and not a license … to disregard the law." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481 (2020). The law says Congress must speak unequivocally to overcome the States' sovereign immunity, and it did not do so here. It might well be gas companies' preference to lord the power of eminent domain over States (and the United States) to "facilitate negotiations." Pet. Br. 1. But no statute—or, as here, statutory amendment—pursues its aim at all costs. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1908 (2019) (opinion of Gorsuch, J.). And the cost to States' dignity of "subjecting [them] to the coercive process of judicial tribunals at the instance of private parties," *In re Ayers*, 123 U.S. 443, 505 (1887), was not even *considered*, let alone shouldered, by Congress in 1947.

When Congress *did* consider the role of States in the pipeline-siting process in 2005, Congress enacted (and the President signed) amendments affirming a role for States substantially more consequential than a State's refusal to sell a specific property interest for an unsatisfactory price and an incompatible use. Those amendments let States decide whether to issue "permits, special use authorizations, certifications, opinions, or other approvals" to Section 7 certificate holders that are "required under Federal law[s]" that States implement. 15 U.S.C. § 717n(a)(2); see Pub. L. No. 109-58, § 313, 119 Stat. 594, 688 (2005). A Congress bent on eliminating any State powers that might stand in the way of gas pipelines would not have done *that*.

b. In any event, the prospects for new gas pipelines are rosier than PennEast and its amici suggest. Condemna-

tion of State-owned property is not the sine qua non of interstate energy infrastructure. We know this because for decades private companies have built new interstate oil pipelines and electricity-transmission lines without exercising *any* federal eminent-domain power, much less the power to condemn property of an unconsenting State. See U.S. Dep't of Transp., "U.S. Oil and Gas Pipeline Mileage" (logging steady increase in oil-pipeline mileage since 1985), https://bit.ly/3b4Sltc (last visited Mar. 30, 2021). Gas pipelines do not inherently need to traverse more State-owned property than oil pipelines, and the early returns from the 18 months since the Third Circuit's decision bear that out. U.S. Energy Info. Admin., Natural Gas Pipeline Project Tracker, https://tinyurl.com/h6cxdwz5 (last visited Mar. 30, 2021); JA 457 (dissent of Comm'r Glick). Companies seeking to build new energy infrastructure of any kind face an array of legal, technical, and political barriers. The Eleventh Amendment does not erect uniquely formidable barriers, or barriers unique to gas pipelines.

To be sure, sovereign immunity may prove a barrier to a *particular* pipeline proposed to be routed through State property if the State does not consent. But that will not put an end to interstate gas delivery, just as it has not put an end to the delivery of petroleum. PennEast does not claim, for example, that it is infeasible to construct a pipeline to transport gas from the Marcellus Shale to the markets it wants to reach without condemning property of an unconsenting State. In fact, FERC found it "reasonable to assume" that "alternate pipelines or other modes of transportation" will "reach intended markets" if this Pipeline is not built. JA 157.[14] *PennEast* might prefer not to use an

[14] Notably, PennEast has asked FERC to amend its Certificate to split the Pipeline into two phases, the first limited to Pennsylvania

alternate route, but that is no reason to conclude that customers' needs for natural gas will go unmet.

Unable to identify actual harm, PennEast speculates about barriers to gas pipelines that hypothetical obstructionist States could erect: claims involving riverbed title and bad-faith acquisitions of preservation easements. There is strong reason to doubt these barriers will arise, and if they did, pipeline proponents and Congress would have remedies to overcome them.

PennEast ominously notes (Br. 49) that rivers trace parts of the boundaries of many States and that some States hold fee title to submerged lands beneath those rivers. But concern of a riparian blockade to energy delivery is misplaced. As in this case, States have not objected to pipelines routed under rivers on property-rights grounds. Horizontal directional drilling enables pipelines to be run underground, hundreds of feet beneath the river bottom, in a manner unlikely to effect a Taking of any State land. See JA 99; Dan Dobbs, *The Law of Torts* § 55, at 112 (2000) ("A tunnel hundreds of feet below the surface that does not affect the value of the land or remove minerals probably should not be regarded as a trespass."); see generally *United States v. Causby*, 328 U.S. 256, 260–261 (1946) ("It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe … But that

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(that would deliver the majority of natural gas originally proposed by the company) and the second crossing from Pennsylvania into New Jersey. Abbreviated Application for Amendment to Certificate of Public Convenience and Necessity, FERC Dkt. No. CP-20-47-000 (Jan. 30, 2020), https://tinyurl.com/f739fu83. Because FERC has certified the Certificate's administrative record to the D.C. Circuit in an ongoing proceeding, FERC presently lacks jurisdiction to amend the Certificate as requested by PennEast. See *infra*, at 46.

doctrine has no place in the modern world.").[15] To the extent a pipeline did interfere with a State's riverbed title, that State likely could deny passage to it anyway, owing to the impacts on water quality from installation. See 33 U.S.C. § 1341(a)(1). And, if any problem of this sort ever arose, Congress could step in to resolve it. See *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201–202 (1967).

PennEast and its amici also worry that a State aiming to block gas pipelines might condemn, or strategically accept, a phalanx of conservation easements. There is no evidence or allegation that New Jersey did that here. The cost to States of such easements—including the price of acquisition and lost tax revenue—render this scenario implausible. In any event, a gas company would have a judicial remedy against State officials if this ever were to occur. See *Dennis v. Higgins*, 498 U.S. 439 (1991). Moreover, the Federal government is already an important player in this space, funding States' acquisition of conservation easements, see 54 U.S.C. § 200305(a)(2), and providing tax credits to individuals who donate them, see 26 U.S.C. § 170(f)(3)(B)(iii). Congress thus has substantial power to rein in private parties or States that use easements strategically to frustrate interstate commerce.

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[15] See also, *e.g.*, *Baatz. v. Columbia Gas Transmission, LLC*, 929 F.3d 767, 772–773 (6th Cir. 2019) (denying claim of trespass on subsurface rights where defendant did not "interfere with the reasonable and foreseeable use of [the landowner's] property"); *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 29 (Texas 2008) (Willett, J., concurring) ("[O]rthodox trespass principles that govern surface invasions seem to me to have dwindling subterranean relevance."); *Boehringer v. Montalto*, 254 N.Y.S. 276, 278 (Sup. Ct. Westchester Cty. Spec. Term 1931) ("[T]he title of an owner of the soil will not be extended to a depth below ground beyond which the owner may not reasonably make use thereof.").

3. The United States also has an ace up its sleeve. Its "exemption" as plaintiff from a State's sovereign-immunity defense allows the Federal government to take State property itself and then transfer the property to private hands. Congress surely knows how to do that. In fact, it briefly considered adopting that very regime *for natural-gas pipelines* a few years before it enacted Section 7(h). That episode illustrates how politically accountable actors balance the Nation's interest against State prerogatives before they authorize condemnation of a State's property.

Early in World War II, oil companies (like gas companies) had difficulty securing condemnation authority from States to build pipelines. The problem came to a head in Georgia, where pipelines from Gulf ports to Atlantic Seaboard cities were needed to alleviate oil shortages. See *Botts v. Se. Pipe-Line Co.*, 10 S.E.2d 375 (Ga. 1940) (interpreting state law to deny condemnation authority). President Roosevelt urgently cabled Georgia's Governor asking that oil companies be granted eminent-domain power to support the war effort. U.S. Off. of Gov't Reports, Information Digest No. 167, p. 2 (Mar. 19, 1941). Georgia legislators responded with a bill that "would give to projects essential to national defense the right of eminent domain where the President of the United States certifies such projects to be essential to national defense." Ga. H.R. Res. 169, 1941 Sess. (Mar. 19, 1941), reprinted in *Journal of the Ten-Days Special Session and the Regular Session of the House of Representatives of the State of Georgia* 1261 (1941). "[T]he principal spokesman for the opposition" to private condemnation authority "stated on the floor of [the Georgia] House that if the President of the United States of America should say over his own signature that the construction of the southeastern pipeline was essential

to national defense that all opposition to granting the eminent domain to pipe lines transporting petroleum products would be withdrawn." *Ibid.*

Congress then enacted legislation, known as the Cole bill, that temporarily authorized private corporations to condemn property to construct interstate oil pipelines the President declared "necessary for national-defense purposes." Pub. L. No. 77-197, § 2, 55 Stat. 610 (1941). However, in light of the urgent need, and recognizing that it might be "impracticable for any private person" to build a pipeline, the Cole bill allowed the President to step in and order a federal agency to condemn property, *id.* § 4, 55 Stat. at 610, and then transfer it to a private party, *id.* § 7, 55 Stat. at 611. When debating the Cole bill, legislators tabled a "controversial" proposal to also authorize federal and private condemnation suits for natural-gas pipelines.[16]

Congress thus knows—and knew quite well in 1947—that State property can be condemned for construction of a gas pipeline that the political branches deem of sufficient importance to "say over [their] own signature," Ga. H.R. Res. 169, *supra*, that the Nation's need for a pipeline outweighs injury to States' dignity and their sovereign lands.

C. States Did Not Surrender Their Immunity To Private Condemnation Suits As Part Of "The Plan Of The Convention"

Faced with settled precedent that the Commerce and Necessary & Proper Clause powers under which the NGA

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[16] *Interstate Petroleum Pipe Lines: Hearings of June 23 and 27, 1941, on H.R. 4816: An act to facilitate the construction, extension, or completion of interstate petroleum pipe lines related to national defense, and to promote interstate commerce*, Subcomm. of S. Comm. on Interstate Commerce, 77th Cong., 1st Sess. 91 (1941) (statement of Sen. Stewart).

was enacted cannot override States' sovereign immunity, and unable to show that the NGA includes the clear statement this Court's precedent would require in any event, PennEast stakes its case on the proposition that there was nothing to override. The issue the Third Circuit decided, PennEast and the Solicitor General maintain, was resolved not in Washington in 1947 (or 1992) but in Philadelphia in 1787. PennEast maintains that, because (1) the eminent-domain power was well known to the Framers, Pet. Br. 31; (2) it was "settled law that the eminent-domain power may be delegated to private parties," *id.* at 23; and (3) States "surrendered their immunity from suits by the federal government over property," *id.* at 32; it follows that (4) States, by ratifying the Constitution, surrendered their immunity to federal lawsuits commenced by developers of federally-licensed private infrastructure projects to extract title to State-owned property for possible use in interstate commerce. This "Plan of the Convention" theory, PennEast and the Solicitor General suggest, is reinforced by historic practice and by the distinctive nature of the "federal eminent domain power" with which the States endowed the national government.

The defects in this line of reasoning are not easily obscured. Start with PennEast's rebranding exercise. What this Court has described as the "Plan of the Convention" is the polar opposite of what the company argues. In *Hans v. Louisiana*, 134 U.S. 1 (1890), quoting Federalist No. 81, the Court emphasized that the States entered the Union with their sovereignty intact and that immunity from private suit was an indispensable aspect of that sovereignty; and that this immunity extends beyond what is explicit in the (amended) text. *Id.* at 12–13. In any event, not every sovereign power *known* to the Framers was delegated to

the national government. U.S. Const. amdt. X. Cf. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) (stressing link between State sovereignty and State land).

But the problem with PennEast's theory is even more basic than that. The power at issue here—to delegate to a private party authority to condemn, over State objection, a State property interest—was wholly *un*known to the Framers. Indeed, it might fairly be described as unthinkable to them that a private party could appropriate the sovereign's property for a purpose or a price that the sovereign did not approve. At risk of stating the obvious, there was not a peep at the Philadelphia Convention or in the protracted debates over State ratification to suggest that this wholly unprecedented power to authorize private parties to hale States into court and appropriate their land for beneficial private projects had materialized. Cf. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 366–369 (2006).

Nor can PennEast or the Solicitor General fill the void of support from the text, debate, or ratification of the Constitution with evidence (or even assertion) that *early* Congresses "liquidated" the meaning of the document by authorizing private condemnation of State property soon after the ink dried on the Fundamental Charter. The record of such authorizations is not "relatively barren." *Fed. Maritime Comm'n v. S.C. State Ports Auth.* (*FMC*), 535 U.S. 743, 755 (2002). It is nonexistent. Congress enacted no measure that even arguably contemplated such Takings until *the twentieth century*.

Worse still for PennEast is what the unbroken history of the Republic's first seven decades *does* show: not one instance from the first Washington Administration to Lincoln of the federal government *itself* condeming *private* property for *its own* projects—the plain vanilla exercise

of eminent domain—without the consent of the State in which the property was located. See William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1761–1785 (2013).

This decades-long void—an "inexorable zero," *Johnson v. Transp. Agency*, 480 U.S. 616, 657 (1987) (O'Connor, J., concurring in the judgment)—is not attributable to the differing conditions prevailing in the Early Republic. For "internal improvements" topped the list of subjects of federal deliberation and action during the Nation's early decades. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 583 (1837). Yet in none of the large-scale federal projects that Congress approved and funded, including creation of interstate canals, national roads, and harbor improvements—as well as the erection of military installations, post offices, courthouses, and lighthouses—was land acquired through federal eminent domain without the situs State's consent. Baude, *supra*, at 1762–1774.

To be sure, in the District of Columbia and the territories, where there was (and is) *no* State sovereign, the Federal government itself filed suits to condemn property—or, when it adjudged doing so more expedient, authorized a private party to sue the (private) landowner directly. Baude, *supra*, at 1764–1766. But well into the nineteenth century, prominent Americans—including Framers, Presidents, and Attorneys General—took the position (strongly suggested by this Court's mid-century decisions) that the Federal government *lacked power* to effect Takings, even of private property, without the situs State's concurrence.[17] They maintained that acquiring such property by condemnation was the type of major incursion on

[17] *E.g.*, *Eminent Domain of Texas*, 8 Op. Att'y Gen. 333 (1857) (opinion of Att'y Gen. Caleb Cushing); James Monroe, Views of the

State sovereignty that could not be deployed by the national government absent an explicit grant in the Constitution's text. Indeed, that was the opinion of this Court at the time. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). To anyone believing that the Federal government needed a State's consent to acquire property from an unwilling *private* owner, a federal power to condemn the State's *own* property—let alone to confer such power on a private party for any purpose qualifying as a "public use"—would have prompted a "shock of surprise" that made the reaction to *Chisolm v. Georgia* look like a modestly raised eyebrow.[18]

President of the United States on the Subject of Internal Improvements (May 4, 1822), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 713, 736–737 (James D. Richardson ed., 1897); see also Cong. Globe, 37th Cong., 2d Sess. 1889 (1862) (statement of Rep. Thaddeus Stevens) ("I do not know that I share in the doubt as to the constitutionality of the United States incorporating companies to make railroads through the States; but I know that it is entertained by a large number of people.").

[18] It was not until the Lincoln Administration—when survival of the Union truly did hang in the balance; when Congress's composition had shifted significantly due to the withdrawal of Representatives most protective of State sovereignty; and when the connection between eminent domain and emancipation of enslaved persons (a subject that lurked beneath discussions of governmental power) had finally been severed—that a direct federal condemnation of private land within a State first received Congress's imprimatur. See Christian R. Burset, *The Messy History of the Federal Eminent Domain Power: A Response To William Baude*, 4 Cal. L. Rev. Cir. 187, 203–207 (2013). PennEast and its amici cite no instance, and we are aware of none, where those who *disagreed* with the long-prevailing view and maintained that the Constitution did not bar federal direct Takings within States *further* claimed that federal power extended to private Takings of State-owned land.

When this Court ultimately rejected the long-prevailing de facto bright line—and held that federal condemnations within States are not per se *un*constitutional—it did not, as PennEast would have it, decide the issue as if the Court had found within the Constitution a previously unnoticed "Eminent Domain Clause." Rather, the Court effectively accepted that federal eminent domain could qualify as a "minor power," i.e., a permissible, unenumerated "*means*" to carry into effect the powers explicitly named and delegated under the Constitution. *Kohl*, 91 U.S. at 372. The Court held in *Kohl* that war and postal powers meant that the power to decide whether the United States could acquire property through condemnation was not, by dint of constitutional silence, reserved to the State where the property is located. *Id.* at 373. Soon after, this Court similarly held that the Federal government's acquisition of private property for *Commerce Clause* purposes was not a matter exclusively for State decision either. *Cherokee Nation*, 135 U.S. at 658.[19]

For reasons already explained, however, these cases do not support, but rather fatally undermine, PennEast's and the Solicitor General's "Plan of the Convention." They establish that the powers States expressly surrendered in the constitutional text—to regulate interstate commerce *and* to deploy means that are "necessary and proper"—entail the power to appropriate State-owned property and even the power to authorize private suits to compel transfer of private property. But it does not follow, as this

[19] Notably, these decisions stopped short of holding that property owned by a government and dedicated to public use was subject to the same regime as private property, cf. *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946); let alone that private Takings of property owned by *States* were per se constitutional.

Court's cases teach, that the expedient of authorizing private suits against unconsenting States is a "proper" means of effectuating those powers. See *supra*, at 23–24.[20]

II. CONGRESS DID NOT AND COULD NOT LIMIT NEW JERSEY'S JURISDICTIONAL DEFENSES TO CONDEMNATION SUITS

This Court directed the parties to brief the question whether the Third Circuit properly exercised jurisdiction over this case, given that the NGA confers "exclusive" jurisdiction on the court reviewing FERC's order granting a certificate "to affirm, modify, or set aside" that order. 15 U.S.C. § 717r(b). The parties agree that the Third Circuit properly exercised jurisdiction. See Pet. Br. 47.

Even the Solicitor General, who injected the question into this case in an invitation brief in this Court and urges (Br. 34) that the Third Circuit's judgment "be vacated on jurisdictional grounds," does not in fact argue that the court of appeals lacked jurisdiction over this *case*, nor that the courts below were prohibited from deciding whether or not the Eleventh Amendment warrants dismissal. Rather, the Solicitor General contends that the Third Circuit erred by deciding an *issue*—whether Section 7(h) authorizes suits against States—that the Solicitor General maintains Congress directed may only be determined by the D.C. Circuit, in the long-postponed (and currently-stayed) Certificate review proceeding. That is the same proceeding that PennEast and FERC steadfastly maintained could not begin until long after these suits were filed, and long after New Jersey was ordered by a federal court to

[20] Regardless, PennEast's argument that States can be subject to private condemnation suits based on consent inherent in the "Plan of the Convention" still does not address the fact that the NGA does not unequivocally authorize those suits. See *supra*, at 22–38.

show cause why its lands should not be immediately possessed by an out-of-state corporation. Compare Pet. App. 51–52 (reciting order of February 14, 2018) with Certified Index to Record, *NJDEP*, *supra*, ECF No. 1756805 (vesting D.C. Circuit with "exclusive" jurisdiction 252 days later, on October 24, 2018). The Solicitor General is wrong.

1. The regime the Solicitor General attributes to Congress divides and conquers the Eleventh Amendment by empowering two federal courts to each decide only one of two overlapping questions: "whether States can be sued under this statute" and "whether unconsenting States can be sued under this statute." *Stevens*, 529 U.S. at 779. And the one court where the State is sued cannot resolve the first, "logically antecedent" question. *Ibid.* Forcing States to appear in one federal court is bad enough; forcing them to appear in two federal courts (and then only if they *also* appear twice before an independent federal agency) to vindicate the Eleventh Amendment does not "accord[] the States the respect owed them as members of the federation." *PRASA*, 506 U.S. at 146. And forestalling resolution of the issue whether a State can be sued in one court until another court in a later case can decide it corrodes the States' "fundamental constitutional protection" against nonconsensual private suits, whose "value" diminishes "as litigation proceeds." *Id.* at 145.[21]

Only a crystalline expression of congressional intent could even plausibly establish such a regime. Cf. *Webster*

[21] In *PRASA*, this Court interpreted the "final decision" limitation on appellate jurisdiction, 28 U.S.C. § 1291, to permit immediate appeal by a State "on Eleventh Amendment grounds" under the collateral-order doctrine. 506 U.S. at 145. A State that immediately appeals an order denying immunity may argue both that Congress did not authorize a suit and that it could not do so. See, *e.g.*, *Allen v. Cooper*, 895 F.3d 337, 349–350 (4th Cir. 2018), aff'd, 140 S.Ct. 994 (2020).

v. Doe, 486 U.S. 592, 603 (1988). Yet all the Solicitor General has is the word "exclusive." 15 U.S.C. § 717r(b). *Exclusive* means that proceedings for review of a FERC certificate order are concentrated in a single court of appeals, and that filing the record with the court suspends FERC's jurisdiction to amend or rescind its order. It likely means as well (or at least it follows from normal comity practices) that a claim or defense asserted in other litigation cannot rest on invalidity of a FERC order pending judicial review. But none of that leaves a State bereft of a non-abrogation defense against a condemnation suit.

The NGA's reference to "exclusive" jurisdiction must be understood in the context of Congress's decision to create a distinct cause of action before a federal district court that need not await even completion of the administrative process, let alone judicial review of its outcome. Plainly, a condemnation suit cannot "affirm" a FERC order; it cannot be filed in "the court of appeals" with exclusive jurisdiction to do that. 15 U.S.C. § 717r(b). Conversely, a successful defense against a condemnation suit does not "modify" or "set aside" a FERC order. *Ibid.* It may hinder construction of a pipeline that is authorized (though not required) by a FERC order. But the same can also be said of an agency's refusal to issue another requisite approval, yet the NGA has a distinct "exclusive jurisdiction" provision for review of such a refusal, *id.* § 717r(d)(1); and still another "exclusive jurisdiction" provision for compelling an agency to act on an application for a required approval, *id.* § 717r(d)(2). Quartering exclusive jurisdiction leaves it not very exclusive.

Whatever the limits of the D.C. Circuit's "exclusive" review of FERC orders may be, that review cannot divest

the Third Circuit of "jurisdiction to determine its own jurisdiction." *Brownback v. King*, 141 S. Ct. 740, 750 (2021). The court of appeals' jurisdiction derived from the district court's jurisdiction, and the State argued that the district court lacked jurisdiction. *Both* the State's arguments—that the NGA *does not* authorize suits against States, and that the NGA *cannot* authorize suits against States—challenge the district court's jurisdiction. For one thing, they ask whether the federal judicial power encompasses these suits—a classic question of subject-matter jurisdiction. For another, Section 7(h) confers jurisdiction on a federal court only if "the owner of the property to be condemned" is susceptible to suit (and values the property at more than $3,000). 15 U.S.C. § 717f(h). In this "unique context," *Brownback*, 141 S. Ct. at 749, the identity of the defendant owner is an element of PennEast's claim that bears on the jurisdiction of the reviewing court.

2. That leaves the Solicitor General leaning on *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), but to no avail. That case was "*not* a condemnation action," *City of Tacoma v. Taxpayers of Tacoma*, 307 P.2d 567, 573 (Wash. 1957), and raised no constitutional issue. Sovereign immunity was not at stake because the State participated "on motion made by [its] Attorney General." *City of Tacoma*, 357 U.S. at 331. And this Court's holding rested as much on bedrock issue-preclusion precepts as the text of the pertinent judicial-review provision.

In *City of Tacoma*, a municipality sued State officials in state court under state law "seeking a judgment declaring valid a large issue of revenue bonds … to finance the construction of" a hydropower project for which FERC issued the municipality a license under the FPA. 357 U.S. at 329. Building the project necessitated inundating a fish

hatchery owned by the State. *Id.* at 333. The state courts invalidated the revenue bonds and "completely enjoined" construction, *id.* at 330, on the ground that state law did not empower a municipality to appropriate State land, *id.* at 332. But FERC's licensing order had explicitly found to the contrary, *id.* at 337, and by the time the municipality had filed the operative complaint, that order had been upheld in a final judgment of the Ninth Circuit from which this Court had denied review. *Id.* at 328.

This Court held that the state courts' review, "in this bond validation suit," *City of Tacoma*, 357 U.S. at 341, of a finding made in the FERC order was precluded by the part of the FPA's judicial-review provision that declared the Ninth Circuit's judgment "final," *id.* at 336 (citing 16 U.S.C. § 825*l*(b)). Any "objections and claims … contrary" to FERC's finding were "impermissible collateral attacks upon, and de novo litigation between the same parties of issues determined by," the Ninth Circuit. *Id.* at 341.

City of Tacoma construed the FPA's "finality" provision consistent with ordinary preclusion principles. If a legal issue has been "finally determined by a court of competent jurisdiction in earlier litigation between the parties," a second court "obviously … may not … re-examine and decide" the issue again. *City of Tacoma*, 357 U.S. at 334. The Court did not confront anything like the question here: whether Congress compelled a State arguing it cannot be subject to one suit to await a second suit to present that argument, while its property rights are eviscerated in the interim.

Further, unlike in *City of Tacoma*, the order granting the Certificate did not decide (explicitly or otherwise) the issue decided by the Third Circuit. FERC conditionally authorized PennEast to "construct[ ]" and "operate" the

Pipeline. 15 U.S.C. § 717f(c)(1)(A); see JA 170. But neither the Certificate nor FERC's order granting it "expressly provides for [PennEast's] exercise of eminent domain over respondents' property." U.S. Br. 11. Indeed, FERC may issue a certificate without even *knowing* who holds interests in property in the path of a proposed pipeline. See *supra*, at 6 n.5. That FERC's order granting the Certificate *did not* decide the interpretive issue on which the Third Circuit rested its decision is apparent from FERC's response to that decision: to grant a petition by PennEast for a separate, declaratory order designed to "remove *uncertainty* about the Commission's interpretation of the NGA." JA 382 (emphasis added).[22]

3. PennEast contends (Br. 44) that the Third Circuit acted within the bounds of its jurisdiction, "but only because of the limited scope of what can be litigated in [Section 7(h)] actions." As the company tells it, the "sovereign indignity [is] wrought by FERC" in the Section 7 certificate proceeding, *id.* at 36; the ensuing condemnations are only "ministerial" appendages to the main event, *id.* at 40.

The first problem with PennEast's theory is that a condemnation action is a "suit"—i.e., a "case[ ]" or "controvers[y]," U.S. Const. art. III, § 2—to which "one of the United States" is a party, *id.* amdt. XI. It is a suit in which not every contestable issue is at stake, nor every form of relief available, but it is a suit nonetheless. The privilege of a State not to be subject to "*any*" private "suit" without

[22] This Court should accord the declaratory order no weight because FERC engaged in an artificial exercise: interpreting Section 7(h) to authorize suits against States while refusing to decide whether the controlling canon of interpretation (the clear-statement rule for statutes subjecting States to private suits) applied. See JA 473. What Section 7(h) would mean if the Eleventh Amendment were repealed or *Dellmuth* overruled is a purely academic question.

consent is what the Eleventh Amendment is all about. *Id.* amdt. XI (emphasis added); see *VOPA*, 563 U.S. at 253. There is simply no textual, historical, or other reason why a condemnation suit is beyond the reach of that privilege.

The second problem is that PennEast is playing a shell game. The State of New Jersey, the company says, had "ample opportunity," Pet. Br. 29, to "voice [its] concerns" in FERC's Certificate adjudication as one of numerous "stakeholders," *id.* at 1. And the true "sovereign offense," *id.* at 36, is being coerced into participating in *that* Kafkaesque proceeding and bound by its outcome. Thus, the State should have no "beef" with PennEast, *id.* at 38, the actor that commenced and prosecuted *both* the FERC adjudication *and* multiple federal lawsuits against the State.

Interpreting the NGA that way only aggravates the constitutional problem. "[A]llowing a private party to haul a State in front of … an administrative tribunal constitutes a greater insult to a State's dignity than requiring a State to appear in an Article III court presided over by a judge with life tenure nominated by the President of the United States and confirmed by the United States Senate." *FMC*, 535 U.S. at 760 n.11. Thus, in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), this Court held that a State is immune from such an adjudication, where it must either appear and argue its case or "stand defenseless" in a later suit filed to effectuate the order of an administrative body, *id.* at 763.

In key respects, a Section 7 certificate proceeding resembles the adjudication that *Federal Maritime Commission* held could not proceed. The decision to commence and continue the proceeding "is plainly not controlled by the United States, but rather … [a] private party." *FMC*,

535 U.S. at 764; see 15 U.S.C. § 717f(d). FERC "does not even have discretion to refuse to adjudicate" any Section 7 certificate application. *FMC*, 535 U.S. at 764; see 15 U.S.C. § 717f(e). And, while a certificate is not "self-executing" as to eminent domain, *FMC*, 535 U.S. at 761, according to PennEast, "if a State does not present its arguments to the Commission, it will have all but lost any opportunity to defend itself" in a later condemnation suit, *id.* at 764 n.17; see Pet. Br. 35–40.[23] Under that reasoning, the true "dispute between a private party and a nonconsenting State," *FMC*, 535 U.S. at 768 n.19, is not the *suit*, but rather the administrative proceeding before FERC.

That takes this case out of the Eleventh Amendment frying pan and into the Eleventh Amendment fire. And it highlights why the statutory design the Solicitor General proposes adds insult to injury by forcing a State to appear in *both* the administrative proceeding *and* the federal suit in order to present a full constitutional defense against an involuntary Taking of its property.

CONCLUSION

The court of appeals' judgment should be affirmed.

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[23] PennEast would have a State suffer even greater indignity here than in *Federal Maritime Commission*. At least there, "only the Federal Government [could] institute a court proceeding" against a State. *FMC*, 535 U.S. at 782 (Breyer, J., dissenting).

Respectfully submitted,

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