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

RESPONDENTS' BRIEF

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INTRODUCTION

This case arises because a private citizen of Delaware haled New Jersey into federal court against its will. When this Court allowed such a proceeding to go forward 228 years ago in *Chisholm v. Georgia*, 2 U.S. 419 (1793), the Nation responded with shock and outrage—swiftly adopting the first constitutional amendment after the Bill of Rights to bar such actions in perpetuity. The Eleventh Amendment provided that a citizen of one State could not sue another sovereign State in federal court. And the sovereign immunity principles it stood for reflected the Framers' widespread belief that private party lawsuits against nonconsenting States violated their inviolable sovereignty.

Two centuries later, this case offers an opportunity to reaffirm state sovereignty in two ways. First, this Court can and should simply reject PennEast's invitation to create a novel, ahistorical carveout to sovereign immunity for condemnation suits. In the vanishingly rare circumstances in which this Court has allowed a private party to sue a State, such as under the Bankruptcy Clause or Section 5 of the Fourteenth Amendment, this Court has relied on specific constitutional text, Founding-era statements, or legislation adopted at the Founding. PennEast presents nothing of the kind. Notwithstanding the Framers' extensive discussions of sovereign immunity, the Framers never even hinted that condemnation suits warranted an exception. For good reason: condemnation suits against sovereign States were unheard of in their lifetimes. Indeed, while the federal condemnation power is well established today, at the Founding this power was disputed and at times flatly denied—even for private land. How the States could have consented to private

federal condemnation suits involving sovereign land at a time when the federal condemnation power itself remained open to debate is anyone's guess.

Alternatively, this Court should adhere to its time-honored rule that Congress does not subject the States to private suit unless it says so explicitly. After all, as this Court has explained, Congress would not embark on the extraordinary act of subjecting States to litigation by private parties through implication; Congress would make its intention unequivocal in the statute's text. That requirement protects state sovereignty and enables this Court to avoid prematurely resolving difficult constitutional issues. And that is why this Court has rejected arguments, like the one PennEast offers, that a law authorizes private litigation against States just because States were not *excluded* from its reach. As the Third Circuit found, that proves fatal to PennEast's claim: the Natural Gas Act does not explicitly authorize private party suits against States.

Like any sovereign immunity case, this dispute is of great consequence to the States. Far from a "ministerial" act, a condemnation suit is an adversarial proceeding implicating state interests. Here, PennEast—not the United States—rushed to condemn state land at its first possible opportunity, even while the pipeline and its route were undergoing additional review. PennEast—not the United States—conducted the pre-suit negotiations with landowners as required under the Natural Gas Act. And PennEast—not the United States—sought to subject a State to a contested compensation trial. So PennEast is the one that created a risk of sovereign land being condemned unnecessarily, while the pipeline and route remain contingent. Pen-

nEast decided that pre-suit negotiations with landowners need not be conducted "in good faith." And PennEast will choose how to litigate, and whether to settle, the value of sovereign land. This is, at its core, a private lawsuit against a State in federal court—exactly as the Framers guarded against.

There is no reason to undermine state sovereignty to avoid perceived consequences. Though this private suit against a nonconsenting State is invalid, the Constitution empowers the Federal Government to initiate any suit against a State it sees fit, including one to condemn sovereign land. The United States has, of course, engaged in condemnations of public and private land across the Nation, and has even condemned land for the explicit purpose of transferring the property to an energy company at cost. That would address the impermissible intrusion into state sovereignty but would make little real-world difference to companies like PennEast. And if the Executive needs clearer authorization from Congress in order to condemn land in this context, that is a matter for Congress; it is not a reason to disregard sovereign immunity altogether. Even until Congress acts, the decision below will not hinder the natural gas industry. There is no basis to strip the States of their immunity.

STATEMENT OF THE CASE

1. On September 24, 2015, the PennEast Pipeline Company, a private company incorporated in Delaware, filed an application with the Federal Energy Regulatory Commission (FERC) to construct an interstate natural gas pipeline. JA35 at ¶1. As designed by PennEast, the main line of its proposed project runs about 116 miles, from Luzerne County, Pennsylvania,

to Mercer County, New Jersey. *Id.* The pipeline would run through land owned by New Jersey.

The Natural Gas Act (NGA) assigns FERC authority to approve the development of natural gas pipelines and facilities. 15 U.S.C. §717f(c). Relying on Congress's Commerce Clause power, the NGA states that no company "shall engage in the transportation or sale of natural gas … or undertake the construction or extension of any facilities therefor" unless it obtains "a certificate of public convenience and necessity issued by the Commission." *Id.* FERC issued PennEast a Certificate on January 19, 2018. JA35.

That approval was conditional in several respects. For one, pipelines often require numerous other regulatory and/or state approvals. In this case, PennEast was still required to obtain federal approval pursuant to the National Historic Preservation Act, 54 U.S.C. §306108, which requires assessment of a project's impact on historical properties, and state regulatory approval under the Clean Water Act, 33 U.S.C. §§1341, 1344, relating to discharges into navigable waters. JA138-39 at ¶172, 181 at ¶10, 196-97 at ¶51, 255 at ¶54. For another, FERC recognized further environmental assessments were necessary for this project, and required completion of those assessments prior to initiation of pipeline construction—but not before PennEast could condemn land along the proposed route. See JA181-200, 238. Finally, FERC's Certificate recognized that there may be certain "route realignments or facility relocations," JA175 at ¶5, and specifically directed PennEast to consider an alternative for its pipeline that shifts the final two miles of the route. JA167-68 at ¶215, 182-83 at ¶13.

As with other agency action, parties may seek review of a Certificate in federal court. But the NGA has a "virtually unheard-of" requirement that parties first raise their challenge before FERC in a rehearing petition before challenging the Certificate in federal court. *ASARCO v. FERC*, 777 F.2d 764, 774 (CADC 1985) (Scalia, J.); 15 U.S.C. §717r(a). On February 20, 2018, New Jersey filed a rehearing petition. JA334. In addition to arguing that the underlying Certificate was arbitrary, capricious, and unlawful, the State argued it was "premature to grant PennEast eminent domain authority as the final route is likely to change." JA235. FERC did not rule for six months.

On August 10, 2018, FERC denied the State's rehearing petition. JA334. After rejecting all challenges to the underlying Certificate, FERC turned to the eminent domain issue, responding that "[i]ssues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the NGA are matters for the applicable state or federal court," not the Commission. JA 239-40 at ¶33. After rehearing was denied, New Jersey filed a petition for review in the D.C. Circuit. *Del. Riverkeeper Network v. FERC*, No. 18-1128. That case has been held pending resolution of the instant litigation.

2. Under the NGA, even before the rehearing process concludes, a private party that obtains a Certificate "may" file condemnation actions in the appropriate district court to obtain the "necessary right-of-way to construct, operate, and maintain [its] pipe line." 15 U.S.C. §717f(h). See *Allegheny Def. Project v. FERC*, 964 F.3d 1, 10-11 (CADC 2020) (noting that FERC's Certificate orders "split the atom of finality. They 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.").

So on February 6, 2018—less than three weeks after FERC issued the Certificate, and months before resolution of the rehearing petition—PennEast initiated condemnation suits in the District of New Jersey to condemn 42 properties or property interests owned by New Jersey or arms of the State. Pet.App.5. (One year later, PennEast filed condemnation actions involving seven more state properties. See DNJ Dkt. Nos. 19-1097, 19-1104, 19-1107, 19-1110, 19-1114, 19-1117.) These suits named New Jersey's properties and the State itself or arms of the State as defendants. See Fed. R. Civ. P. 71.1(c)(1) (federal condemnation action must name property and at least one owner). PennEast sought a preliminary injunction to obtain immediate access to these properties. Pet.App.4-5.

PennEast's decision to file condemnation actions against New Jersey before D.C. Circuit review—and before obtaining all other approvals—was especially concerning to New Jersey given the importance of the lands at issue. Pet.App.5 n.4. New Jersey held nine of these litigated properties in fee, including valuable state forests. See C.A.App.137, 155-56; DNJ Dkt. Nos. 19-1097, 19-1104, 19-1107, 19-1110, 19-1114, 19-1117. For the remaining 40 properties, the State possessed non-fee interests that run with the land—frequently, easements or development rights requiring land be preserved in perpetuity for agricultural, recreational, or conservation use—that PennEast intended to condemn. Pet.App.5. New Jersey spent millions of dollars in constitutionally-dedicated funds to obtain these interests, see C.A.App.96-98 at ¶12; C.A.App.101 at ¶3;

C.A.App.109-110 at ¶9; C.A.App.116 at ¶3, including over $2 million (in conjunction with a local government) to acquire fee interests and a conservation easement in a series of properties to protect the City of Lambertville's water supply. C.A.App.101-02 at ¶5(a). There was thus a serious concern that important public lands would be condemned even as the pipeline and its path were still under review.

Another problem quickly arose in the litigation: affected property owners, including the State, protested that PennEast did not comply with its duty to negotiate in good faith before filing its condemnation actions. See 15 U.S.C. §717f(h) (permitting condemnation only if a private party cannot "acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way"). Before filing its actions, PennEast submitted a "take-it-or-leave-it" offer of compensation to the State for one of the first 42 properties it sought to condemn in February 2018. C.A.App.138-39. PennEast made no offers to the State for the remaining 41 properties (although it made offers for the seven properties it sought to condemn in 2019). See C.A.App. 97, 101, 110, 116, 156. In justifying its approach, PennEast argued that the "NGA does not impose a *good faith* negotiation requirement," Pet.App.84 (emphasis added), and that PennEast did not have to negotiate for the majority of the State's interests. Pet.App.87 n.49.

PennEast also made demands in litigation that its Certificate had not authorized—demands with consequences for state land. *Inter alia*, some of PennEast's filings sought to secure the ability to use its pipelines to transport natural gas by-products. Compare D. Ct. Dkt. No. 18-1603, Doc. 1 at ¶2(f)(1)) (DNJ Feb. 6,

2018) (seeking such relief), with JA175 (FERC Certificate limiting use of pipeline). PennEast's preliminary injunction application also sought an order allowing it to clear trees from some of the condemned lands, even though the Certificate barred such preconstruction activities. Compare D. Ct. Dkt. No. 18-1603, Doc. 1 at ¶41 (DNJ Feb. 6, 2018), with JA256 n.136. Multiple defendants raised these issues to the court, and the right-of-way was subsequently altered to come in line with the Certificate. Compare D. Ct. Dkt. No. 18-1603, Doc. 61 and 62 (DNJ Jan. 7, 2019), with Doc. 59 (DNJ Dec. 31, 2018) and Doc. 70 (DNJ Jan. 16, 2019).

3. New Jersey moved to dismiss, reasoning that its sovereign immunity prevented a private plaintiff like PennEast from haling it into court. The District Court denied New Jersey's motion and granted PennEast's application for 42 orders of condemnation and a preliminary injunction to take immediate possession of the properties. Pet.App.6.

The Third Circuit reversed. The Court expressed "deep doubt" that PennEast could hale the State into court without its consent under hornbook principles of sovereign immunity. Pet.App.26. Although the Federal Government can file a condemnation suit against the State—just as it could file any other action against a State—the States' "consent, 'inherent in the convention,' to suit by the United States … is not consent to suit by anyone whom the United States might select." Pet.App.15 (quoting *Blatchford v. Native Villages of Noatak*, 501 U.S. 775, 785 (1991)). That was true even if the suit was styled *in rem*. See Pet.App.24-26.

The Third Circuit recognized that a contrary holding endorsing private condemnation actions against a nonconsenting State would work a serious affront to

state sovereignty. As the panel explained, a condemnation lawsuit involves a host of meaningful choices, including whether to engage in pre-suit negotiations, when to sue or seek immediate access to the land, and whether to settle during the compensation stage and at what price. Pet.App.17-18. The identity of a plaintiff-condemnor thus made a great deal of difference to the State, as "[t]he incentives for the United States, a sovereign that acts under a duty to take care that the laws be faithfully executed and is accountable to the populace, may be very different than those faced by a private, for-profit entity like PennEast." *Id.*

But the court did not have to resolve whether a private party could file a condemnation action against a nonconsenting State in federal court because "nothing in the NGA indicates that Congress intended to do so." Pet.App.27. Since sovereign immunity was at stake, Congress's intent to subject the States to suit "must be 'unmistakably clear in the language of the statute.'" *Id.* (quoting *Blatchford*, 501 U.S., at 786). And the NGA did not include any of the textual and unequivocal evidence this Court has demanded in analogous cases; the NGA's plain text did not "mention the Eleventh Amendment or state sovereign immunity" or "refer to the States at all." *Id.* The panel refused to assume that "Congress intended—by its silence—to upend a fundamental aspect of our constitutional design." Pet.App.29-30.

SUMMARY OF ARGUMENT

I. a. Fundamental precepts of sovereign immunity establish that private parties cannot sue nonconsenting States. That rule extends to condemnation suits. Despite extensive discussions of state immunity at the Constitutional Convention, PennEast cannot identify

any evidence from the Founding that States contemplated—or were subject to—private condemnation actions. Instead, in the early days of the Republic, it was not even clear any federal eminent domain power existed as to *private* land within state borders. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845). The States at the Founding thus could not have consented to private condemnation actions against them.

Nor are condemnation actions "ministerial." To the contrary, even after FERC approves a pipeline proposal, a private plaintiff's conduct in a condemnation suit still affects state interests in multiple respects. A private party decides whether to conduct pre-suit negotiations in good faith. A private party decides when to condemn state land, even as its Certificate remains subject to challenge. And a private party subjects the State to trial over the forced sale of its real property—an adversarial proceeding in which parties debate the value of sovereign land. Such actions thus substantiate the Framers' fears over "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Fed. Mar. Comm'n v. S.C. Port Auth.*, 535 U.S. 743, 760 (2002) (*FMC*).

b. Nothing about this analysis changes because the action is styled *in rem*: lawsuits designated as against state property implicate immunity like those against States themselves. See *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869). The bankruptcy and admiralty cases on which PennEast relies turned not on a wide-ranging *in rem* exception, but on the very textual and historical evidence that PennEast lacks here.

II. But this Court need not conclusively resolve the constitutional question because the NGA does not authorize this suit in the first place. This Court has held

repeatedly that for a statute to subject States to private party suits, its plain text must be "unequivocal." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). That rule protects state sovereignty, which Congress would not infringe by implication, and allows this Court to avoid vexing constitutional questions. PennEast cannot satisfy that burden: nothing in the NGA's text allows for, or mentions, condemnations involving States in particular. PennEast attempts to make up for the NGA's silence with inferences from the text of *other* statutes and legislative history 45 years after the 1947 NGA amendments, but neither hold up. To the contrary, the text of other statutes shows that Congress will be explicit if it wishes to subject States to condemnation actions. And even could legislative history offer a missing textual statement, the legislative materials here do not support private suits against States.

III. As PennEast acknowledges (Br. 44), the courts below had jurisdiction to consider these issues. Sovereign immunity is a jurisdictional limit on the federal courts. *Blatchford*, 501 U.S., at 779. Here, PennEast sued New Jersey in federal district court. Once New Jersey asserted its immunity from suit, the Constitution required the district court to resolve that defense to ensure its actions were consistent with Article III. That required the court to review not only the State's constitutional argument, but also its statutory one, which is "logically antecedent" and thus "routinely addressed" first. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000). Nor does the NGA require the State to assert immunity by filing an affirmative action, in a different court, against a different party. The NGA states only that a district court may not "affirm, modify, or set aside" the underlying

pipeline approval, 15 U.S.C. §717r(b), but allows it to address condemnation-specific issues like this one.

IV. PennEast's sky-is-falling arguments are simply incorrect. Although the result of New Jersey's sovereignty is that a private party cannot file a condemnation action against it, the United States can condemn state land without infringing state dignity, leaving industry no worse off. To the degree PennEast's concern is simply that the NGA does not currently provide the Executive with authority to condemn state land in this context, that is an issue Congress can easily address, not a reason to disregard sovereign immunity. And in any event, natural gas companies have a range of tools to move projects forward without suing a nonconsenting State, just as other industries have done.

ARGUMENT

I. Under The Constitution, Private Parties May Not File A Condemnation Lawsuit Against A Nonconsenting State In Federal Court.

The Eleventh Amendment provides that "[t]he 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." U.S. Const. amend. XI. Though sovereign immunity extends well beyond the Amendment's text, this is the rare scenario that actually violates its explicit terms: PennEast, a private citizen of Delaware, lacks authority to sue New Jersey in federal court. PennEast claims this action can nevertheless proceed based on a novel theory of condemnation exceptionalism—namely, that the history and import of condemnation actions justify nonconsensual private

suits in federal court. And PennEast claims that it can bring condemnation actions because they are *in rem*. These arguments cannot withstand scrutiny.

A. There Is No Condemnation Exception To State Sovereign Immunity.

1. Constitutional history undermines PennEast's claims of condemnation exceptionalism.

a. The Framers shared a "widespread understanding" that an "integral component" of the States' sovereignty was their "inviolable … immunity from private suits." *FMC*, 535 U.S., at 751-52; see *Alden v. Maine*, 527 U.S. 706, 756 (1999) (adding that "the fear of private suits against nonconsenting States was the central reason given by the Founders who chose to preserve the States' sovereign immunity"). As John Marshall put it, "I hope that no gentleman will think that a state will be called at the bar of the federal court.… It is not rational to suppose that the sovereign power Should be dragged before a court." J. Elliot, Debates on the Federal Constitution 555 (2d ed. 1836); see also *id.*, at 533 (Madison: "It is not in the power of individuals to call any state into court."); The Federalist No. 81, at 487 (Hamilton: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."). So when this Court in *Chisholm v. Georgia* allowed a private party to sue a State in federal court, the Nation responded with "profound shock" and "outrage," immediately ratifying the Eleventh Amendment to restore the States' immunity from private suit. *Alden*, 527 U.S., at 720.

There is no evidence that the Framers understood the States' sweeping immunity from private suits to include a condemnation carveout. Because the States

"entered the federal system with their sovereignty intact," *Blatchford*, 501 U.S., at 779, this Court can only find forfeiture of immunity to a certain category of suit when there is "compelling evidence that the Founders thought" the waiver inherent in the constitutional design, *id.*, at 781. That is why, in the few cases in which this Court found States subject to suit, it relied on evidence in the text of the Constitution or statements at the Founding. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (relying on Fourteenth Amendment's text); *Cent. Va. Community Coll. v. Katz*, 546 U.S. 356, 368, 373 (2006) (relying on the "history of the Bankruptcy Clause," including a "discussion at the Constitutional Convention," and "legislation considered and enacted in the immediate wake of the Constitution's ratification"). But no private plaintiff can sue a State when it lacks "persuasive evidence" that such lawsuits were contemplated. *Alden*, 527 U.S., at 733-34. Here, PennEast cannot identify a single comment at the Constitutional Convention or at any ratifying convention, during the Eleventh Amendment ratification process, or in Founding-era legislation even hinting that state immunity exempts condemnation lawsuits. Compare U.S.Br.29-30 (arguing there is "no basis to conclude" that States "silently retained" immunity from private condemnation lawsuits), with *Alden*, 527 U.S., at 741 (holding that mere "silence" at the Founding does not "strip the States of the[ir] immunity").

The Framers' silence made sense: private condemnation suits against the sovereign were unheard of in their lifetimes. Because the proper constitutional inquiry is whether consent to such private suit was inherent at the Founding, this Court's decisions have "recognized a 'presumption that no anomalous and unheard-of proceedings or suits were intended to be

raised up by the Constitution—anomalous and unheard of *when the constitution was adopted*.'" *Alden*, 527 U.S., at 727 (emphasis added) (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)); see also *FMC*, 535 U.S., at 755 ("We … attribute great significance to the fact that States were not subject to private suits in administrative adjudications at the time of the founding or for many years thereafter.").

In *FMC*, for example, this Court rejected an argument by the Federal Government much like the one it makes here—that States "have long been subject to … administrative enforcement proceedings" and therefore lack immunity to them. 535 U.S., at 755-56. The reason for this Court's rejection was simple: the robust modern history of administrative proceedings against States says nothing about whether consent was "inherent" in the Constitution's ratification. *Id.* Because administrative proceedings against States "did not occur until 1918," and there was a "dearth of specific evidence" of such proceedings against States during "the late 18th century and early 19th century," the history counseled *against* eliminating state immunity in private administrative proceedings. *Id.*, at 755-56.

So too here. While PennEast identifies myriad private condemnation actions against *private* owners, see *infra* at 19-20, PennEast cannot identify a condemnation suit *involving state land* until the turn of the 20th century, Pet.Br.9; U.S.Br.28-29, and the only known private condemnation action against a *nonconsenting* State (before the instant one) was dismissed by a federal district court in Texas four years ago. Pet.App.16-17. Even as the United States embarked on significant internal developments in the 18th and early 19th centuries, from roads to canals to harbor improvements,

private condemnation actions against the States were as nonexistent as private administrative ones. PennEast's invitation to create a condemnation exception without historical basis must be declined.

Even PennEast's sparse late-19th century examples only confirm the limits of its historical evidence. See Pet.Br.9-10 (citing *Stockton v. Baltimore & N.Y.R. Co.*, 32 F. 9 (D.N.J. 1887); *Cherokee Nation v. Southern K. R. Co.*, 135 U.S. 641 (1890)). *Stockton* involved a suit initiated by the State for failure to receive compensation, so it is not an example of a private plaintiff suing a State, and immunity from private suit did not arise and could not have arisen. 32 F., at 20. Instead, the district court decision turned on whether the State even had an underlying compensable property interest in the submerged lands at issue—and found that it did not. *Id.*, at 19. But the court recognized the issues presented would be different concerning lands owned by a State for its exclusive public use—such as "the state-house at Trenton." *Id. Cherokee Nation* provides even less guidance; at that time, the Nation was not viewed as "sovereign in the sense that the United States is sovereign, or in the sense that the several states are sovereign." 135 U.S., at 653. This hardly demonstrates Founding-era state consent to suit.

b. PennEast has a second historical problem: the existence of the underlying federal power to exercise eminent domain even over private land within a nonconsenting State's borders was at times hotly debated and at others matter-of-factly denied for decades after ratification. While a federal eminent domain power is well-established today, this history undermines PennEast's claim that the Framers understood private parties could exercise it against the States.

After ratification, every branch of the Federal Government expressed doubt that the United States itself had the power to condemn land within a nonconsenting State's borders. In the early 1820s, when the Federal Government endeavored to develop "a system of internal improvement by roads and canals," President Monroe concluded that it could not do so by condemning land within state borders: "The condemnation of the land … must be done by the State. To these purposes the powers of the General Government are believed to be utterly incompetent." James Monroe, Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822), in 2 A Compilation of the Messages & Papers of Presidents (James D. Richardson ed., 1897). Multiple members of Congress shared such views. See 32 Annals of Cong. 1351-52 (1818) (Representative stating none "of the framers of the Constitution could ever have imagined" federal eminent domain actions within state borders without consent); 31 Annals of Cong. 1209-10 (1818) (Representative opposing federal eminent domain power); 40 Annals of Cong. 709 (1823) (Representative noting "appropriation of the soil … belong[s] exclusively to the States"). See William Baude, *Rethinking the Fed. Eminent Domain Power*, 122 Yale L.J. 1738, 1741 (2013) ("At the Founding, the federal government was not understood to have the power to exercise eminent domain inside a state's borders.").[1]

[1] In contrast, it was uncontroversial that the Federal Government could condemn land within the territories and the District of Columbia. That helps explain PennEast's only pre-1875 case, *Custiss v. Georgetown & Alexandria Tpk. Co.*, 10 U.S. (6 Cranch)

This Court's earliest relevant decisions are in accord. In *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), this Court found that "the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted." *Id.*, at 223; see also *Goodtitle v. Kibbe*, 50 U.S. 471, 478 (1850) (reaching same conclusion five years later). Given the rejection of such actions, federal condemnations of even private land within state borders did not begin until late into the 19th century. See *Kohl v. United States*, 91 U.S. 367, 373 (1875) (noting condemnation "power of the Federal government has not heretofore been exercised adversely"); U.S. Dep't of Justice, Lands Division, *Fed. Eminent Domain Manual* 1940 at 3 ("Acts of Congress prior to 1867 concerning eminent domain apply only to the territories or to the District of Columbia. In fact there seems at first to have been some doubt in Congress whether the United States could exercise its power of eminent domain in the states.").

To be clear, this Court's eventual decision in *Kohl* establishes the Federal Government has power to condemn land within the States. Nothing about New Jersey's argument suggests *Kohl* is incorrect or warrants reconsideration. Nor does it diminish the Federal Government's ability to condemn state-owned lands: once *Kohl* established the federal condemnation authority, it followed quite naturally that "[t]he fact that land is owned by a state is no barrier to its condemnation by

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233 (1810), which it cites as an example of the Federal Government delegating condemnation power. PennEast overlooks the key fact that Alexandria was then in D.C., not Virginia.

the United States." *Okla. ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941). After all, at the Founding, the States consented to *all* suits filed by the Federal Government, whatever substantive powers it was later found to possess. See *Blatchford*, 501 U.S., at 782. But private party suits cannot be similarly implied against the States, and instead require evidence of consent from the Founding era. See *Alden*, 527 U.S., at 732 (rejecting that "powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving [federal] objectives"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 & n.13 (1996). And if there was doubt about the application of federal condemnation authority even *within* States at that time, *a fortiori* States could not have consented to private parties exercising it against them.

c. Against all this, PennEast offers a syllogism: (1) the Federal Government and the States have long delegated to private parties a right to file condemnation actions against private owners over their private land; (2) at the Founding, the States consented to suit by the United States, including condemnation suits; and so (3) States must have consented to the Federal Government empowering private parties to file condemnation actions against them too. There are a number of problems with PennEast's analysis.

Take the history of private condemnation actions. Although the history of *federal* condemnation litigation by private parties is not so clear as PennEast suggests, see *supra* at 16-19, there is a long history, dating back to the Founding, of private parties filing condemnation actions under state law. See Pet.Br.6-8;

U.S.Br.26-27. But nothing is remarkable or meaningful about a history of private litigation against private parties, condemnation or otherwise. Long before the Founding—and through the present—colonial governments and States empowered private parties to bring a range of suits against other private parties, including for damages. But the history of private-on-private litigation says nothing regarding the validity of filing the same action against a State. Compare *Alexander v. Pendleton*, 12 U.S. 462 (1814) (Founding era case in which private party filed a quiet title suit against a private party), with *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (finding the "Eleventh Amendment would bar" any "quiet title suit against [a State] absent the State's consent"). Indeed, the premise of sovereign immunity is that private parties *cannot* bring suits against the States that they could file against each other; otherwise, immunity is meaningless. However robust the history of private-on-private condemnation, it cannot prove state consent.

The second step of the syllogism—consent to suit by the United States itself—does not provide the missing proof of state consent to private lawsuits. The most obvious problem is that the States have no immunity from suits by the United States because "submission to judicial solution of controversies arising between these two governments" does "no violence to the inherent nature of sovereignty." *United States v. Texas*, 143 U.S. 621, 646 (1892). Because that rationale rests on the presence of the United States as a party, it includes condemnation actions (and any other actions) brought by the United States. But it does not extend to suits by private parties, condemnation or otherwise, even when they rely on "delegated" power from the Federal Government. As Justice Scalia wrote for the

Court, "the consent, 'inherent in the convention,' to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select." *Blatchford*, 501 U.S., at 785. Indeed, States consented to suits by the United States for damages, but no one would suggest the United States could "select" a private party to bring such claims against the States under the Eleventh Amendment.[2]

PennEast suggests this case is special because condemnation actions reflect an "inherently governmental" function. Pet.Br.31, 37. PennEast appears to have invented this distinction out of whole cloth, and it is incorrect. This widespread use of public-private governance at the Founding traces back to medieval England's "strange mélange of private, public, and associative functions." William J. Novak, *Public-Private Governance: A Historical Introduction*, in Gov't by Contract: Outsourcing and American Democracy 27 (Jody Freeman & Martha Minow eds. 2009). Early American corporations were viewed as quasi-governmental entities, as most "charters were granted to associations with a special public-utility or public-interest character." *Id.*, at 30. Warfare, prosecution, education, healthcare, and welfare were public functions at times delegated to private parties. See U.S. Const. art. I, §8, cl. 11 (granting Congress power to issue "Letters

[2] PennEast argues that a "voluntary" condemnation power is an "oxymoron." Pet.Br.6. But the United States *can* exercise that power against the States against their will precisely because of state consent at the Founding. Private suits against state sovereigns are a different matter; there, consent remains wanting. Indeed, the compulsory nature of an action is precisely what state immunity guards against. See *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

of Marque and Reprisal" to privateers); Allen Steinberg, *From Private Prosecution to Plea Bargaining*, 30 Crime & Delinquency 568, 571-72 (1984) ("Private prosecution dominated criminal justice during the colonial period."). Yet that gave none of these private actors the authority to sue States. See *Smith v. Reeves*, 178 U.S. 436, 445-46 (1900) (rejecting argument "that a state cannot claim exemption from suit by a corporation created by Congress … for purposes authorized by the Constitution and laws of the United States"). Immunity was paramount.

Nor is the ahistorical nature of this theory its only problem. First, the "inherently governmental" nature of condemnation makes it *less* likely the States would have consented to private actions against them, rather than by responsible federal officials, and only underscores the lack of evidence that they did so. Second, neither precedent nor PennEast explains how a vague standard like "inherently governmental" operates in practice. And finally, PennEast's approach calls into question rulings expressing "serious doubt" that a qui tam relator could sue a State under the Constitution. *Stevens*, 529 U.S., at 787. Because it is difficult to imagine a more governmental function than recovering public dollars under the False Claims Act, and since the United States retains far more control over a qui tam lawsuit than over a private condemnation action, Pet.App.23, that doubt would have been misplaced.

2. PennEast's claim that state consent can be implied from the fact that condemnation suits are "ministerial," Br. 3, is likewise misguided. As a threshold matter, PennEast's crabbed view that state sovereign immunity is wholly about avoiding money judgments is wrong. See *FMC*, 535 U.S., at 765 (finding the focus

on "the financial integrity of States" is "a fundamental misunderstanding of the purposes of sovereign immunity"). Instead, "the doctrine's central purpose is to 'accord the States the respect owed them as' joint sovereigns" by protecting them from "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Id.*, at 760, 765; see also *Seminole Tribe*, 517 U.S., at 54 ("[T]he relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment.").

Far more importantly, this case is a perfect example of how a State could be injured even absent a damages claim—during both the taking and compensation phases. For one, coercive condemnation litigation can be (and often is) avoided with negotiation, but the negotiation must be conducted in good faith to succeed. Here, PennEast believed that while the NGA requires certain pre-suit negotiations with landowners, the law "does not impose a *good faith* negotiation requirement," Pet.App.84 (emphasis added), and PennEast refused to negotiate with the State over the vast majority of its interests. Pet.App.87 n.49; N.J.CA3.Br.34-41 (challenging on appeal this failure to negotiate regarding state property interests). The United States as condemnor, by contrast, follows a good-faith negotiation duty, see 42 U.S.C. §4651 (requiring that federal agencies seek to "avoid litigation" through good-faith negotiation), which potentially avoids haling a State into court altogether.

For another, the condemnor decides the timing of its suit, a deceptively simple but hugely consequential issue that impacts whether the State will lose its land *before* the court of appeals determines the validity of

FERC's Certificate. See *Allegheny*, 964 F.3d, at 10-11 (noting construction will often begin before owners get "their day in court" to challenge a Certificate, "ensuring that irreparable harm will occur before any party has access to judicial relief"); *Spire STL Pipeline LLC,* 169 F.E.R.C. ¶ 61,134, ¶ 62,009 (2019) (while rehearing pending, company brought over 100 condemnation proceedings and began site work on over 1,000 acres of land). In this case, PennEast rushed to federal court less than three weeks after obtaining a FERC Certificate with *42* condemnation actions to take state property interests—before New Jersey could seek rehearing (let alone petition for review), before the company had all its state and federal regulatory approvals, and while the route was subject to change. See Pet.App.54 (State urging district court to deny the preliminary injunction "given the ongoing FERC proceedings and the likelihood that the pipeline route could change, causing unnecessary condemnation"); JA237 (FERC noting that "once a natural gas company obtains a certificate of public convenience and necessity it may exercise the right of eminent domain in a U.S. District Court or a state court, regardless of the status of other authorizations for the project"). States have an interest in avoiding condemnation when a pipeline may encounter subsequent regulatory obstacles or the Certificate may be set aside—a consideration far more resonant to a governmental condemnor than to a private plaintiff with "powerful incentives to … move forward with the project expeditiously." Pet.Br.40.

Still more, this case shows how a private party may seek authority in a condemnation suit that FERC did not grant—requiring a State to spend its limited time and resources opposing an overbroad application in court. In this case, New Jersey and other landowners

opposed a preliminary injunction request that went beyond FERC's authorization. Compare, e.g., JA 256-57 at ¶55 n.136 (Certificate prohibiting preconstruction activities including tree removal), with D. Ct. Dkt. No. 18-1603, Doc. 1 at ¶2(f)(1) (DNJ Feb. 6, 2018) (PennEast seeking injunction allowing it to clear trees from certain properties). Such issues simply would not arise in a lawsuit by federal officials. In one telling example, PennEast filed suits to immediately condemn nearly all of the properties on its approved route—despite FERC's explicit direction three weeks earlier to consider an alternative route that shifts the final two miles of the project. JA167-68 at ¶215, 182-83 at ¶13. In treating this process as ministerial, PennEast overlooks these meaningful decisions.

The ways in which a condemnation action matters are particularly striking at the compensation stage. A condemnee must be made whole for property taken, meaning a condemnation suit forces the State into an adversarial proceeding over the value of its land. Because assessment of any property's value "may not be relegated to a purely mathematical formula," 4 Nichols on Eminent Domain §12.02 n.4, parties to condemnation proceedings introduce competing expert testimony—with valuations diverging widely—and participate in a compensation trial. See *United States v. 50 Acres of Land*, 469 U.S. 24, 26-30 & 27 n.5 (1984) (describing federal trial over value of public land at which competing valuations diverged by more than a million dollars). And because certain types of public properties are "so seldom sold that there is no accurate way to predict the price," they can be an especially difficult subject for litigation. 4A Nichols, *supra*, §15.01; see *United States v. 564.54 Acres of Land*, 441 U.S. 506, 509, n.3 (1979). Disputed legal questions arise too—

including whether compensation should exceed market valuation because that market "value has been too difficult to find" or because "its application would result in manifest injustice to owner or public." *50 Acres*, 469 U.S., at 29; see 4A Nichols, *supra*, §15.01. Just as parties vigorously contest damages at a trial even after liability is established, compensation proceedings are likewise significant affairs.

Despite PennEast's repeated reference to administrative proceedings at FERC, no land changed hands and no compensation issues were resolved. New Jersey's disagreement will thus be with the private party that haled it into court—PennEast. And it is easy to see how compensation might be litigated differently based on the condemnor's identity: as a sovereign that owns and manages public lands, the United States would be less quick to introduce expert testimony devaluing public property than a plaintiff with private incentives to reduce its project costs. See Pet.App.18 (agreeing that the "incentives for the United States, a sovereign that acts under a duty to take care that the laws be faithfully executed and is accountable to the populace, may be very different than those faced by a private, for-profit entity like PennEast, especially in dealing with a sovereign State"). Whether the private plaintiff demands $100,000 from the state treasury, or fights tooth-and-nail in a federal trial to withhold that sum after taking state land, litigation and settlement choices that mean the difference of hundreds of thousands of dollars for a State are hardly ministerial.

B. States Retain Sovereign Immunity From Suits Against Their Property.

PennEast, but not the United States, argues that its lawsuit against a sovereign State may proceed because it has been styled *in rem*. That argument flies in the face of precedent and first principles.

1. PennEast ignores what this Court has affirmed: a nonconsensual suit against the sovereign's property offends the State like one against the sovereign itself. Compare Pet.Br.41 (asserting state interests are limited because "[a]n *in rem* action does not hale an unconsenting state into court, but rather hales the property into court"), with *The Siren*, 74 U.S., at 154 (identifying "no distinction between suits against the government directly, and suits against its property"); *United States v. Alabama*, 313 U.S. 274, 282 (1941) ("A proceeding against property in which the United States has an interest is a suit against the United States."); *Minnesota v. United States*, 305 U.S. 382, 386 (1939) (same). That is why, contrary to PennEast's position, whether "a suit in a federal court is *in rem*, or *quasi in rem*, furnishes no ground for the issue of process against a nonconsenting state." *Missouri v. Fiske*, 290 U.S. 18, 28 (1933); see also, e.g., *Belknap v. Schild*, 161 U.S. 10, 16-17 (1896) (same); *Upper Skagit Indian Tribe v. Lundgren*, 138 S.Ct. 1649, 1652 (2018) (treating as "error" a reading of this Court's decisions "distinguishing *in rem* from *in personam* lawsuits" for tribal immunity purposes).

This Court's approach to sovereign immunity in *in rem* actions has ample justification. Whatever designation formally applies, "an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court." *Shaffer v.*

Heitner, 433 U.S. 186, 206 (1977); see also *id.*, at 207 (explaining that a court's "jurisdiction over a thing" is a "customary elliptical way of referring to jurisdiction over the interests of persons in a thing"). States themselves are the ones subjected to the coercive process of federal court. See Fed. R. Civ. P. 71.1 (requiring Penn-East to name property and at least one owner in the condemnation action). States are the ones that stand to lose property rights. And States are the ones to engage in adversarial litigation with the private plaintiff over sovereign lands. In every respect, States rather than their parcels are harmed. See *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 258 (2011) (finding that the "indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent," including in a suit "to acquire state lands"); *Coeur d'Alene*, 521 U.S., at 281-82 (explaining that sovereign interests are at their zenith when sovereign land is concerned and that quiet title actions cannot proceed against States).

In any event, allowing courts to exercise jurisdiction over a nonconsenting State if the case is styled *in rem* is unworkable. The "classification of an action as *in rem* or *in personam*" is one "for which the standards are so elusive and confused generally and which … vary from state to state." *Shaffer*, 433 U.S., at 206; see also Br. of U.S. at 14, *Upper Skagit*, No. 17-387 (Jan. 2018) (highlighting challenges in relying on a distinction between *in rem* and *in personam* for sovereign immunity). This Court has sometimes described analogous actions using different monikers. Compare *Upper Skagit*, 138 S. Ct., at 1651 (describing quiet title as *in rem*), with *Nevada v. United States*, 463 U.S. 110, 143-44 (1983) (describing quiet title as *in perso-*

nam). And different states use different labels for condemnation itself. See *Algonquin v. Lowe*, 954 N.E.2d 228, 232-33 (Ill. App. 2011) (eminent domain is not *in rem* because, under state law, suit is filed against the owners, not land). Just as this Court found these appellations too varied and confusing to be useful in personal jurisdiction cases, see *Shaffer*, 433 U.S., at 205-06, they cannot determine state immunity.

2. PennEast's reliance on bankruptcy cases, admiralty cases, and the immovable property doctrine only confirm that New Jersey retains its immunity.

Begin with bankruptcy. PennEast correctly identifies that bankruptcy proceedings are primarily *in rem*, and that this Court in *Katz* found the States lack immunity in such proceedings. But as this Court recently noted, "everything in *Katz* is about and limited to the Bankruptcy Clause." *Allen v. Cooper*, 140 S.Ct. 994, 1002 (2020). Rather than rest on the *in rem* nature of bankruptcy suits, the Court's cases instead emphasized the unique text of the Bankruptcy Clause; its history, including evidence that the Framers specifically contemplated empowering bankruptcy judges "to prevent competing sovereigns' interference with the debtor's discharge"; and U.S. legislation "in the immediate wake of the Constitution's ratification" that subjected States to bankruptcy court jurisdiction. *Katz*, 546 U.S., at 370, 373-77. Said another way, the evidence supporting "bankruptcy exceptionalism," *Allen*, 140 S.Ct., at 1002, is precisely what the case for condemnation exceptionalism lacks: Founding-era material indicating state consent.

Moreover, the kind of *in rem* jurisdiction at play in bankruptcy cases differs markedly from the kind at issue here. As *Tennessee Student Assistance Corp. v.*

Hood highlighted, the res in bankruptcy is that *of the debtor*—and bankruptcy debtors do "not seek monetary damages or any affirmative relief from a State by seeking to discharge [their] debt." 541 U.S. 440, 450 (2004); see *Allen*, 140 S.Ct., at 1002 (same). By entering into bankruptcy, the debtor is not "subject[ing] an unwilling state to a coercive judicial process." *Hood*, 541 U.S., at 450. This action could hardly differ more; a private party *is* going after the State's land, subjecting New Jersey to "coercive judicial process" involving adversarial hearings over sovereign property.

Admiralty decisions are likewise unhelpful to PennEast's cause. As in bankruptcy, this Court's admiralty jurisdiction over States turns not on a general *in rem* exception but on the "unique role in admiralty cases" that "federal courts have had … since the birth of this Nation." *California v. Deep Sea Research*, 523 U.S. 491, 501 (1998). The cases on which PennEast relies in fact confirm that, outside of admiralty's narrow scope, "the Eleventh Amendment bars federal jurisdiction over general title disputes relating to state property interests." *Id.*, at 506; compare also Fed. R. Civ. P. 71.1, with Fed. R. Civ. P. Supp. C, E (requiring owner be named in *in rem* action, except in admiralty suits). And even in admiralty, a State lacks immunity only when it does not possess the property; otherwise, immunity persists. *Deep Sea Research*, 523 U.S., at 506; *Fla. Dep't of State v. Treasure Salvors*, 458 U.S. 670, 682 (1982). Even under that regime, PennEast's suit against New Jersey could not go forward.

The longstanding immovable property doctrine, on which PennEast relies (Br.32-33), similarly supports the State. The doctrine establishes that all sovereigns lack immunity from suits involving real property they

possess "in the territory of another sovereign." *Upper Skagit*, 138 S.Ct., at 1653; see also *id.*, at 1655 (Roberts, C.J., concurring); *id.*, at 1657-58 (Thomas J., dissenting). The doctrine is premised on the idea that the government "acquired land in another state for the purpose of using it *in a private capacity*," *Georgia v. City of Chattanooga*, 264 U.S. 472, 479 (1924) (emphasis added), since it cannot act as sovereign in another's exclusive territory. See *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116, 144-45 (1812). But the immovable property doctrine is needed precisely because sovereigns *do* have immunity when it comes to disputes over their land within their borders.

II. Under The NGA, Private Parties May Not File A Condemnation Lawsuit Against A Nonconsenting State In Federal Court.

The Court need not decide whether private parties can file condemnation lawsuits against nonconsenting States, however, because the NGA does not expressly authorize them to do so. See *Stevens*, 529 U.S., at 779 (explaining this Court "routinely addresse[s]" the statutory authority to sue a State before resolving the constitutional inquiry, because the former is "logically antecedent"). Section 7(h) of the NGA says that private entities who have obtained a Certificate from FERC to build a pipeline may acquire the "necessary right[s]-of-way" for the pipeline "by the exercise of the right of eminent domain." 15 U.S.C. §717f(h). But that language does not address condemnation of state lands—that is, the NGA says nothing regarding filing actions against States over sovereign property. And silence is insufficient to justify nonconsensual private lawsuits against a sovereign in federal court.

1. This Court does not confront this interpretive issue on a blank slate. "A federal court," this Court has held repeatedly, may only "entertain a suit against a nonconsenting State" if Congress has expressed its intent to subject the States to suit through "'unequivocal statutory language.'" *Allen*, 140 S.Ct., at 1000 (quoting *Seminole Tribe*, 517 U.S., at 56); see also *Stevens*, 529 U.S, at 779 (confirming that Congress can only allow a "cause of action it creates to be asserted against States … by clearly expressing such an intent" in the text of the statute); *Dellmuth*, 491 U.S., at 230-31 (noting, "in this area of the law, evidence of congressional intent must be both unequivocal and textual," leaving a reader with "perfect confidence"). There must be unequivocal textual evidence that the private party may sue a State no matter whether it relies on a theory of waiver, abrogation, or even delegation for the lawsuit. See *Sossamon v. Texas,* 563 U.S. 277, 291 (2011); *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003); *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 541 (2002); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 363 (2001); *Blatchford*, 501 U.S., at 785-86; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985), powerfully illustrates how this requirement operates. In 1973, Congress passed the Rehabilitation Act, which—among other things—prohibited discrimination against individuals with disabilities "under any program or activity receiving Federal financial assistance," and empowered private parties to file lawsuits against "*any recipient* of Federal assistance" alleging noncompliance. *Id.*, at 244-45 (emphasis added) (quoting 29 U.S.C. §§794, 794a). The Court recognized the most natural reading of the text would authorize

suits against States, as "there is no claim here that the State … is not a recipient of federal aid," *id.*, at 245-46, and legislative history indicated that "States were among the primary targets" of the Rehabilitation Act. *Id.*, at 249 (Brennan, J., dissenting). But because "States are not like any other class of recipients of federal aid," this "general authorization for suit in federal court"—even one that most logically included States as defendants—was insufficient. *Id.*, at 246 (majority op.). When "Congress chooses to subject the States to federal jurisdiction, it must do so specifically" in the statute's text. *Id.*; see also *Dellmuth*, 491 U.S., at 230 ("*Atascadero* should have left no doubt that … evidence of congressional intent must be both unequivocal and textual.").

That proves fatal to PennEast's claims. As laid out above, the NGA allows private parties to file condemnation actions for "necessary" real property, 15 U.S.C. §717f(h), but is silent on their ability to do so against the States. The text does not mention state lands or suits against States, and "makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity." *Dellmuth*, 491 U.S., at 231. And while PennEast emphasizes the law does not *exclude* States from the general condemnation cause of action, see Pet.Br.25, that misunderstands the proper analysis. See *Atascadero*, 473 U.S., at 246 (refusing to permit private actions against the States despite text "authoriz[ing] suit … against a general class of defendants which literally included States").

There are good reasons to require such unequivocal, textual evidence before any cause of action can be pursued against States. For one, this approach best respects congressional intent. Because "congressional

elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a 'clear statement' rule is merely normal interpretation." Antonin Scalia, *A Matter of Interpretation* 29 (1997). Indeed, because courts have long subjected the States to suit only if the text is clear, it is "difficult to believe that" Congress "would drop coy hints but stop short of making its intention manifest." *Dellmuth*, 491 U.S., at 230-31; see also *Quern v. Jordan*, 440 U.S. 332, 344 (1979) ("It is not easy to infer that Congress in legislating pursuant to the Commerce Clause … desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution.").[3]

But the justifications for this approach go even further. Even where Congress can subject the States to private suits in federal court, doing so "upsets the fundamental constitutional balance between the Federal Government and the States, placing a considerable strain on the principles of federalism that inform Eleventh Amendment doctrine." *Dellmuth*, 491 U.S.,

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[3] Such principles long predate the NGA amendments of 1947. See Amy Coney Barrett, *Substantive Canons & Faithful Agency*, 90 B.U. L. Rev. 109, 145-50 (2010); see also, e.g., Fortunatus Dwarris, *A General Treatise On Statutes & Their Rules of Construction* 111 n.8 (Platt Potter ed., 1871) (explaining that "the general words of a statute do not include the government or affect its rights, unless such intention be clear and indisputable, upon the face of the act"); *United States v. Wittek*, 337 U.S. 346, 358 (1948) (same). Not only does this pedigree bear on congressional intent, but "the practice of employing such canons has been with us for so long that the sheer force of precedent counsels against abandoning it." Barrett, *supra*, at 176.

at 227 (citations omitted). Given "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties," *FMC*, 535 U.S., at 760, requiring textual clarity "temper[s] Congress' acknowledged powers … with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure." *Dellmuth*, 491 U.S., at 227-28. And such a rule allows federal courts to avoid resolving vexing Eleventh Amendment questions unnecessarily. See *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (noting the "cardinal principle" that "if a serious doubt of constitutionality is raised" as to any statute, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided"); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (same).[4]

PennEast's suggestion that this analysis is "novel" and "double-barreled" because it requires textual clarity before reading a cause of action to apply against the States is puzzling. Pet.Br.30. This Court regularly distinguishes between "the broader question whether [a] statute creates any private cause of action" generally, and the more specific "question whether the statute provides for suits against the States." *Stevens*, 529 U.S, at 779. And to respect congressional intent and protect state sovereignty, this Court has required unequivocal, textual evidence for the latter step alone. Were it otherwise, the cases above would be incorrect, as it was clear in each that a general cause of action

[4] That said, this requirement applies even where the creation of a cause of action against the States would unquestionably be constitutional. See *Dellmuth*, 491 U.S., at 227-28, 230. While the doctrine finds support from the canon of constitutional avoidance, its rule is thus not limited by it.

existed. See *Atascadero*, 473 U.S., at 246 (again distinguishing the "general authorization for suit in federal court" from the requisite explicit authorization of actions against States). That is the only unequivocal clarity this Court must insist upon: not whether the NGA contains a condemnation cause of action writ large, but whether it applies to the States specifically. This singular and venerable protection for sovereign interests is not "double-barreled" at all.

2. The linchpin of PennEast's response is that Congress knows how to prevent private condemnations of state lands explicitly when it wants to. See 49 U.S.C. §24311(a)(1)(A) (allowing Amtrak to condemn land, but not state land); 16 U.S.C. §814 (Federal Power Act limiting private condemnations to certain subsets of state land); Pet.Br.27 (arguing clear statement rule renders such exclusions surplusage). PennEast, however, ignores that Congress is equally clear if it wishes to *authorize* condemnation actions against States. In the Energy Security Act of 1980, Congress established the Synthetic Fuels Corporation and empowered it to file condemnation actions for property interests "when it is necessary to construct a pipeline to transport synthetic fuel." Pub. L. No. 96-294, §171(c), 94 Stat. 611, 674 (June 30, 1980). Despite PennEast's position that "necessary" must include state lands, Congress found reason to state explicitly in this Act that the condemnation authority "includ[ed] property owned by any State." *Id.* Said another way, Congress knows how to be clearer in precluding *or* condoning actions against States, and PennEast's position produces surplusage in other laws as well. Consequently, this case confirms the dangers of divining a clear statement by implication from *other* laws. See *United States v. Nordic Vill.*

Inc., 503 U.S. 30, 37 (1992) (insisting on a clear statement in the text of the relevant statute).

PennEast's resort to legislative history is no more illuminating. In short, PennEast argues that a House Committee Report in 1992 indicated that the then-extant version of the Federal Power Act authorized condemnation actions against States, and since the 1947 NGA was based on that version of the FPA, the same is true here. Pet.Br.15, 27. But "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report." *Nordic Vill.*, 503 U.S., at 37; see also *Dellmuth* 491 U.S., at 230 (because a clear statement requires unmistakable textual clarity, "by definition" "recourse to legislative history will be futile" and "generally will be irrelevant"). That is especially so where the materials postdate the law by *45 years*. See *Bostock v. Clayton Cty.*, 140 S.Ct. 1731, 1747 (2020) (finding that, given its unreliability, "[a]rguments based on subsequent legislative history ... should not be taken seriously") (quoting *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring)).

Nor is the 1992 legislative history persuasive evidence. The single report PennEast discusses followed multiple hearings in the 102nd Congress, at which the issue of condemnation of state lands arose. Indicating that the NGA did *not* indisputably authorize condemnation actions against States, one attorney told the committee that his natural gas client was unable to route a pipeline through "State reforestation lands," because "under the 11th amendment to the Constitution a private citizen can't sue a State in Federal court." H.R. Rep. No. 102-11 at 214 (Apr. 30, 1991);

but see *id.*, at 174 (State complaining FERC granted "a private developer the right to condemn State parkland" under the FPA, without addressing immunity). And the mere fact Congress in 1992 amended the FPA to eliminate condemnations of state land is no more instructive than the fact Congress spelled out their inclusion in the Energy Security Act 12 years earlier.

Further, the Report on which PennEast relies said an FPA licensee has "power of eminent domain to condemn all *non-Federal* lands," H.R. Rep. No. 102-474, at 99 (1992) (emphasis added)—even though the law included no greater exclusion for federal land than for state property. That simply reflected the view, which the United States successfully pressed in litigation, that the text was insufficiently *explicit* to cover federally-owned land. See *Transwestern Pipeline v. Kerr-McGee Corp.*, 492 F.2d 878, 883-84 (CA10 1973); Br. of U.S. at 29-31, *Transwestern*, No. 73-1521 (CA10 Oct. 29, 1973) (arguing that because "Congress did not expressly provide for private condemnation of federal land" in the NGA, the statute "could not—in the absence of *express* terms to the contrary—be applied to the United States"). Yet neither the 1992 Committee Report, nor the United States here, explains why the blanket authority to file condemnation suits cannot be extended to federal land without explicit authorization, but can be so extended to the States.

The NGA's own legislative history is no more illuminating. The only document PennEast cites to show that this law endorses private condemnations of state land is one sentence, from one approximately 4-page letter, submitted directly to the record by an opponent of the 1947 amendments. See Br.28. That letter says nothing about Congress's intent, incorrectly suggested

private condemnations are invalid as to *private* land, and never grappled with immunity. See *Amndmts. to the NGA: Hearing on S.1028 Before the Sen. Comm. on Interstate & Foreign Commerce*, 80th Cong. 12 at 103-06 (1947). Far more telling is PennEast's inability to find a member of Congress—or single bill supporter—mentioning the condemnation of state land, notwithstanding this significant intrusion on sovereignty. See *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) (cautioning against searching through legislative history and "picking out your friends").

PennEast's final argument relies on its view of the NGA's ultimate purpose—to prevent state vetoes over natural gas pipelines. But as PennEast's materials establish, Congress was addressing a particular problem in the 1947 NGA amendments: the States' refusal to let pipeline companies exercise eminent domain under state law—including to condemn private land—on which the companies were then dependent. See 35 S. Rep. 80-429, at 2 (1947). Such a high-level purpose is therefore insufficiently precise, let alone unequivocal and textual, to resolve this distinct issue. See *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."). After all, New Jersey'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. That is a far cry from an industry-wide veto.

III. The Courts Below Had Jurisdiction To Consider These Questions.

1. This Court has never before held, and should not now hold, that a State can only raise Eleventh Amendment immunity by affirmatively initiating a separate action, in a different court, against a different party. Sovereign immunity limits the jurisdiction of Article III courts—protecting States from "the coercive process of judicial tribunals at the instance of private parties." *Alden*, 527 U.S., at 749. Here, PennEast sued a State in federal district court. Once the State asserted its immunity as a defense, the Constitution required that court to decide this issue to ensure its actions remained consistent with the "judicial authority in Article III." *Blatchford*, 501 U.S. at 779.

Requiring New Jersey to affirmatively file a suit in another forum to assert its immunity makes even less sense in practice. As noted above, the NGA has a "virtually unheard-of" "mandatory petition-for-rehearing requirement" that parties first seek rehearing before petitioning a court for review. *ASARCO*, 777 F.2d, at 774. As a result, to raise immunity *after being sued*, New Jersey would have to raise it before FERC, wait for an agency ruling, and then seek judicial review—even absent any other objection to the pipeline itself. But "if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts," it is illogical "that they would have found it acceptable to compel a State to do exactly the same thing before [an agency] tribunal." *FMC*, 535 U.S., at 760.

To make matters worse, this state of affairs could deprive the State for months of *any* judicial forum in which to raise immunity. Because a FERC Certificate

is "not final enough for aggrieved parties to seek relief in court" (as they must await rehearing), "but [is] final enough for private pipeline companies to go to court and take private property," *Allegheny*, 964 F.3d, at 10, the State would have only been able to assert immunity long after it was sued. In this case, PennEast filed suit and moved for immediate possession *six months* before FERC resolved the rehearing petition. And in the interim, New Jersey would have been forced to defend against an injunction despite an unresolved immunity defense, notwithstanding that its sovereignty "provides an immunity from suit." *FMC*, 535 U.S., at 766. If the NGA demanded this result, it would raise serious constitutional problems.

But it does not. Section 717r(b) of the NGA says only that a State may not collaterally seek to "affirm, modify, or set aside" FERC's Certificate order approving the underlying pipeline. 15 U.S.C. §717r(b). New Jersey's defense is not a challenge to a Certificate, but an assertion of immunity to a subsequent condemnation action. And a distinct part of the NGA governing condemnation suits, 15 U.S.C. §717f(h), directs *those* actions to proceed in "the district court" and does not include §717r(b)'s exclusivity requirement. All manner of condemnation-specific questions are thus litigated in district court—e.g., whether PennEast had a duty to negotiate before suit in good faith. Pet.App.83-85. FERC itself agreed "[i]ssues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the NGA are matters for the applicable state or federal court." JA 239-40. Because sovereign immunity is specific to the condemnation action, and does not collaterally attack the Certificate, it is not a matter "of the type … Congress

intended to be reviewed within the statutory structure" of §717r(b). *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010).

City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958), is not to the contrary. There, Washington State petitioned a federal appeals court to contest the issuance of a FERC license for failure to comply with state laws. *Id.*, at 328. The State later asserted the same substantive challenges to the license in separate state court proceedings. *Id.*, at 329. This Court concluded that this second effort, challenging the license on the same grounds as the previous action, was a collateral attack in violation of the exclusive review provisions of 16 U.S.C. §825l. *Id.*, at 339. No party raised immunity or any other jurisdictional defense, so the Court did not address whether and how an exclusive review provision would or would not apply to such arguments. That is a far cry from this case.

2. The United States appears to accept this analysis as it relates to the State's constitutional arguments but resists that the courts had jurisdiction to consider the related *statutory* question. See U.S.Br.15-17. That argument solves none of the issues described above, and introduces its own.

The assertion of immunity implicates two inextricably intertwined questions: whether Congress could subject States to private suit, and whether it did. See *Allen*, 140 S.Ct., at 1000-01 (noting this Court "permit[s] a federal court to entertain a suit against a nonconsenting State" only if both of these "two conditions" are satisfied). The United States apparently proposes splitting the atom of sovereign immunity, so that one court would have to decide if a private party can file a

nonconsensual condemnation suit under the Constitution, while a different court would decide (after FERC rehearing) if Congress authorized that plaintiff to do so. U.S.Br.16-17. But "the statutory question [is] 'logically antecedent to the existence of' the Eleventh Amendment question," and is "routinely addressed" first. *Stevens*, 529 U.S, at 779. It is unclear how these two questions would be resolved in tandem by separate courts. And it would put district courts—and this Court—in the untenable position of having to decide whether States retain immunity from nonconsensual private suits without being allowed to first decide if there is a statutory interpretation "by which the question may be avoided." *Crowell*, 285 U.S., at 62.

There is no basis for such an odd result. While this Court may not address any question that "would 'expand the Court's power beyond the limits that the jurisdictional restriction has imposed,'" U.S.Br.16 (quoting *Stevens*, 529 U.S., at 779), that would not happen here. As laid out above, §717r(b) speaks only to challenges that "affirm, modify, or set aside" a Certificate, and not issues relating solely to condemnation, which are handled under §717f(h). New Jersey's assertion of immunity—whether in its intertwined constitutional or statutory manifestations—does not violate that exclusive review provision, and nothing in *Tacoma* provides a basis for dividing the constitutional and statutory immunity defenses. This Court, like the courts below, has jurisdiction over the issues presented.

IV. PennEast Misstates The Impacts Of New Jersey's Sovereign Immunity.

PennEast closes with a consequentialist argument: that this Court *must* strip New Jersey of its immunity, despite the Eleventh Amendment and lack of textual

clarity in the NGA, because a contrary rule could hinder the development of natural gas. This line of thinking has no place in the sovereign immunity analysis. But more importantly, PennEast is wrong.

As the Third Circuit explained, this dispute is not over whether state land can be condemned for natural gas pipelines. Instead, the parties debate whether a private company can file a condemnation suit against a State. That is of huge consequence to New Jersey, who should only be subject to nonconsensual suit by a responsible federal plaintiff—one that likely follows a good-faith negotiation duty; seeks in court only what FERC authorized; declines to condemn sovereign land until a pipeline has all relevant regulatory approvals; and refuses to, in adversarial litigation, undervalue state property. But the identity of the condemnor has no inherent consequence for the industry. Indeed, if States assert their immunity, "[i]nterstate gas pipelines can still proceed. New Jersey is in effect asking for an accountable federal official to file the necessary condemnation actions and then transfer the property to the natural gas company." Pet.App.30.

Indeed, the United States has experience initiating all manner of condemnation claims—including in the development of government buildings, environmental management areas, transportation, national defense, and more. The Federal Government even has experience condemning land for later use by private energy companies. Under 16 U.S.C. §824a-4, the Federal Government may condemn rights-of-way for certain electric transmission facilities and "transfer[]" the rights "to the holder of a permit" after that "holder has made payment … of the entire costs of the acquisition of such property interest, including administrative

costs." While that statute does not govern natural gas, it provides a model that could be used to resolve PennEast's concerns while ensuring federal control over every stage of the condemnation suit—protecting New Jersey's sovereignty in the process.

PennEast protests that although the United States has constitutional authority to file these suits, it lacks authority under the NGA. The most obvious rejoinder is the Third Circuit's: if the "government needs a different statutory authorization to condemn property for pipelines, that is an issue for Congress, not a reason to disregard sovereign immunity." Pet.App.31. This Court should undermine neither its longstanding sovereign immunity jurisprudence nor the requirement of textual clarity to solve perceived shortcomings in the statute Congress wrote.

But even absent congressional action, PennEast is hardly without options. First, while the United States disclaims authority under the NGA to condemn property, the lower courts have had no occasion to consider this question, and this issue deserves greater exploration. Pet.App.31. Second, the vast majority of land is not owned by States and there is no evidence in this case or any other for PennEast's bald assertion that States will engage in gamesmanship to acquire property simply to halt natural gas pipelines.[5] Finally, even if their land is at stake, States will not commonly withhold consent. Despite the passage of more than a

[5] In describing the State's property interests, PennEast confuses an initial 2-page *application* to donate property to New Jersey's Green Acres program (Br.20) with the complex instrument conveying an easement at the end of a long multi-party process—one that involves the expenditure of millions of dollars in taxpayer funds. C.A.App.92-100.

year and a half since the Third Circuit's decision, neither PennEast nor the United States offers evidence of disruption, only speculation. Aside from one case in the Fourth Circuit that arose prior to issuance of the decision below, see *Colum. Gas Transmission v. 0.12 Acres of Land*, No. 19-2040, neither PennEast nor FERC—which is in the best position to know—identifies any other pipeline impacted, despite ongoing approvals. Other analogous industries lack the authority to hale States into federal court in a private condemnation action, but their work goes on.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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