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

REPLY BRIEF

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New Jersey concedes that states surrendered their immunity to federal takings of state property in the plan of the convention. It likewise concedes that eminent-domain power was universally understood at the framing to be delegable. Yet it insists that states retain immunity from proceedings initiated by entities exercising the federal government's delegated eminent-domain authority. That makes no sense and would mean that the federal government has something less than the full eminent-domain authority enjoyed by every other sovereign.

New Jersey's argument depends critically on the proposition that even when the federal government itself authorizes the taking of state property for an important national initiative, there is an independent sovereign indignity if the suit to ensure just compensation is filed by the federal government's designee, rather than by the federal government itself. That curious theory lacks grounding in either doctrine or common sense. While cases in which one sovereign lawfully exercises eminent domain over another sovereign's property are relatively rare, not one recognizes any immunity from the court proceedings associated with a concededly legitimate taking. This Court held as much in rejecting Georgia's claim to immunity from an eminent-domain action initiated by Chattanooga. Such proceedings do not implicate the concerns underlying sovereign immunity. They are *in rem* proceedings and their principal office is to provide just compensation, which ensures compliance with the Fifth Amendment, not violation of the Eleventh Amendment.

New Jersey does not argue that §717f(h) can be read to exclude state property under ordinary tools of statutory construction. Congress plainly authorized FERC to approve pipelines traversing state property, and the certificate holder's §717f(h) action is the only means to effectuate FERC's judgment. In lieu of any textual basis to exclude state property, New Jersey embraces the Third Circuit's novel double-barreled clear-statement rule, under which Congress must not only delegate the federal eminent-domain power (which it plainly did in §717f(h)), but also clearly "abrogate" state sovereign immunity. But there is no sovereign immunity for Congress to abrogate. The sovereign intrusion comes when FERC authorizes the taking of state property without consent, not from an *in rem* suit to ensure just compensation.

Given the ubiquity of state property interests and the absence of any other mechanism to secure rights-of-way and provide just compensation, New Jersey's argument gives states a holdout's veto over interstate pipeline development. New Jersey would wield that holdout power not as a sovereign (its regulatory views must yield to FERC's contrary judgment), but only as a property owner. And New Jersey could exercise that holdout's veto for any reason, from second-guessing FERC's judgment about the need for the pipeline to distaste for Pennsylvania's fracking policies. No wonder a wide range of industry, labor, and consumer *amici* object. The eminent-domain power exists to override such property-owner vetoes. The immunity New Jersey asserts is simply incompatible with national infrastructure development, which is why it was surrendered to the federal government in the plan of the convention.

ARGUMENT

I. The NGA Delegates The Federal Eminent-Domain Power As To State Property.

Under ordinary tools of statutory construction, §717f(h) plainly authorizes certificate holders to secure rights-of-way and provide just compensation for all properties traversed by a FERC-approved pipeline route, private and state alike. The statutory text admits of no state-property exception, and both the statutory evolution and purposes foreclose any possibility of an implicit exception. Petr.Br.25-30; *see also* US.Br.19-24; Columbia.Br.5-12; Chamber.Br.6-19; EEIA.Br.16-26.

New Jersey does not dispute that FERC can approve pipeline routes across its property or seriously contend that current law allows FERC itself to initiate eminent-domain proceedings. Thus, New Jersey is left arguing that the NGA allows FERC to approve pipelines that traverse state lands (as virtually any interstate pipeline must) in theory but provides no means to effectuate the FERC-approved route if a state objects. New Jersey cannot credibly claim that this holdout's veto is consistent with the statutory purposes or evolution. After all, the NGA was repeatedly amended to eliminate such state vetoes, and Congress maintained §717f(h)'s full scope at the same time it eliminated a subset—but only a subset—of state- and local-government property from the FPA's parallel eminent-domain provision. Petr.Br.26-27. New Jersey tries to downplay the scope of its asserted veto power by suggesting a state's "immunity is implicated only if its property is involved, and only if a private plaintiff—rather than

the United States—files suit against its will." NJ.Br.39. But given the ubiquity of state property interests (augmented, if necessary, by easements from disgruntled private landowners and its own condemnation authority) and the complete absence of authority for anyone but the certificate holder (a.k.a., "a private plaintiff") to initiate §717f(h) proceedings, that is just a convoluted way of saying virtually always.

Although Congress could not have intended to authorize such an extensive veto power, New Jersey still insists that §717f(h) lacks a sufficiently clear statement to abrogate the states' sovereign immunity. *See* NJ.Br.32-39; NJCF.Br.22-32. The short answer to that argument is straightforward: There is no sovereign immunity to abrogate, and hence no basis for the double-barreled clear-statement rule New Jersey seeks. *See infra* Part II. Once it is clear that a statute empowers the federal government to authorize a pipeline across state property and authorizes the certificate holder, and the certificate holder alone, to effectuate FERC's judgment by initiating eminent-domain proceedings, there is no basis for demanding a separate statement reaffirming that state property is subject to eminent-domain. The certificate holder is plainly empowered to secure and provide just compensation for all the necessary rights-of-way. That explains why Congress expressly exempts state property from certain eminent-domain provisions, like Amtrak's, and why it amended §814 of the FPA to expressly exempt a subset of state- and local-government property, while recognizing that the unamended text, substantively identical to the

current version of §717f(h), extended to all state property. Petr.Br.26-27.

That directly on-point evidence about a sister statute is far more relevant than a now-defunct 1980 statute authorizing a short-lived federal Synthetic Fuels Corporation. NJ.Br.36. That federal corporation could exercise eminent domain on its own motion (without FERC approval), so Congress specified that state- *and local-government* property was not off-limits. The latter reference underscores that government property was not expressly specified to abrogate an immunity belonging *solely* to states. And the corporation was disbanded before its eminent-domain authority was exercised. Section 717f(h), by contrast, has been on the books in its current form and used vis-à-vis state property without objection, including by New Jersey, for over 70 years.[1]

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

New Jersey's entire case thus stands or falls with its claim that states may assert sovereign immunity to block eminent-domain proceedings authorized by the federal government if they are initiated by a private party. But that claim is doomed by New Jersey's concession that states surrendered their immunity from the federal eminent-domain power in the plan of

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[1] New Jersey notes that federal delegations of eminent-domain power are typically read to exclude federal property. NJ.Br.38. But federal lands are not sacrosanct; the authority for rights-of-way across federal lands come from other statutes, like the Mineral Leasing Act. *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S.Ct. 1837, 1841 (2020).

the convention. It was well-established at the founding that the sovereign eminent-domain authority was delegable. Thus, conceding federal eminent-domain power but contesting its delegability is not a valid option. Moreover, once it is conceded that the federal government can take state and private property alike, it makes no sense to recognize a state immunity from the *in rem* process designed to effectuate the federal judgment and to provide just compensation. The remedy that avoids a Fifth Amendment violation cannot itself be an Eleventh Amendment violation.

A. States Have No Immunity From the Federal Eminent-Domain Power.

1. It is well-established that the federal government's eminent-domain power is "essential" and "inseparable from sovereignty" and cannot depend on "the will of a state." *Kohl v. United States*, 91 U.S. 367, 371-72 (1875). New Jersey thus does not dispute that "the Federal Government has power to condemn land within the States," including state-owned land. NJ.Br.18. Indeed, it eagerly concedes that it would have no constitutional objection if this action had been initiated by FERC, and FERC then transferred the property interests to PennEast, even though Congress specifically authorized the certificate holder—and not FERC—to initiate the action. NJ.Br.44-45. Nor does New Jersey dispute that it would have no constitutional objection if Congress put the onus on affected property owners to initiate inverse-condemnation actions. Petr.Br.36. New Jersey's sole contention is that its sovereign dignity is offended because Congress chose to authorize

PennEast to initiate the action through which FERC's judgment is effectuated and New Jersey obtains compensation for the FERC-authorized taking.

New Jersey grounds that peculiar claim on the equally peculiar theory that an eminent-domain *proceeding* imposes some sovereign injury distinct from the taking of state property. Indeed, in its view, but for the fact that "States consented to *all* suits filed by the Federal Government," NJ.Br.19, even the United States could not initiate a proceeding to provide a state with just compensation—even though New Jersey concedes that the United States can take its property. That gets matters backwards. The intrusion on state sovereignty occurs when the federal government authorizes the taking of state property without consent and overrides any contrary state policy objection. That involuntary taking, whether by the federal government itself or its delegee, overrides the state's sovereignty. The process for effectuating the federal judgment and furnishing just compensation to the state as property owner remedies the taking and ameliorates the pecuniary injury. Treating such an action as an independent sovereign affront mistakes a constitutional remedy for a constitutional violation and suggests that the federal government enjoys a lesser eminent-domain authority than the states or any other government, which remain free to fully delegate eminent-domain power to private parties. *E.g.*, N.J. Stat. Ann. §48:3-17.6.

It is little surprise, then, when this Court squarely held that "[t]he fact that land is owned by a state is no barrier to its condemnation by the United States," *Oklahoma ex rel. Phillips v. Guy F. Atkinson*

Co., 313 U.S. 508, 534 (1941), both this Court and Oklahoma focused entirely on the indignity of the taking itself, not the indignity of the lawsuit. This Court ruled when the federal government acts within its legitimate realm, it possesses an unfettered eminent-domain authority and is not distinctly hamstrung in exercising that power vis-à-vis state property. *See id.* ("'Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield.'").

New Jersey's argument here is just a junior-varsity version of Oklahoma's unsuccessful argument. Just as the federal government faces no distinct disability in exercising its eminent-domain authority vis-à-vis state property, it suffers no distinct disability in delegating its authority vis-à-vis state property. Even if New Jersey's objection sounds in the Eleventh Amendment rather than the Tenth Amendment, its basic flaw is the same. When the states accepted the federal government's eminent-domain power in the plan of convention, they acceded to the full power, not to a hamstrung power that exempts state property either generally or whenever the power is delegated.

The absence of a carve-out for state property makes sense because states have a sovereign interest in *all* property within their boundaries. Nonetheless, they yielded that sovereign interest to the superior claims of the federal government in the plan of the convention. The state's distinct interest in parcels in which they also possess a property interest certainly entitles them to just compensation, but that pecuniary interest in compensation is far less sovereign than their governmental interest in regulating all lands

within their borders. Indeed, the takings clause by its terms applies to "private property," and states are entitled to the same just-compensation remedy as private-property owners when state property is taken, but no remedy when sovereign regulatory authority is displaced. *See*, *e.g.*, *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984); *Block v. North Dakota ex rel. Bd. Of Univ. & Sch. Lands*, 461 U.S. 273, 291 (1983). Thus, a *sovereign* immunity that kicks in only when the federal government's designee initiates process to effectuate a FERC-authorized taking and provide just compensation for the state's "*private* property" would be a strange beast indeed.

Not surprisingly, New Jersey's effort to bifurcate the power to take property and the power to bring eminent-domain proceedings is inconsistent with bedrock principles of sovereign immunity. Whatever may be said of states, foreign nations have decidedly not "consented to *all* suits filed by the Federal Government." NJ.Br.19. Yet it is "hornbook law" that foreign nations have "no immunity from jurisdiction with respect to actions relating to immovable property," including eminent-domain actions. *Upper Skagit Indian Tribe v. Lundgren*, 138 S.Ct. 1649, 1657 (2018) (Thomas, J., dissenting); *see also Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193 (2007).

New Jersey tries to dismiss the immovable-property doctrine as "premised" on the private capacity in which the "inferior" sovereign owns the property. NJ.Br.31. But New Jersey's argument does not turn on the capacity in which it owns the property; New Jersey concedes the power of the federal

government to take property within the state without regard to whether it is owned by the state in fee, by easement, or some other capacity. Whatever the status of New Jersey's property interest, New Jersey objects to the private initiation of the judicial proceeding through which transfer is effectuated (and just compensation is provided). Yet that is precisely the immunity that the immovable-property doctrine disclaims, even when an action is initiated by someone other than the co-equal sovereign. *See Permanent Mission*, 551 U.S. at 199. A sovereign that accepts the authority of another sovereign with superior authority over land—whether in the plan of the convention or by purchasing property within the jurisdiction of the territorial sovereign—cannot assert an immunity from suit against the superior sovereign or its delegee when it comes to that land.

This Court recognized as much in *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924). There, consistent with long-settled sovereign-immunity principles, this Court held that Georgia had no immunity from an eminent-domain proceeding to take property it owned in Tennessee—even though the action was initiated by Tennessee's delegee, the City of Chattanooga. The Court did not rest its decision on any general lack of immunity from suits in the courts of a sister sovereign. Instead, this Court assumed Georgia would have an immunity from an ordinary *in personam* suit and had not "consented generally to be sued in the courts of Tennessee in respect of all matters arising out of the ownership and operation of its railroad property in that state." *Id.* at 482. Nonetheless, this Court held that by acquiring property in Tennessee, Georgia necessarily consented

not just to the taking of its property, but to the eminent-domain proceeding through which Tennessee's delegee effectuated the taking.

2. As all of that underscores, what the federal government obtained, and what the states acceded to, in the plan of the convention was the full eminent-domain power traditionally exercised by sovereigns, not a limited power that precludes either its exercise or its effective delegation vis-à-vis states.[2] New Jersey accepts that the states consented to the exercise of federal eminent domain against their own property, and the eminent-domain power to which they consented is the eminent-domain power as it was "known" at the Founding. *Kohl*, 91 U.S. at 372. As it was known at the Founding, that power included both the authority to initiate eminent-domain proceedings and the power to delegate the initiation of those proceedings to private parties (subject, of course, to the limits of proper delegation). That should be the end of the matter.

New Jersey (and NJCF even more so) protests that a §717(h) action falls within the literal terms of

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[2] To the extent New Jersey decries a lack of pre-Founding cases in which, say, colonial Pennsylvania or one of its delegees exercised eminent domain over land owned by colonial Maryland in Maryland, *see* NJ.Br.14-15, that just reflects that eminent-domain authority does not extend beyond a sovereign's realm. But as *Georgia* illustrates, within that realm, the eminent-domain authority is complete, and is operative against inferior sovereigns that might otherwise possess immunities. The effort to carve out states from the full eminent-domain authority is thus just a quarrel with the United States' status as a superior sovereign throughout its realm, not a separate, coherent Eleventh Amendment objection.

the Eleventh Amendment. NJ.Br.12; NJCF.Br.18-22. That is both incorrect and ultimately beside the point. The §717(h) action is an *in rem* suit against the property, not "against" the state; the state need not appear or participate. *See infra* Part I.B. Moreover, the action is not a "private condemnation suit," NJ.Br.22-27, because that is an oxymoron. An eminent-domain action is always brought under the authority of the sovereign, because the eminent-domain power is "an attribute of sovereignty" that "appertains" only to sovereigns. *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). When the action is brought by a delegee it acts "for this purpose … as a public agent." Thomas M. Cooley, *Constitutional Limitations* 562 (1868).

In all events, the question here turns on principles of sovereign immunity, not the Eleventh Amendment as such. New Jersey does not think this action could be brought in state court where the Eleventh Amendment is inapplicable by its terms, and this Court has repeatedly recognized that there are "suits" involving states that can be initiated by private parties without offending the Eleventh Amendment because immunity from those actions was surrendered in the plan of the convention and not restored by the Eleventh Amendment. *See, e.g.*, *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), *California v. Deep Sea Rsch., Inc.*, 523 U.S. 491 (1998); *Georgia*, 264 U.S. 472. That Amendment is confirmatory of the original constitutional design. Thus, just as it extends immunity beyond its text, *see, e.g.*, *Alden v. Maine*, 527 U.S. 706, 729 (1999), it does not create immunities inconsistent with the plan of the convention.

Respondents' effort to draw support from *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), is unavailing.[3] While New Jersey invokes *Stevens'* expression of "serious doubt" that the Eleventh Amendment would permit a *qui tam* relator to sue a state, that is because a *qui tam* action is *not* just about the "governmental function [of] recovering public dollars," NJ.Br.22, but "gives the relator himself" the right to collect a bounty and continue the suit even over the United States' objection. 529 U.S. at 772. Moreover, unlike an eminent-domain action, *see infra* Part I.B, a *qui tam* action unquestionably "subject[s] an unwilling State to a coercive judicial process" and "seek[s] monetary damages." *Hood*, 541 U.S. at 450-51. Congress' ability to empower private parties to bring coercive actions seeking money damages from states says precious little about whether Congress may delegate to private parties the power to initiate proceedings to effectuate FERC's decision and *pay* states just compensation.

3. New Jersey gains nothing by suggesting that "there was doubt about the application of federal condemnation authority even *within* States at th[e] time" of the Founding. NJ.Br.19. Any doubt was settled by this Court's decision in *Kohl*, which New Jersey disclaims any interest in having this Court reconsider. And there was no doubt at the framing or

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[3] *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775 (1991), which dealt with whether the government may delegate its bare power to sue states, is no more helpful. Section 717(h) does not delegate a bare power to sue; it authorizes a FERC certificate holder to effectuate the route approved in the certificate and ensure just compensation.

at any time since that the eminent-domain authority can be delegated. *See* Petr.Br.33-34; Cooley, *supra* 536 ("[I]t has long been settled that it is not essential that the taking should be to or by the State itself."). Thus, once it is conceded that the federal eminent-domain authority can be exercised within states and vis-à-vis state property (and New Jersey concedes both points), there is no basis for suggesting that it cannot be delegated in those circumstances. To the contrary, the fact that whether the federal eminent-domain power extended beyond federal enclaves was unsettled, while the delegability of whatever power existed had "long been settled," Cooley, *supra* 536; *Custiss v. Georgetown & Alexandria Tpk. Co.*, 10 U.S. (6 Cranch) 233 (1810), underscores the incoherence of New Jersey's objection *only* to the latter. The former was controversial (but the controversy has been settled); the latter was not.

New Jersey emphasizes broad statements from the framers about the inviolability of sovereign immunity. NJ.Br.13; NJCF.Br.39-40. But the cited statements are incomplete. Even in the context of reassuring constitutional skeptics that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," NJ.Br.13 (quoting Federalist No. 81), Hamilton went on to say in the next sentence that such immunity "remain[s] with the states" *unless* "there is a surrender of this immunity in the plan of the convention," The Federalist No. 81, pp. 548-49 (J. Cooke ed. 1961).

While not taking issue with *Kohl*, New Jersey nonetheless claims that the lack of early federal eminent-domain actions outside federal enclaves is

relevant. NJ.Br.15-16. But as *Kohl* explained, the federal government in its early years generally relied on state procedures out of expedience rather than any absence of power. 91 U.S. at 373. Unlike New Jersey today, states generally welcomed infrastructure development and cooperated fully. And when states became less cooperative, the federal government invoked its own eminent-domain power, which was affirmed in *Kohl*.

New Jersey not only accepts *Kohl* but does not dispute that *Stockton v. Baltimore & N.Y.R. Co.*, 32 F. 9 (D.N.J. 1887) (Bradley, J.), approved a federal taking of *state* land. It emphasizes *Stockton*'s caveat that the analysis might differ if the United States sought to take "the state-house at Trenton." NJ.Br.16. But that just underscores that the threat to sovereignty comes from the taking and not the means of transferring title and furnishing just compensation. Thus, while the Tenth Amendment likely protects the powers that be in Trenton from federal seizure of the state-house, *cf. Coyle v. Smith*, 221 U.S. 559 (1911), there is no distinct Eleventh Amendment problem with an action to effectuate an otherwise valid taking and provide compensation. New Jersey claims that *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641 (1890), is irrelevant because the Cherokee Nation was not viewed as fully sovereign, NJ.Br.16, but the Court made clear that the same taking would pass muster if it were state land. *See Cherokee*, 135 U.S. at 656-57.

In sum, New Jersey's detour into questions settled by *Kohl*, a decision that is nearing its sesquicentennial and that New Jersey ultimately accepts, is diverting, but beside the point. When all is said and done, New

Jersey concedes that states acceded to the federal government's exercise of eminent-domain power as it was "known" at the Founding. *Kohl*, 91 U.S. at 372; *see* Petr.Br.31-34. And it does not dispute that at the framing and before the eminent-domain authority was well-known to be delegable to private parties. Petr.Br.6-10, 33-34. Thus, New Jersey is left arguing that the federal government has something less than the full eminent-domain authority enjoyed by every other sovereign, including New Jersey. That is not sustainable. As this Court observed in *Kohl*: "If the United States have the power, it must be complete in itself. It can be neither enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised." *Kohl*, 91 U.S. at 374.

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

New Jersey's novel theory that it possesses immunity from eminent-domain proceedings separate from the underlying taking of its property ignores that eminent-domain proceedings are unique *in rem* actions that pose little threat to sovereign interests. Petr.Br.41-44. That is not because any proceeding "styled *in rem*," NJ.Br.27, is necessarily outside the Eleventh Amendment's scope. It is because, like the *in rem* bankruptcy proceedings in *Hood*, and the *in rem* admiralty action in *Deep Sea Research*, an eminent-domain action neither "seek[s] monetary damages" from a state nor "subject[s] an unwilling State to a coercive judicial process." *Hood*, 541 U.S. at 450-51. Instead, eminent-domain proceedings augment the treasury and ensure just compensation.

Congress could have put the onus on New Jersey to initiate the action or sent the valuation question to a non-judicial body. Cooley, *supra* at 560-61. They are *sui generis* proceedings far removed from the actions and concerns underlying the Eleventh Amendment.[4]

New Jersey concedes that §717f(h) actions *augment* the state treasury, and it offers no theory of how *receiving* funds for a taking the state does not contest here could offend its sovereign dignity. New Jersey emphasizes Rule 71.1, NJ.Br.28, but that rule does not convert §717f(h) actions into *in personam* actions against the state. It merely requires plaintiffs to list at least one property owner in their complaints, without making that owner (or anyone else) an indispensable party.[5] New Jersey does not deny that *in rem* jurisdiction empowers courts to adjudicate by virtue of their jurisdiction over the *res* without *in personam* jurisdiction over property owners, who retain their constitutional right to compensation regardless of whether they participate in the action. Fed. R. Civ. P. 71.1(e)(3); *see Hood*, 541 U.S. at 453-54. And Rule 71.1 provides that, consistent with historical practice, commissioners, rather than a jury, may ascertain the amount of just compensation. Fed. R.

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[4] *Upper Skagit* did not reject any distinction between *in rem* and *in personam* actions; it merely explained that the Court's *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), decision did not rest on that distinction. 138 S.Ct. at 1652.

[5] The United States was an indispensable (and immune) party in *The Siren*, 74 U.S. (7 Wall.) 152 (1869), only because it involved personal property, which unlike real property is not inherently within the court's territory, but could be subjected to the court's jurisdiction only via coercive process over the United States.

Civ. P. 71.1(h); *see also Bauman v. Ross*, 167 U.S. 548, 593 (1897) (valuation need not "be made by a jury; but may be entrusted by Congress to commissioners appointed by a court or by the executive").

To be sure, the §717f(h) action confirms the certificate holder's right-of-way as well as fixing just compensation. But New Jersey disclaims any desire (or jurisdictional ability) to challenge the certificate holder's entitlement to the right-of-way. And simply effectuating a federal decision prospectively poses no greater threat to state dignity than the typical suit permitted by *Ex Parte Young*, 209 U.S. 123 (1908). Moreover, when legislatures delegate the eminent-domain authority, they generally link payment of just-compensation and the transfer of the property interest *as a protection for the property-owner* to ensure the delegee makes payment. Cooley, *supra* at 562. Finally, the necessity of a FERC-granted certificate eliminates any specter of a private party haling a state into federal court on its own initiative.

New Jersey points only to inapposite cases involving very different kinds of actions. For example, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), addressed a lawsuit seeking not just to transfer rights-of-way, but to strip Idaho of its "governmental powers and authority over … a vast reach of lands and waters." *Id.* at 282. No one disputes that stripping a state of its regulatory jurisdiction would offend its sovereign dignity. But a §717f(h) action does nothing of the sort. Any loss of regulatory authority took place before FERC in Washington, or at the convention in Philadelphia. And New Jersey's extended discussion of *Central*

Virginia Community College v. Katz, 546 U.S. 356 (2006), rests on the mistaken premise that *Katz* involved *in rem* proceedings. NJ.Br.29. In fact, the Court deemed it not "necessary to decide whether" the proceedings were "properly characterized as *in rem*" because states reserved no immunity from *any* bankruptcy proceedings. 546 U.S. at 372. The far more relevant precedent is *Hood*, which held pre-*Katz* that states lack immunity from *in rem* bankruptcy proceedings. *See Hood*, 541 U.S. at 453-54.

Straining to find some way in which a §717(h) proceeding inflicts a distinct sovereign injury, New Jersey posits various ways in which a certificate holder might act differently from the federal government itself. NJ.Br.22-26. But for an argument based entirely on the supposed distinct indignity of being haled into court, New Jersey's concerns have little to do with the court proceeding itself. It first objects that private parties are not subject to a good-faith-negotiation requirement. NJ.Br.23. But the district court ruled that "[e]ven if the NGA did require a showing of good faith, … such a requirement has been met." Pet.App.85 n.47. Indeed, it was New Jersey, not PennEast, that categorically refused to negotiate. *See* PennEast.CA3.Br.10. PennEast would much prefer to have reached amicable resolution than become embroiled in years of litigation all the way up to this Court. New Jersey also fails to explain how good-faith negotiations could ever succeed if New Jersey holds the trump card of immunity from the only action Congress has provided if negotiations fail.

New Jersey's complaints about the timing of a §717f(h) action fare no better. NJ.Br.23-24. New

Jersey's immunity argument does not turn on the timing of the certificate holder's suit. PennEast could have bided its time and New Jersey's immunity claim would be identical. Moreover, no certificate holder, PennEast included, has any incentive to expedite the just-compensation process if the property owner is not actively resisting providing necessary preliminary access. Here, for example, PennEast was forced to move quickly and seek preliminary relief because the state refused to allow it to even *enter* any property in which the state claimed any interest—even when PennEast reached amicable settlements with the property owners—to complete surveys the state itself was demanding. *See* PennEast.CA3.Br.10-15 & n.6.

New Jersey argues that "compensation might be litigated differently based on the condemnor's identity." NJ.Br.26. But any differences would appear to inure to New Jersey's benefit. It is hard to believe that states will do better litigating against federal agencies with no readily discernible marginal costs of litigation than with private parties anxious (*too anxious*, according to New Jersey) to move forward with their federally authorized pipeline. No litigant has a greater interest in condemning property on the cheap than the federal government, which routinely faces taking litigation, but only as the taker and never as the "takee." Moreover, the reason that eminent-domain authority has been delegated almost as long as there have been infrastructure projects is not to condemn land on the cheap, but because the entity that will generate revenue from the project is best positioned to pay property owners fair value.

III. The Jurisdictional Dispute Underscores The Anomalous Nature Of New Jersey's Objection.

Respondents' effort to resist the government's jurisdictional arguments only highlights the limited and anomalous nature of New Jersey's argument here. New Jersey does not contest the federal government's eminent-domain power over all property within state boundaries, including the state's, presumably because those issues are long settled. And New Jersey does not contest the validity of the FERC proceedings or PennEast's FERC-issued certificate to traverse state property, presumably because doing so would open a jurisdictional trap door. New Jersey is thus left arguing that while it has no objection to the federal government's decision to authorize a pipeline across state land, it is nonetheless immune from the one and only action Congress has provided to secure the right-of-way and ensure just compensation. PennEast continues to believe that this Court has jurisdiction to reject that argument on the merits. But if this Court deems that argument inseparable from a collateral attack on the certificate, then the judgment below must be vacated, as the problem is not a lack of Article III jurisdiction over PennEast's §717f(h) action, but a lack of authority to consider New Jersey's collateral attack.

NJCF operates with the freedom of a "party" that did not file a court of appeals brief. It thus offers a variety of arguments that could only be understood as collateral attacks on the FERC certificate (and even FERC's finality rules). Those arguments have the advantage of consistency, as they suggest that FERC

cannot validly authorize a pipeline route traversing state land, but the considerable disadvantages of being jurisdictionally barred and foreclosed by precedent.[6]

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

New Jersey never disputes that the decision below grants states a holdout's veto over interstate pipelines. The scope of that veto is nearly boundless given the extent of state property holdings. Petr.Br.48-49. Indeed, because states generally hold title to the beds of streams that form state boundaries (not to mention countless intrastate waters, *see, e.g.*, Marcellus.App.1a), the construction of any interstate pipeline would depend on the consent of at least two states. *Cf. Stockton*, 32 F. at 17-18. This country experimented with a system in which important national initiatives depended on state consent, and the obvious shortcomings of that approach produced the plan of the convention.

New Jersey promises that "States will not commonly withhold consent," NJ.Br.45, but that is rather rich coming from New Jersey, which withheld consent even to rights-of-way based on non-possessory interests and is single-handedly holding up a pipeline

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[6] NJCF implies that there is an Eleventh Amendment problem with any federal administrative proceeding initiated by a private party that implicates state prerogatives or property in ways that incentivize states to appear to protect their interests. But such proceedings are commonplace and far different from the rare and anomalous proceeding rejected in *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743 (2002), where a private party could forcibly hale states before a federal agency.

that would provide one billion cubic feet per day of natural gas transportation capacity, save the region more than $1 billion, and create 12,000 new jobs. Petr.Br.50; Labor.Br.7-17; Penn.Mfrs.'Ass'n.Br.10-19; INGA.Br.17-22. New Jersey hardly stands alone in this NIMBY approach. *See* Columbia.Br.12-19; Oregon.Br.1 (noting state's intention to object to proposed pipeline). And if the decision is affirmed, the acronym may need updating, because nothing would stop New Jersey from objecting based less on concerns about a pipeline in its own backyard, and more on its distaste for fracking operations in Pennsylvania (or simple disagreement with FERC about the pipeline's necessity).

The Third Circuit attempted to minimize the prospect of disruption by suggesting that FERC could file the §717f(h) action itself. New Jersey throws lukewarm water on that suggestion, saying only that the issue "deserves greater exploration." NJ.Br.45. That underscores that New Jersey's real objective here is not to enjoy the greater dignity it associates with having the federal government initiate the §717f(h) action or write the just-compensation check. At a minimum, New Jersey is banking on the notion that if the federal government is hobbled with the need to undertake the ministerial aspects of eminent domain, there will be fewer pipelines. What New Jersey really wants is a holdout's veto over interstate pipelines, and that is what the Third Circuit gave it, because §717f(h) could not be plainer that the only party who can bring the action is the certificate holder.

To be clear, New Jersey will exercise that holdout's veto not as a sovereign—it concedes that the

NGA displaces its ability to object to the FERC-approved route as a sovereign—but only as a property owner. The eminent-domain authority exists to override such a property-owner's veto. New Jersey's argument that it is different when the state owns the property cannot be squared with the plan of the convention.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

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