

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-1039

PENNEAST PIPELINE COMPANY, LLC, PETITIONER

v.

STATE OF NEW JERSEY, ET AL.

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

MOTION OF THE UNITED STATES FOR LEAVE TO
PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE
AND FOR DIVIDED ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for leave to participate in the oral argument in this case as amicus curiae supporting petitioner and that the United States be allowed ten minutes of argument time. Petitioner has agreed to cede ten minutes of its argument time to the United States and therefore consents to this motion.

This case presents the question whether the Natural Gas Act (NGA), 15 U.S.C. 717 et seq., authorizes the holder of a certificate of public convenience and necessity, authorizing the construction of an interstate natural-gas pipeline, to initiate a condemnation action to acquire State-owned property necessary for the construction of the pipeline. Pursuant to the NGA, the Federal Energy Regulatory Commission (FERC) authorized petitioner to construct an interstate natural-gas pipeline along a specific route from Luzerne County, Pennsylvania, to Mercer County, New Jersey, and to acquire all land needed for that pipeline, including, if necessary, by eminent domain. When petitioner later initiated a condemnation proceeding to acquire land in which respondents claim an interest, respondents argued that the NGA did not authorize petitioner to commence the suit against them and, if it did, the Eleventh Amendment prohibited it. The district court rejected respondents' claims, but the court of appeals reversed. The court of appeals expressed doubt whether Congress could, consistent with the Eleventh Amendment, authorize a private entity to initiate a condemnation action in order to exercise the federal right of eminent domain against State-owned property. But ultimately, the court declined to decide that constitutional question, resting its decision instead on its conclusion that Congress in the NGA had not authorized petitioner to file such a condemnation action against a State.

The United States has filed a brief as amicus curiae in support of petitioner. The government argues, first, that the court of appeals lacked jurisdiction to determine whether the NGA authorizes petitioner to condemn respondents' property, outside of the NGA's exclusive review scheme for the certificate of public convenience and necessity. The government further argues that, even if the court possessed jurisdiction to address that question, it erred in holding that the NGA does not authorize a pipeline operator, when necessary, to initiate a condemnation action in order to acquire any property that FERC has determined is necessary for the construction of an interstate pipeline, without exception for property in which a State may claim an interest.

The United States has a substantial interest in this case. FERC is responsible for administering the NGA and for granting certificates of public convenience and necessity for the construction and operation of interstate natural-gas pipelines, including the certificate issued to petitioner in this case. FERC has a strong interest in ensuring that courts do not entertain collateral attacks on FERC-issued certificates outside the direct review scheme provided by the NGA. And it also has a strong interest in ensuring that private entities to which FERC has issued such certificates possess the authority necessary to carry out the federally approved projects, including, if necessary, through the exercise of the federal right of eminent domain.

The government filed a brief as amicus curiae at the petition stage of this case at the Court's invitation. The government has presented argument in other cases addressing the meaning of the NGA, the nature of the sovereign right of eminent domain, and the scope of the Eleventh Amendment. See, e.g., Knick v. Township of Scott, 139 S. Ct. 2162 (2019) (eminent domain); Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (eminent domain); Oneok, Inc. v. Learjet, Inc., 575 U.S. 373 (2015) (NGA); Virginia Office for Protection & Advocacy v. Stewart, 563 U.S. 247 (2011) (Eleventh Amendment); Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) (Eleventh Amendment). And the government believes that participation by the United States in this case will be of material assistance to the Court.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

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