No. 19-1039

IN THE

Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC,

Petitioner,

v.

NEW JERSEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, THE NATIONAL LEAGUE OF CITIES, THE U.S. CONFERENCE OF MAYORS, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Natural Gas Act delegates to Federal Energy Regulatory Commission certificate holders the authority to exercise the Federal government's eminent domain power to condemn land in which a State claims an interest.

2. Whether the Court of Appeals properly exercised jurisdiction over the case.

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INTEREST OF AMICI CURIAE[1]

The following State and local government associations respectfully submit this *amici curiae* brief in support of respondents:

The Council of State Governments ("CSG") is the Nation's only organization serving all three branches of State government. CSG is a region-based forum that fosters the exchange of insights and ideas to help State officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with forty-nine State municipal leagues, NLC serves as a national advocate for more than 19,000 cities and towns, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities at present. Each

1. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") is a non-profit professional organization of over 2,500 local government attorneys. Since 1935, IMLA has served as a national, and now international, resource for legal information and cooperation on municipal legal matters. Its mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local governments. It does so in part through extensive amicus briefing before the U.S. Supreme Court, the U.S. Courts of Appeals, and state supreme and appellate courts.

Amici offer additional reasons why this Court should affirm the Third Circuit's holding that Natural Gas Act § 717f(h), 15 U.S.C. § 717f(h), does not permit private parties to condemn State lands. *Amici* have a strong interest in preserving State and local control over States' natural resources, including State lands. State and local governments regularly act on behalf of their citizens to preserve or develop lands for specific uses including agriculture, education, energy development, or recreation. The interpretation of the Natural Gas Act advanced by

PennEast and by the United States would disrupt the balance of power between the Federal government and States with respect to State resources. Although States will defer to the Federal government when it acts in the national interest to take State lands, they expect the exercise of that authority to be limited and subject to political correction.

Amici have a strong interest in preserving this Court's long-standing limitations on such takings.

SUMMARY OF THE ARGUMENT

The Constitution establishes a careful balance between Federal and State authority, preserving the integrity, dignity, and residual sovereignty of the States. In certain circumstances, the Constitution permits Congress to alter the balance between the Federal government and the States. This Court will not, however, assume that a statute makes such a fundamental change unless the statutory language is unmistakably clear that Congress intended to do so.

Allowing private parties to invoke the Federal government's authority to condemn State lands would dramatically alter the Federal-State balance. States have a sovereign prerogative—and in many cases, a constitutional obligation—to preserve, manage, and control State land for the benefit of their citizens. To carry out those mandates and develop workable plans for land use, States and localities rely on the stability of State property interests.

If the Federal government seeks to disrupt those interests by exercising any authority it might have to take State lands, it ordinarily faces political constraints and public scrutiny. For example, the Federal sovereign must litigate any condemnation proceeding in open court, declaring publicly that it is the source of encroachment on State lands. Even prior to instituting a condemnation action, Congress must legislate clearly that it intends to take State lands, opening up any potential taking to the political process. Channeling the Federal government's eminent domain decisions through the political process gives States protection from encroachments on their sovereignty and preserves the carefully crafted balance between State and Federal interests.

Against these longstanding principles, PennEast and the United States argue that § 717f(h) of the Natural Gas Act ("NGA") authorizes private parties to stand in the shoes of the Federal government and condemn State lands—but the statute says nothing of the sort. The Third Circuit correctly recognized that adopting this interpretation would encroach on State sovereignty, and correctly rejected PennEast's position because § 717f(h) does not include any "clear statement" of Congressional intent to delegate its power to sue States to private parties.

PennEast and the United States respond that Congress's *silence* as to State lands in the NGA constitutes a satisfactorily clear statement that Congress intended to allow private parties to step into the shoes of the Federal sovereign and exercise eminent domain authority—free from political accountability—over State lands. But this inverts the "clear statement" rule, which requires

Congress to state unequivocally when it intends to disrupt the Federal-State balance. The NGA includes no such clear statement.

To overcome deficiencies in its statutory argument, PennEast proposes a novel exception to the Eleventh Amendment's barrier to private party suits against States. PennEast and the United States argue that a condemnation suit is merely a "ministerial" byproduct of the federal government's exercise of eminent domain—but there is no "ministerial suit" exception to the Eleventh Amendment. And this argument ignores the reality of condemnation actions, which substantially intrude on sovereignty and involve all the trappings of civil litigation, including a trial by jury. Private parties should not be permitted to use this mechanism to upend carefully negotiated State and local land use plans, without any clear Congressional authorization.

ARGUMENT

I. Delegation of the Federal Government's Eminent Domain Authority Would Allow Private Parties to Trample on States' Sovereign Interests

PennEast and the United States interpret the NGA to permit the Federal government to delegate its eminent domain authority to a private party. Pet. Br. 30–31; SG Br. 30. This delegation theory would infringe on fundamental attributes of State sovereignty, including State and local governments' inherent authority to manage land for the benefit of their citizens—and would allow private parties to take State lands free from the accountability constraints that otherwise influence the Federal sovereign's direct exercise of its powers.

As this Court has recognized, each State has a unique and fundamental interest in the land within its borders—"an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). But if PennEast and the United States prevail, and the NGA is interpreted to allow private parties to condemn State lands, then private interests will have the power to permanently alter a State's lands and override its considered judgment regarding land use.

Natural resource management is so fundamental to States that at least thirty-two States and Puerto Rico have constitutional provisions governing their environmental and natural resources, including the preservation of State lands. *See* Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 Rutgers L.J. 863, 867 (1996). These provisions set forth State-level policies affecting resource conservation, preservation of agricultural and natural resources, wildlife management, and forest conservation. Some guarantee clean water or air and grant related environmental rights to State citizens.[2]

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2. Ala. Const. art. XI, § 219.07(1); Cal. Const. art. X, § 2; Colo. Const. art. XVIII, § 6; Fla. Const. art. II, § 7; Haw. Const. art. XI, § 9; Idaho Const. art. XV, § 1; Ill. Const. art. XI, § 2; La. Const. art. IX, § 1; Mass. Const. art. XCVII; Mich. Const. art. IV, § 52; Minn. Const. art. XIII, § 12; Mo. Const. art. III, § 37; Mont. Const. art. II, § 3; N.M. Const. art. XX, § 21; N.Y. Const. art. XIV, §§ 3–4; N.C. Const. art. XIV, § 5; Ohio Const. art. VIII, § 2; Ore. Const. art. XI, § 2; Pa. Const. art. I, § 27; P.R. Const. art. VI, § 19; R.I. Const. art. I, § 17; Utah Const. art. XVIII, § 1; Va. Const. art. XI, § 2.

For example, State constitutions require the protection of agricultural lands, *e.g.*, Haw. Const. art. XI, § 3; preserve the public's right to fish on public lands, even if they are sold, Cal. Const. art. I, § 25; grant the State ownership of its beaches to hold in trust for public benefit, Fla. Const. art. X, § 11; and provide for land to be used to benefit State educational institutions, Utah Const. art. XX, § 2. Other States require their legislatures to enact legislation to advance particular land use aims, such as to protect natural resources, *e.g.*, Colo. Const. art. XXVII, § 1; La. Const. art. IX, § 1; N.M. Const. art. XX, § 21, or to preserve their historical sites and buildings, Va. Const. art. XI, § 1. The constitutions of Hawaii, Illinois, Massachusetts, Montana, Pennsylvania, and Rhode Island all contain Environmental Rights Amendments, providing their citizens with an individual right to clean air and water and the preservation of natural resources. Haw. Const. art. XI, § 9; Ill. Const. art. XI, § 2; Mass. Const. art. XCVII; Mont. Const. art. II, § 3; Pa. Const. art. I, § 27; R.I. Const. art. I, § 17.

The constitutions of at least two States—New York and Florida—include intricate conservation policies that could be severely disrupted if the Federal government could simply delegate to private parties its authority to override States' decisions about their own natural resources. The New York Constitution includes a provision prohibiting the "lease[], [sale] or exchange[], or [] tak[ing] by any corporation, public or private" of certain State-owned forest preserves, N.Y. Const. art. XIV, §§ 1, 3, and the State courts have developed an array of rules regarding ownership and land use to implement this constitutional protection, *see, e.g.*, *Ass'n for Protection of the Adirondacks v. MacDonald*, 253 N.Y. 234, 242 (1930)

(use of timber in preserved forest prohibited); *People v. Adirondack Ry. Co.*, 160 N.Y. 225, 248 (1899) (railroad company lacked authority to condemn preserved State lands through eminent domain); N.Y. O.A.G. Informal Op. 2002-1 (Jan. 8, 2002), 2002 WL 188493, at *1 (restrictions on use of all-terrain vehicles on county-owned reforested lands). The Florida Constitution similarly provides that any "fee interest in real property held by an entity of the state and designated for natural resources conservation purposes" must be "managed for the benefit of the citizens of this state and may be disposed of only if the members of the governing board of the entity holding title determine the property is no longer needed for conservation purposes[.]" Fla. Const. art. X, § 18.

In implementing those constitutional commands, States manage their natural resources through extensive statutory and regulatory schemes, with close coordination between State and local governments. They make considered decisions to use different types of property interests—from limited, local easements to broader categorical regulations—to manage a variety of State priorities, including agricultural, historical, and ecological concerns. These decisions go to the heart of local governance. In New Jersey, for example, the State collaborates with local governments to acquire easements to help maintain beaches and backwoods for recreation, preserve historical sites and farmland, and improve fishing in the State's rivers. *See* N.J. Dep't of Envtl. Prot., *State Acquisition Project Areas*, Green Acres Program, (Aug. 18, 2020), https://www.nj.gov/dep/greenacres/currentstate.html. Many other States pursue similar goals alongside their localities. *See, e.g.*, Okla. Const. art. XXVI (establishing department of wildlife conservation,

which administers private land access program); Mont. Code Ann. § 2-15-3301 (establishing department of natural resources and conservation); Wash. Rev. Code § 89.08.070 (defining duties of State Conservation Commission to include coordination among local conservation districts).

Local governments depend on the stability of their States' property interests. Uncertainty about land use priorities inhibits local government efforts to develop zoning plans and other land use policies tailored to the community. States, too, understand the importance of their sovereign land use decisions to localities, and for that reason, State law often requires the State to work with, or even seek approval of, local governments before obtaining easements.[3] *See* Jesse J. Richardson Jr. & Amanda C. Bernard, *Zoning for Conservation Easements*, 74 L. & Contemp. Probs. 83, 91–96 (2011). The efforts of New Jersey counties and municipalities in this case exemplify that process. Hopewell Township, a rural New Jersey community, engaged in intensive planning and negotiation to create a recreational area for hiking on Baldpate Mountain, working with the State and Mercer County to coordinate funding and the acquisition of easements. PennEast's condemnation action disrupts that plan. *See PennEast Pipeline Co. v. A Permanent Easement for 5.82 Acres and Temporary Easement for 4.94 Acres in Hopewell Township*, No. 3:19 Civ. 1104, Dkt. 1 (D.N.J. Jan. 25, 2019). PennEast also upended the collaborative effort by the township and New Jersey to

3. *E.g.*, Mass. Gen. Laws ch. 184, § 32; Mich. Comp. Laws Ann. § 324.36203(2)(b); Mo. Rev. Stat. § 67.880; Mont. Code Ann. § 76-6-206; Neb. Rev. Stat. § 76-2, 112(3); N.J. Stat. Ann. § 13:8B-6; Tenn. Code Ann. §§ 11-15-107(a), 11-15-108(b); Va. Code Ann. §§ 10.1-1700–1075.

preserve family farmland, *PennEast Pipeline Co. v. A Permanent Easement for 1.86 Acres and Temporary Easement for 3.82 Acres in Hopewell Township*, No. 3:18 Civ. 1754, Dkt. 1 at 161 (D.N.J. Feb. 7, 2018); and to acquire land to meet its State constitutional obligation to provide affordable housing, *PennEast Pipeline Co. v. A Permanent Easement for 2.57 Acres and Temporary Easement for 3.34 Acres in Hopewell Township*, No. 3:18 Civ. 1937, Dkt. 1 (D.N.J. Feb. 9, 2018); *see also S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp.*, 67 N.J. 151, 179 (1975).

The situation in Hopewell Township exemplifies the disruption that results from subordinating States' sovereign land use priorities to private interests. For this precise reason, the eminent domain power is ordinarily reserved for Congress in limited contexts. Otherwise, private parties could disrupt carefully considered State regulations and policies—effectively nullifying the protections provided by State constitutions, laws, and promises to their local governments. To allow a private party to exercise the Federal government's eminent domain power in this way would intrude substantially on State sovereignty.

PennEast's reading of the NGA countenances precisely that type of intrusion. Following PennEast's theory, if the Federal Energy Regulatory Commission ("FERC") issues a pipeline company a certificate of public convenience, the company can file a condemnation action even though such a taking would otherwise be contrary to the State's resource-management statutes and regulations—or even its constitution. Ordinarily, the Federal government relies on the Supremacy Clause and, for purposes of filing a condemnation action against a State, its Eleventh

Amendment exception to take State lands. *See United States v. Carmack*, 329 U.S. 230, 239–41 (1946) (principles of Federal government's supreme authority underscore that "the supremacy of a federal public use over all other uses" of land); *see also Kleppe v. New Mexico*, 426 US. 529, 543 (1976) (Congressional legislation enacted pursuant to Property Clause authority preempts conflicting state legislation).[4] Those powers belong to the Federal government, which derives its sovereignty from, and is ultimately accountable to, the People. *Martin v. Hunter's Lessee*, 14 U.S. 304, 324–25 (1816). Private parties enjoy no such constitutional leverage over State lands. Yet, per PennEast's delegation theory, a FERC certificate of public convenience cloaks its private bearer with the same constitutional powers the federal sovereign enjoys when it exercises eminent domain directly.

Nor does PennEast's novel delegation theory stop with the NGA. If the Court adopted PennEast's position,

4. Even the Federal government may be restricted by State law when seeking to take State lands held in the public trust because that trust can only "be destroyed by destruction of the sovereign." *United States v. 1.58 Acres of Land Situated in the City of Boston, Suffolk Cty., Com. of Mass.*, 523 F. Supp. 120, 124–25 (D. Mass. 1981) (authorizing Federal taking of State land held in public trust subject to same "restrict[ions]" that State sovereign had as public trustee); *City of Alameda v. Todd Shipyards Corp.*, 635 F. Supp. 1447, 1450 (N.D. Cal. 1986) ("[T]he United States acquired this portion subject to the public trust, and the United States may not convey this portion to a private party."). *But see United States v. 11.037 Acres of Land*, 685 F. Supp. 214, 217 (N.D. Cal. 1988) (refusing to "subjugate" the federal government's eminent domain power to the public trust interests of the State in light of Supremacy Clause). Allowing a private party to exercise authority that is fraught even in the Federal context would pose a greater danger to State sovereign interests.

Congress could delegate its eminent domain authority in any number of situations, effectively federalizing intra-State land use decisions across the nation. Power lines, sewage transport facilities, water pipes, nuclear power plants, landfills, wind farms—these are just a handful of the types of projects that could disrupt, or whose development could be disrupted by, private parties armed with Federal condemnation power.

When State lands are taken for an ostensibly public purpose, it is imperative that the parties, courts, and bystanders alike understand that the Federal government seeks to assert its supreme authority and impose a national priority on the State. But PennEast's position would shield the Federal government from accountability for its disruption of State sovereignty by allowing it to delegate its eminent domain power. Where the interests at issue include, as they do here, farmland and agricultural easements, environmental preserves, and water resources, the traditional recourse afforded to owners of condemned parcels—just compensation—does not sufficiently preserve State interests. No compensation can account for the loss of the State's ability to preserve its agricultural industry, forests, or wildlife. Indeed, the very purpose of the constitutional and statutory provisions detailed above is to channel market forces to avoid disrupting States' long-term resource management. The State cannot take whatever compensation the private party provides and purchase a new forest or lake or ecosystem. States and localities can only depend on the political process to protect these policy interests—and the political process cannot function appropriately when delegation of Federal authority blurs otherwise clear lines of accountability.

II. The NGA Does Not Reflect an Unmistakably Clear Statement as Required to Alter the Federal-State Balance

If Congress can authorize a private party to invoke the Federal courts' power to intrude on these interests—which is doubtful, since this sovereignty arises "from the Constitution"—it must state its purpose clearly in the language of the statute, so that States and voters know who is responsible for the encroachment.

PennEast and the United States do not even attempt to find a clear statement in the NGA authorizing litigation against States. The relevant provision, Section 717f(h), states only that the holder of a certificate of public convenience and necessity may acquire land or rights of way from "the owner of property . . . by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts." 15 U.S.C. § 717f(h). The ordinary rules of statutory interpretation do not warrant the extension of this provision to sovereign States. To the contrary, the Court has applied a "longstanding interpretive presumption that 'person' does not include the sovereign," because "both comity and respect for our federal system demand that something more than mere use of the word 'person' demonstrate the federal intent to authorize unconsented private suit against them." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 & n.9 (2000). The equally generic term "owner" should be similarly construed. If anything, Congress's silence as to States is a clear indication that it never intended to work a major alteration of the Federal-State balance by delegating eminent domain authority over State lands.

PennEast's interpretation of the NGA would radically alter the Federal-State balance by permitting a private party to hale States into Federal court to take State lands. For that reason, the Court should apply "the ordinary rule of statutory construction" that "if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intentions to do so unmistakably clear in the language of the statute." *Stevens*, 529 U.S. at 787 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)).

PennEast attempts to untangle delegation of the Federal government's power to sue States from the abrogation of State sovereign immunity, asserting that no clear statement is required for the former. Pet. Br. 31–34. The United States echoes that purported distinction. SG Br. 22. But whether subjecting States to private lawsuits is framed as abrogating State sovereign immunity or delegating the Federal government's exemption from that immunity, the result is the same: a target State will be subjected to a condemnation suit brought by a private party. A clear statement of Congressional intent is required to authorize that result. The Court explained as much in *Stevens*, where it held that the False Claims Act did not authorize lawsuits against States because it lacked unmistakably clear language granting that authority, 529 U.S. at 787, even though the *qui tam* relator argued that he was acting as a "partial assignee" of the Federal government and suing to vindicate the interests of the United States as delegated to him, *id.* at 771, 773 n.4.

The clear statement rule applies forcefully in the Eleventh Amendment context, but the Court has made it clear that it is not limited to that context. Instead,

it applies whenever "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government.'" *Will*, 491 U.S. at 65 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Unmistakably clear language is also required, for example, when Congress "intends to pre-empt the historic powers of the States" or "intends to impose a condition on the grant of federal moneys." *Id.* This is because the primary way our federal system protects State sovereignty is through the political process. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985). For that process to work as intended, the States, their citizens, and their representatives must be able to understand when a law threatening the Federal-State balance is up for debate, and elected officials must accept political accountability for any law that does seek to alter that balance. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). Accordingly, "the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971).

The need for an unmistakably clear statement by Congress is especially pressing in this case, which implicates "the allocation of scarce resources among competing needs and interests" that "lies at the heart of the political process." *Alden v. Maine*, 527 U.S. 706, 751 (1999). Forcing States to sell carefully managed resources to private parties "strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Id.*; *cf. New York v. United States*, 505 U.S. 144, 169 (1992) ("Accountability is . . . diminished when, due to federal coercion, elected

state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.").

III. Condemnation Actions Against State Lands Are Major Intrusions on State Sovereignty, Not "Ministerial"

PennEast argues that the Court should ignore the fundamental importance of State and local land use policy and set aside ordinary clear statement rules on the theory that condemnation actions are exempt from the normal rules governing State sovereignty. PennEast argues that condemnation actions against States are merely "ministerial," Pet. Br. 40, because such lawsuits can be brought only after a FERC order authorizes a pipeline route crossing State lands. But FERC's involvement does not remove the affront to State dignity or the disruption of land use policies brought about by a condemnation action. PennEast asserts that the actual decision to take State lands is made when FERC approves a certificate of public convenience and necessity authorizing a pipeline route that crosses State lands, and that process of invoking Federal judicial power to force a State to turn over its property is a merely "ministerial" afterthought. Pet. Br. 38–40. But this position misunderstands the process of condemning State land under the NGA, and would result in even greater impingements on State sovereignty by essentially forcing States to appear before FERC.

FERC's approval of a pipeline route does not cause any transfer of property rights or directly lead to any litigation. Instead, a certificate of public convenience and necessity authorizes its holder to pursue a condemnation

action *if* it "cannot acquire by contract" necessary rights of way or is "unable to agree with the owner of property to the compensation to be paid" for such rights of way. 15 U.S.C. § 717f(h). The decision to initiate litigation and the manner of prosecuting any suit is left entirely in the hands of the private certificate holder. As the Third Circuit pointed out, "PennEast filed suit in its own name; PennEast will gain title to the land; there is no special statutory mechanism for the federal government to intervene in NGA condemnation actions; and PennEast maintains sole control over the suits." Pet. App. 23. Indeed, as the timing of the condemnation actions in this case illustrates, a certificate holder need not even wait for FERC to resolve a petition for rehearing before suing to condemn State lands. J.A. 35, J.A. 334, Pet. App. 5.

Nor is a condemnation action a trivial affair. The plaintiff hales the property owner into court through service of process. Fed. R. Civ. P. 71.1(d). In several circuits, the plaintiff may move for a preliminary injunction, forcing expedited litigation. *See Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres, More or Less, Over Parcel(s) of Land of Approximately 1.21 Acres, More or Less, Situated in Land Lot 1049*, 910 F.3d 1130, 1152 (11th Cir. 2018) (collecting cases). The defendant must appear and defend itself, on pain of waiving any objections or defenses not asserted. Fed. R. Civ. P. 71.1(e). The parties then litigate much in the manner of an ordinary Federal lawsuit, including proceeding to a trial by jury if any party demands it. Fed. R. Civ. P. 71.1(h). The end result, of course, is a judicial order extinguishing the defendant's property interest and setting monetary compensation. The Eleventh Amendment expressly prevents States from being subjected to these sorts of proceedings in almost

every context. And the intrusion on State sovereignty is greater than usual in this context because condemnation actions deprive the State of the right to manage its own land for the benefit of its people.

PennEast and the United States' suggestion that FERC should be the forum for States to defend their sovereign interests only compounds the infringement of State sovereignty. As a multi-member independent agency, 42 U.S.C. § 7171(b)(1), FERC is "independent . . . from presidential control and thus from democratic accountability." *In re Aiken Cty.*, 645 F.3d 428, 441 (D.C. Cir. 2011) (Kavanaugh, J., concurring); *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring in part and dissenting in part) ("Independent agencies wield substantial power with no accountability to either the President or the people."). FERC, by design, is not susceptible to the political process that serves as States' primary protection from Federal intrusion. *See Garcia*, 469 U.S. at 556; *Gregory*, 501 U.S. at 464; *see also Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172–73, (2001) (holding that agencies are rarely empowered to "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power").

Moreover, if, as PennEast and the United States contend, FERC's decision is sufficient to deprive a nonconsenting State of its property interests, it would effectively force States to appear before the agency to defend their rights. But the Eleventh Amendment prohibits compelling States to participate in agency proceedings that will finally determine their rights when sovereign immunity would protect the States from having

to litigate those rights in court. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 763–64 (2002).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Third Circuit.

Respectfully submitted,

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