No. 19-1039

In The

Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC,

Petitioner,

v.

STATE OF NEW JERSEY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1]

The Institute for Justice (IJ) is the nation's premier defender of private property rights against eminent-domain abuse. It represented the Petitioners in *Kelo* v. *City of New London*, No. 04-108, and has represented landowners in state and federal eminent-domain proceedings nationwide.

The merits question here does not implicate private property rights, but the jurisdictional question does. The government's jurisdictional arguments would leave countless property owners stuck in condemnation proceedings before Article III judges vested with the jurisdiction to take their land away from them but not vested with the jurisdiction to determine whether their land is being taken lawfully. But nothing in the Natural Gas Act suggests that Congress meant to consign property owners to such sharply limited proceedings, and IJ therefore urges the Court to reject the government's expansive jurisdictional arguments, preserve the rights of private property owners nationwide, and resolve this case on the merits.

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[1] Petitioner and Respondents have all filed notices of blanket consent to the filing of amici curiae briefs with the Clerk of Court. Pursuant to Rule 37.6, Amicus affirms that no counsel or party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than Amicus, its members, or counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Petitioner and Respondents agree that the courts below had jurisdiction to adjudicate the merits of their dispute. The government disagrees, urging this Court to adopt an expansive reading of the Natural Gas Act's exclusive-jurisdiction provision that would leave Article III courts wholly powerless to judge the legality of condemnation cases over which they preside. The government's jurisdictional argument is wrong, and the Court should reject it.

First, the government's expansive reading of the Natural Gas Act's exclusive-jurisdiction provision finds no support in the statute's text. It is true, of course, that 15 U.S.C. § 717r(b) requires any challenge to a Federal Energy Regulatory Commission (FERC) order granting a certificate of public convenience and necessity to build a natural gas pipeline to be filed in the relevant federal court of appeals. But there is no reason to assume, as the government does, that this also means any as-applied challenge to a certificate-holder's use of eminent domain must be filed there too.

The problem for the government's argument is that § 717r(b) is not the only jurisdictional provision in the Natural Gas Act. The Act also vests jurisdiction over condemnation actions filed by a certificate-holder in the federal district courts. 15 U.S.C. § 717f(h). The simplest way to reconcile these two provisions is to read them to mean what they say: Challenges to the certificate itself—challenges that say the certificate was wrongly granted, the pipeline's route was wrong, or the power of eminent domain was wrongly delegated—must be filed in the court of

appeals. But district courts hearing condemnations retain jurisdiction to hear challenges to particular condemnations—that is, arguments that a specific condemnation is unlawful for reasons other than the invalidity of the certificate. This reading maps the Natural Gas Act neatly onto state eminent-domain procedures, under which courts routinely reject specific condemnations without questioning the validity of the statute or order authorizing a condemnor to exercise eminent domain in the first place.

This reading of the statute also brings it into line with other federal statutes vesting "exclusive" jurisdiction to review agency orders in the courts of appeals. Some of those statutes expressly forbid courts from entertaining later, as-applied challenges to an order. Others, like the Natural Gas Act, do not. The natural reading, again, is that the statutes that do not forbid later as-applied challenges do not forbid later as-applied challenges.

And nothing in this Court's precedents requires it to reject this more natural reading of the statute. The government leans heavily on *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), but that case at most holds that a party cannot re-litigate an issue that it already raised unsuccessfully in its appeal of an underlying order. And even in dicta, that case nowhere suggests that an appellate court's exclusive jurisdiction to hear facial challenges to an order necessarily extinguishes a trial court's jurisdiction to hear as-applied defenses in later enforcement actions or condemnations.

Second, even if the Natural Gas Act's text were ambiguous on the jurisdictional question, several canons of statutory construction counsel in favor of rejecting the government's expansive reading.

For one, courts nationwide consistently hold that eminent-domain statutes must be strictly construed against a condemnor. All eminent-domain laws operate in derogation of property rights, and courts respond by reading them narrowly to preserve those rights to the greatest extent possible. That doctrine makes this case an easy one. The government offers a reading of the Natural Gas Act that extinguishes all of a property owner's substantive rights (including claims about facts that have not yet arisen). Amicus offers a reading that preserves some of those rights. Strictly construing the statute in favor of property rights requires choosing the second interpretation.

Further, the government's reading of the statute would lead to absurd results. The upshot of the government's argument is that property owners can litigate as-applied challenges to a certificate-holder's use of eminent domain only by directly appealing the underlying certificate as soon as it issues. But appellate courts should not, and sometimes cannot, resolve arguments about the legal consequences of events that might happen years in the future (or never) based on facts that do not yet exist.

Finally, adopting the government's reading of the statute would raise serious due-process questions. If FERC's issuance of a certificate to build a natural-gas pipeline extinguishes a property owner's future

hypothetical as-applied challenges to a condemnation, the Due Process Clause would require specific notice of the sweeping rights those owners stand to lose. Rather than wade into the notice question—on which this Court's precedents stand in some tension—the Court should instead read the statute to say only what it says.

ARGUMENT

The government's argument fails at the outset because it is atextual—nothing in the Natural Gas Act prevents condemnees from raising as-applied challenges to their own condemnation. But even if the statute were less clear, canons of statutory construction counsel against adopting the government's expansive reading of the statute's exclusive-jurisdiction provision.

I. The Natural Gas Act Does Not Strip District Courts Of Jurisdiction To Hear As-Applied Challenges To Condemnations.

The government contends that the court below lacked jurisdiction over New Jersey's Eleventh Amendment defense because the Natural Gas Act vests the courts of appeals with exclusive jurisdiction to hear challenges to a FERC-issued certificate of public convenience and necessity. Br. of U.S. as Amicus Curiae Supporting Petitioner ("Br. of U.S.") 11–19. Because a certificate of public convenience and necessity vests a certificate-holder with the power of eminent domain, the government reasons, challenges to the certificate-holder's ability to exercise that power must also be brought by direct

appeal of the certificate in the courts of appeals. *Id.* at 11.

This misreads the statutory text, which nowhere forbids district courts hearing condemnation cases from considering as-applied challenges to those condemnations. Moreover, the government's reading of the Natural Gas Act ignores how the language of the Act compares with analogous federal statutes. Finally, nothing in this Court's precedents requires it to adopt the government's erroneous interpretation of the statute's text.

A. The text of the Natural Gas Act is clear.

The government's argument misreads the text of the Natural Gas Act, which specifically vests district courts with jurisdiction over condemnations and nowhere strips them of jurisdiction over as-applied challenges to those condemnations. The government's argument is further undermined by the Act's specific command that district courts hearing Natural Gas Act condemnations follow the "practice and procedure" of state courts because those "practice[s] and procedure[s]" include hearing as-applied challenges to condemnations.

1. Nothing in the Act's text strips district courts of jurisdiction to resolve as-applied arguments.

The government's analysis stumbles at the outset by discussing only one of the two relevant jurisdictional provisions in the Natural Gas Act. The government correctly recites only the first, 15 U.S.C. § 717r(b), which provides that a party "aggrieved by an order [issuing a certificate] may obtain a review of

such order" in the appropriate court of appeals and that the court of appeals shall have "exclusive" jurisdiction to "affirm, modify, or set aside such order in whole or in part."

But the Natural Gas Act also vests jurisdiction over condemnation actions brought by a certificate-holder (for property worth at least $3,000) in the United States district courts. 15 U.S.C. § 717f(h). Read in combination, this means the statute vests jurisdiction over challenges to the certificate itself in the courts of appeals but then vests jurisdiction over an condemnation action filed under the certificate in the district court. The question is how to harmonize these two competing jurisdictional provisions.

The government, because it does not acknowledge the second provision, does not directly try to reconcile them. Presumably, though, it would contend that the jurisdiction given to the district courts is essentially ministerial—that the district courts have the power to enter an order transferring ownership in land from one party to another but no power to inquire into the lawfulness of that order.

This ignores a more straightforward reading of the two provisions. The language of § 717r(b) strips district courts of jurisdiction to hear claims that go to the *validity* of the underlying certificate—claims that FERC's findings of fact were wrong or that the certificate's grant of the eminent-domain power itself was illegitimate. But § 717f(h) says that, otherwise, the district courts have jurisdiction over the condemnation action itself, including claims that say a condemnation is unlawful (even though the certificate itself may be valid). In other words, the

combination of the two sections tells us that the courts of appeals have jurisdiction over facial claims that the certificate-holder should not have the eminent domain power in the first place—but that the district courts have jurisdiction over claims that the eminent domain power is being applied unlawfully.

2. The government's argument disregards the Act's command that district courts follow the "practice and procedure" of state courts hearing condemnation cases.

Amicus's reading of the statutory text is bolstered by § 717f(h)'s instruction that district courts hearing these condemnations hew to the "practice and procedure" of the relevant state courts. The "practice and procedure" of state courts hearing condemnation cases is to resolve arguments about the condemnation's legality. And state courts routinely hold that a condemnation is unlawful without questioning the validity of a condemnor's underlying authority to take land. Indeed, state courts do this even when faced with a statute that, like the Natural Gas Act, strips them of jurisdiction to question certain aspects of the condemnation at all.

Take New Jersey, whose "practice[s] and procedure[s]" should have governed below. New Jersey, like many States, has declared that the removal of so-called "blight" is a public use justifying the invocation of eminent domain. N.J. Const., Art. VIII, § III, ¶ 1. And New Jersey implements this constitutional power of eminent domain by allowing municipalities to designate "redevelopment area[s]" if those areas meet certain blight-related criteria. N.J.

Stat. §§ 40A:12A-5, 6. A landowner whose property is placed in a "redevelopment area" has only 45 days to challenge that designation. N.J. Stat. § 40A:12A-6(b)(5)(h). Failure to file a timely challenge forever extinguishes the property owner's right to "assert[] a challenge to the redevelopment determination as a defense in any condemnation proceeding to acquire the property[.]" *Ibid.*

New Jersey courts have recognized that extinguishing this right to challenge the redevelopment determination eliminates a valuable property right. *Cf. Harrison Redev. Agency* v. *DeRose*, 942 A.2d 59, 86–87 (N.J. Super. Ct. App. Div. 2008) (finding previous version of the statute failed to require constitutionally sufficient notice). After all, the New Jersey Constitution says that blight elimination is a public use, and a valid redevelopment determination says that blight exists. Just like a valid FERC certificate authorizes the use of eminent domain, a valid redevelopment determination in New Jersey does the same.

Nonetheless, New Jersey courts still recognize that a property owner who is barred from challenging the validity of a redevelopment determination remains free to challenge the condemnation on any other grounds. A New Jersey court, for example, will reject a condemnation of property in a valid redevelopment zone if the condemnation is not "reasonably necessary" to an actual redevelopment project. See *Borough of Glassboro* v. *Grossman*, 200 A.3d 419, 429 (N.J. Super. Ct. App. Div. 2019).

So too in other states. State courts across the country routinely reject condemnations without

invalidating (or even questioning) the order or statute from which a condemnor's legal authority flows. Sometimes, these decisions rest on the fact that the condemnor, though authorized to take land generally, has not established that it needs the subject property anytime soon.[2] Other times, courts reject takings because the record shows the timing or placement of an otherwise lawful "public use" was meant to serve some illegitimate purpose like stymying an unwanted development project.[3]

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[2] See, *e.g.*, *Utah Dep't of Transp.* v. *Carlson*, 332 P.3d 900, 907 (Utah 2014) (rejecting taking and remanding for further development where condemnor had not sufficiently articulated explanation for taking more land than it immediately needed); *City of Stockton* v. *Marina Towers, LLC*, 88 Cal. Rptr. 3d 909, 913, 921 (Cal. Ct. App. 2009) (rejecting attempted condemnation where explanation for immediate need for land was "so vague, uncertain, and sweeping in scope" as to preclude review); *Ga. Dept. of Transp.* v. *Jasper County*, 586 S.E.2d 853, 857 (S.C. 2003) (rejecting condemnation where proposed use of land was not "fixed, definite, and enforceable"); *Regents of Univ. of Minn.* v. *Ch. & N.W. Transp. Co.*, 552 N.W.2d 578, 580 (Minn. Ct. App. 1996) (rejecting condemnation where future use was "speculative" at the time of taking); *accord Casino Reinvestment Dev. Auth.* v. *Birnbaum*, 203 A.3d 939, 941 (N.J. Super. Ct. App. Div. 2019) (affirming trial-court ruling rejecting taking where condemnor did not provide "reasonable assurances [that its proposed use] would come to fruition in the foreseeable future").

[3] See *Middletown Township* v. *Lands of Stone*, 939 A.2d 331, 333 (Pa. 2007) (finding condemnation for recreational use pretext to stop development); *Earth Mgmt., Inc.* v. Heard Cty., 283 S.E.2d 455, 459 (Ga. 1981) (rejecting proposed public-park condemnation as mere pretext for blocking the development of a waste treatment facility); *Pheasant Ridge Assocs. Ltd. P'ship* v. *Town of Burlington*, 506 N.E.2d 1152, 1154–58 (Mass. 1987) (same, where true purpose was to block low-income housing).

These cases establish that state courts hearing condemnations can and do evaluate the lawfulness of the specific taking before them without invalidating or even evaluating the underlying delegation of the eminent domain power. Read in tandem, §§ 717f(h) and 717r(b) suggest that federal district courts can do the same thing in Natural Gas Act condemnations.

B. The government's reading of the Natural Gas Act ignores other exclusive-jurisdiction statutes.

The Natural Gas Act is only one of several statutes vesting exclusive jurisdiction over the validity of agency actions in the courts of appeals. Congress regularly vests the appellate courts with "exclusive" jurisdiction "to affirm, modify, or set aside" an agency order "in whole or in part." *E.g.*, 15 U.S.C. § 717r(b) (Natural Gas Act); 15 U.S.C. § 78(a)(3) (Securities and Exchange Act); 15 U.S.C. § 80a-42 (Investment Company Act); 15 U.S.C. § 80b-13(a) (Investment Advisors Act); see also 49 U.S.C. § 46110(c) (Federal Aviation Act) (adding "amend" to the standard language).

But some statutes go beyond this stock language and expressly foreclose parties from making as-applied challenges to an agency order in any proceeding outside the direct-review process. See, *e.g.*, 33 U.S.C. § 1369(b)(2) (providing that any EPA action subject to review under the Clean Water Act "shall not be subject to judicial review in any civil or criminal proceeding for enforcement"). On the government's reading of the Natural Gas Act, this language would be surplusage—because, after all, "[e]xclusive means exclusive." Br. of U.S. 14

(quotation marks omitted). But the better reading is that this language exists because "the "default rule is to allow defendants in enforcement actions to [make as-applied arguments] unless Congress expressly provides otherwise." *PDR Network, LLC* v. *Carlton & Harris Chiropractic*, 139 S. Ct. 2051, 2062 (2019) (Kavanaugh, J., concurring).

There is no analogous provision in the Natural Gas Act stripping federal district courts of the authority to hear as-applied challenges to the condemnations before them. Indeed, there is instead a provision vesting those courts with jurisdiction over condemnations arising out of the certificate. See *supra* 6–8. This Court should therefore reject the government's reading of the statute and hold that the Natural Gas Act means what it says: that the courts of appeals have exclusive jurisdiction over the validity of the certificates themselves, not over the lawfulness of any conceivable use of eminent domain under those certificates.

C. None of this Court's precedents require a contrary reading of the statute.

The government relies heavily on *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958). See Br of U.S. 11–15. That case, however, is perfectly consistent with the idea that § 717r(b) allows district courts to hear as-applied challenges to particular condemnations.

City of Tacoma concerned the State of Washington's objections to a Federal Power Commission license that authorized the City of Tacoma to build a dam, allegedly in contravention of the State's laws. 357 U.S. at 328. The State, under a

statute that similarly vested "exclusive jurisdiction to affirm, modify, or set aside" the Commission's order in the appellate courts, filed an appeal in the Ninth Circuit, where it lost. *Id.* at 328, 335. But the State had more success in a parallel State-court case: While the Ninth Circuit proceedings were pending, the City filed a declaratory-judgment action to determine the validity of bonds it planned to issue to finance the dam's construction. *Id.* at 329. After the Ninth Circuit ultimately upheld the issuance of the license, the Washington State courts hearing the parallel case enjoined the entire project as a matter of state law. The dam project required flooding State-owned fisheries, the state courts held, and under Washington law the City was not an entity authorized to flood State property. *Id.* at 331. The Washington Supreme Court therefore affirmed an injunction halting the entire project entirely. *Ibid.*

This Court granted certiorari and reversed because "the very issue upon which respondents stand here was raised and litigated in the Court of Appeals." 357 U.S. at 339. The State (and its citizens, whose "common public rights . . . were represented by the State in those proceedings") was therefore bound by the Ninth Circuit's final judgment rejecting their claims. *Id.* at 340–41.

That holding, of course, has no bearing here, where no party contends any court has already decided the legal issues presented. Instead, the government's expansive reading hinges on dicta suggesting that "even if it might be thought that [the] issue was not raised in the Court of Appeals, it cannot be doubted that it could and should have been

[because the Court of Appeals had] 'exclusive jurisdiction to affirm, modify, or set aside' the [license]." *Id.* at 339. That statutory language "necessarily precluded de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review." *Id.* at 336. On the government's view, this dicta means that any as-applied attack on a condemnation amounts to a forbidden collateral attack on FERC's grant of the certificate itself. Br. of U.S. 13–14.

But that reading cannot withstand contact with the case itself. The reason the Court said in *City of Tacoma* that the State of Washington's claims should have been litigated as a direct attack on the dam-building license was because the State of Washington raised facial challenges to the dam-building license itself. The State in that case had sought and obtained an injunction preventing the dam from being constructed at all. *City of Tacoma*, 357 U.S. at 330. And it did so on the grounds that the license itself was invalid because the City simply was not the sort of entity that could be authorized to build a dam there. *Id.* at 332–33. This sort of facial attack, leading to a facial injunction, would have rightly been brought in the courts of appeals—but it does not therefore follow that any challenge to a particular *application* of that license would have to do the same.

City of Tacoma therefore maps directly onto this case—just not in the way the government contends. Facial arguments challenging the issuance of the certificate of public convenience and necessity would need to be raised directly in the courts of appeals. And many have been: Respondents (and

others) have directly objected to FERC's authorization of the PennEast pipeline on grounds that the pipeline is unnecessary (JA 222–23) or that it would harm the environment (JA 232–33). The same would hold true of arguments that PennEast (as a private corporation) simply cannot be vested with the power of eminent domain. These are issues "inhering in the controversy" over the certificate itself and so they must be exclusively litigated in a court of appeals. *City of Tacoma*, 357 U.S. at 336; see also *id.* at 339. But it does not follow that any claim that a certificate cannot be used in a particular way is a claim "inhering in the controversy" over the certificate itself. Again, a controversy over a certificate's legitimacy differs from a controversy over whether a legitimate certificate may be used in a particular way. Indeed, it would be a peculiar "collateral attack" on the certificate's legitimacy that left the certificate itself intact.

This understanding of the *City of Tacoma* dicta matches the way lower courts have read that case. The Second Circuit, for example, has cautioned against reading *City of Tacoma* as broadly as the government urges here:

> In formulating *City of Tacoma*'s holding, it is important not to take out of context the Court's statement that Section 313(b) "necessarily preclude[s] *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review." Because the notion of issues "inhering in a controversy" is inherently vague, this

> statement could be taken to mean that district courts are precluded from hearing *any* issue that was raised or decided in a prior administrative proceeding. The "inhering in the controversy" statement, however, must be read in relation to the Supreme Court's other statements that, under Section 313(b), a party aggrieved by an administrative *order* may seek judicial review of the order in the courts of appeals, that the courts of appeals have exclusive jurisdiction to affirm, modify or set aside such *orders,* and that all objections to such *orders* must be made in the courts of appeals or not at all. We thus read *City of Tacoma* as holding that Section 313(b) precludes (i) *de novo* litigation of issues inhering in a controversy over an administrative *order*, where one party alleges that it was *aggrieved by the order*, and (ii) all other modes of judicial review *of the order*.

Merritt v. Shuttle, Inc., 245 F.3d 182, 188 (2d Cir. 2001) (Sotomayor, J.).

The test, then, is "whether the claim 'could and should have been' presented to and decided by a court of appeals" rather than raised in defense of a condemnation action. *Ibid.* (quoting *City of Tacoma*, 357 U.S. at 339). And it neither could nor should have been. Challenges to the initial order granting the

certificate are limited to those parties who are "aggrieved by [the] order." 15 U.S.C. § 717r(a) & (b). But New Jersey's sovereign-immunity claim was not caused by the issuance of the order. Instead, when the order was issued, New Jersey's sovereign-immunity claim was at best the result of a series of future contingencies. If (1) PennEast were (still) financially able to proceed through a given property when that property became necessary to the project; (2) PennEast were to actually choose to proceed through the property; (3) New Jersey still owned the property at that time; (4) PennEast and New Jersey were unable to reach a voluntary agreement about the property;[4] and (5) PennEast were to file eminent-domain proceedings in federal, rather than in state court, *then* New Jersey would have an objection under the Eleventh Amendment. This train of assumptions, at a minimum, would test the outer limits of an "aggrieved" party under the statute, and even otherwise, courts might not have the constitutional authority to make those assumptions.[5]

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[4] Before any exercise of eminent domain, certificate-holders must first attempt to "acquire by contract[] or . . . agree with the owner of property to the compensation to be paid." 15 U.S.C. § 717f(h). New Jersey separately contends that PennEast failed to engage in negotiations to acquire the property voluntarily. *In re PennEast*, 938 F.3d 96, 101 (3d Cir. 2019).

[5] See *Nat'l Park Hospitality Ass'n* v. *Dep't of Interior*, 538 U.S. 803, 807–08 (2003) ("Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'").

Fortunately, nothing in the statute or this Court's precedents requires a reviewing court to travel down this string of hypotheticals. A more sensible reading of the statute is that New Jersey's Eleventh Amendment objections are not caused by FERC's order granting the certificate but are instead caused by the specific federal eminent-domain action PennEast eventually filed. Those objections, therefore, should be resolved in that action. Nothing in *City of Tacoma* suggests, let alone commands, a different result.

II. Canons Of Statutory Construction Also Counsel Against Adopting The Government's Position.

As discussed above, the statutory text is clear, and no resort to canons of construction is required: The Natural Gas Act vests jurisdiction over the validity of FERC certificates in the courts of appeals and vests jurisdiction over condemnation actions (which includes jurisdiction over the lawfulness of a particular condemnation) in the district courts.

Even if the text were ambiguous, though, several canons of statutory construction counsel in favor of rejecting the government's expansive reading of the text. First, the Natural Gas Act (as relevant here) is an eminent domain statute, and statutes authorizing eminent domain must be strictly construed against a condemnor. Second, adopting the government's reading would lead to absurd results. And third, the government's expansive reading would raise serious constitutional issues.

A. Eminent-domain statutes must be strictly construed against a condemnor.

Courts across the country have long held that statutes granting the power of eminent domain, like all statutes in derogation of property rights, "must be construed strictly against the grantee." 1A *Nichols on Eminent Domain* § 3.03(6)(b) (3d ed. 2018). Indeed, the principle that eminent-domain laws must be construed strictly against a condemnor is the law of almost every American jurisdiction.[6]

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[6] See *Agricola* v. *Harbert Constr. Corp.*, 310 So.2d 472, 475 (Ala. 1975); *Municipality of Anchorage* v. *Suzuki*, 41 P.3d 147, 150 (Alaska 2002); *Orsett/Columbia L.P.* v. *Superior Court*, 83 P.3d 608, 610–11 (Ariz. Ct. App. 2004); *City of Little Rock* v. *Raines*, 411 S.W.2d 486, 491 (Ark. 1967); *Kenneth Mebane Ranches* v. *Superior Court*, 10 Cal. App. 4th 276, 282–283 (Cal. Ct. App. 1992); *Bly* v. *Story*, 241 P.3d 529, 533–34 (Colo. 2010); *Simmons* v. *State*, 280 A.2d 351, 355 (Conn. 1971); *Rollins Outdoor Advert., Inc.* v. *District of Columbia*, 434 A.2d 1384, 1388 (D.C. 1981); *Cannon* v. *State*, 807 A.2d 556, 559 (Del. 2002); *Tosohatchee Game Pres., Inc.* v. *Cent. & S. Fla. Flood Control Dist.*, 265 So. 2d 681, 684 (Fla. 1972); *Dep't of Transp.* v. *City of Atlanta*, 337 S.E.2d 327, 333–34 (Ga. 1985); *McKenney* v. *Anselmo*, 416 P.2d 509, 514 (Idaho 1966); *Dep't of Transp.* v. *First Galesburg Nat. Bank & Trust Co.*, 566 N.E.2d 254, 257 (Ill. 1990); *Util. Ctr., Inc.* v. *City of Fort Wayne*, 985 N.E.2d 731, 735 (Ind. 2013); *Clarke Cty. Reservoir Comm'n* v. *Robins*, 862 N.W.2d 166, 176 (Iowa 2015); *Nat'l Compressed Steel Corp.* v. *Unified Gov't of Wyandotte County/Kansas City*, 38 P.3d 723, 730 (Kan. 2002); *Royal Elkhorn Coal Co.* v. *Elk Horn Coal Corp.*, 237 S.W. 1083, 1086 (Ky. 1922); *State ex rel. Dep't of Highways* v. *Jeanerette Lumber & Shingle Co.*, 350 So.2d 847, 855–56 (La. 1977); *In re Bangor Hydro-Elec. Co.*, 314 A.2d 800, 808–09 (Me. 1974); *Davis* v. *Bd. of Educ. of Anne Arundel Cty.*, 170 A. 590, 590–92 (Md. 1934); *Providence & Worcester R.R. Co.* v.

Only one State dissents from this consensus: Nevada. See *State ex rel. Standard Slag Co.* v. *Fifth Jud. Dist. Ct.*, 143 P.2d 467, 469 (Nev. 1943) (adopting principle of "broad and liberal" construction for eminent-domain laws).

This Court has never had occasion to squarely adopt or reject the strict-construction principle as applied to federal eminent-domain statutes. But see *United States* v. *Carmack*, 329 U.S. 230, 243 n.13 (1943) (suggesting that statutes delegating eminent-

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Energy Facilities Siting Bd., 899 N.E.2d 829, 835 (Mass. 2009); *Chesapeake & Ohio Ry. Co.* v. *Herzberg*, 166 N.W.2d 652, 655–56 (Mich. 1968); *Miss. Power & Light Co.* v. *Conerly*, 460 So. 2d 107, 111 (Miss. 1984); *City of N. Kansas City* v. *K.C. Beaton Holding Co., LLC*, 417 S.W.3d 825, 832 (Mo. Ct. App. 2014); *City of Bozeman* v. *Vaniman*, 869 P.2d 790, 792 (Mont. 1994); *Burlington N. & Santa Fe Ry. Co.* v. *Chaulk*, 631 N.W.2d 131, 137 (Neb. 2001); *Claremont Ry. & Lighting Co.* v. *Putney*, 62 A. 727, 728 (N.H. 1905); *Soc'y of N.Y. Hosp.* v. *Johnson*, 154 N.E.2d 550, 552 (N.Y. 1958); *State* v. *Core Banks Club Props., Inc.*, 167 S.E.2d 385, 390 (N.C. 1969); *Minnkota Power Co-op., Inc.* v. *Anderson*, 817 N.W.2d 325, 331 (N.D. 2012); *Johnson* v. *Preston*, 203 N.E.2d 505, 506 (Ohio Ct. App. 1963); *City of Muskogee* v. *Phillips*, 352 P.3d 51, 54 (Okla. Civ. App. 2014); *City of Portland* v. *Kamm*, 285 P. 236, 237 (Ore. 1930); *In re Condemnation of 110 Wash St.*, 767 A.2d 1154, 1159–60 (Pa. Commw. Ct. 2001); *Ronci Mfg. Co.* v. *State*, 403 A.2d 1094, 1097 (R.I. 1979); *Eldridge* v. *City of Greenwood*, 503 S.E.2d 191, 203 (S.C. Ct. App. 1998); *Ehlers* v. *Jones*, 135 N.W.2d 22, 23 (S.D. 1965); *Draper* v. *Webb*, 418 S.W.2d 775, 776–77 (Tenn. Ct. App. 1967); *Tx. Rice Land Partners, Ltd.* v. *Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 198 (Tex. 2012); *Marion Energy, Inc.* v. *RFJ Ranch P'ship*, 267 P.3d 863, 867 (Utah 2011); *Dillon* v. *Davis*, 112 S.E.2d 137, 141 (Va. 1960); *Cowlitz County* v. *Martin*, 177 P.3d 102, 105 (Wash. Ct. App. 2008); *Mountain Valley Pipeline, LLC* v. *McCurdy*, 793 S.E.2d 850, 855 (W. Va. 2016); *Coronado Oil Co.* v. *Grieves*, 603 P.2d 406, 410 (Wyo. 1979).

domain authority to private entities should be construed more strictly than delegations to public bodies). Nothing in its precedents, however, suggest that this Court should reject the national consensus in favor of the Nevada rule. Instead, it should follow the longstanding wisdom of State courts that have dealt with eminent-domain disputes for decades.

And, here, the consensus rule about eminent-domain statutes makes the Court's interpretive choices easy. One reading of the Natural Gas Act strips property owners of all of their rights outside the certificate-appeal process. The alternative reading allows property owners to retain some rights. Absent a clear statutory command to choose the first reading, the strict-construction rule for eminent-domain statutes directs the Court to choose the second.

B. The government's reading of the law would lead to absurd results.

On the government's view, property owners facing condemnation under the Natural Gas Act can never raise legal objections to their condemnation in the condemnation action itself. Instead, any property owner who wants to question the legality of the possible future taking of his property (on whatever grounds) must style his objections as an appeal of the underlying FERC certificate itself. But, taken seriously, this view of the law would lead to absurd results and flood the courts of appeals with innumerable, purely hypothetical legal challenges. *Cf. Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (departing from ordinary meaning of word to avoid "an absurd, perhaps unconstitutional, result").

Consider a property owner who wants to argue that the taking of his property is unconstitutional because, at the time of the condemnation, there is no reasonable prospect that the condemnor will use it for its stated purpose anytime soon. *Cf. Casino Reinvestment Dev.* v. *Birnbaum*, 203 A.3d 939, 941 (N.J. Super. Ct. App. Div. 2019) (rejecting condemnation on these grounds). In an ordinary eminent-domain case, this would be straightforward: The arguments would be presented to and resolved by the court with jurisdiction over the condemnation action. But on the government's view, what happens? Has the property owner waived his as-applied argument by not filing it as an appeal of the original certificate within 45 days of its being granted? Should the property owner have filed an appeal asking for a ruling that the future condemnation would be unlawful *if* the certificate-holder tried to condemn the land before it was reasonably needed? Does the property owner need to ask FERC to amend the certificate to make clear that it cannot be used in this one specific way?

These are not hypothetical concerns because FERC certificate-holders have tried to condemn land for which they had no present need. On July 5, 2020, the corporations responsible for building the FERC-approved Atlantic Coast Pipeline announced the cancellation of the project. See 85 Fed. Reg. 44295. But as of that date, the Atlantic Coast Pipeline was still litigating condemnation cases along the East Coast. See, *e.g.*, Notice of Hearing, *Atl. Coast Pipeline* v. *3.13 Acres,* No. 4:18-CV-00035-BO, Dkt. 59 (E.D.N.C. July 1, 2020) (notice setting motion hearing

for July 10, 2020).[7] On the government's view, though, those cases could not consider the impending (or, indeed, even the announced) cancellation of the project. Instead, the Natural Gas Act gives a district court only jurisdiction to take property from A and give it to B—not jurisdiction to inquire into whether B still plans to use it.

Or take the argument raised by Respondents here. As discussed above, the government's view is that New Jersey should have filed an objection with the court of appeals arguing that *if* a chain of hypothetical events ensued, it would have a valid Eleventh Amendment objection to a future federal-court condemnation. *Supra* 17. But the government's argument actually goes further than that. If the statute means what the government says, New Jersey should have been required to bring that objection as to land it already owned—but *also* as to land it might acquire in the interim. In other words, States must file objections about land they do not currently own but might have purchased by the time a licensee gets around to a condemnation.

But surely not. If Congress had wanted to strip district courts of the power to hear arguments routinely entertained by trial courts in condemnation

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[7] The motion set for hearing in *3.13 Acres* asked the district court to stay the proceedings given the increasing likelihood that the Atlantic Coast Pipeline would never use the land for anything. *Id.* Dkt. 55. The government's apparent position is that the district court lacked jurisdiction to entertain the property owners' arguments (correct though they proved to be) and should instead have handed title to the land over to a company that would shut down a few days later.

actions and instead to have required the courts of appeals to answer endless hypothetical questions about how and when a certificate-holder's power of eminent domain might be used, it could have been expected to say so explicitly. Instead, it has not said so at all. The government's expansive reading of § 717r(b) should therefore be rejected.

C. The government's reading of the statute would create constitutional problems.

On the government's view of the law, a property owner who fails to promptly appeal FERC's grant of a certificate does not waive only his right to challenge the certificate. He also waives his right to challenge any future hypothetical use of the powers granted by that certificate. But such an expansive waiver of rights should require a similarly expansive notice of what is at stake. After all, a reasonable property owner would never suspect that failing to object to a nearby business's application for a liquor license would foreclose him from filing a nuisance action should that business prove to be too loud. Similarly, a property owner would be surprised to learn that failing to object to FERC's issuance of a certificate would foreclose all as-applied challenges to that certificate's use. Yet nothing notifies property owners whose land is in the path of a potential pipeline that they must act now lest they waive claims based on facts that have not yet occurred.

This raises potentially serious questions because this Court's precedents are unclear about how much substantive notice a person in these circumstances would be entitled to. In *North Laramie Land Company* v. *Hoffman*, the Court suggested that

relatively little notice would be needed because "[a]ll persons are charged with knowledge of the provisions of statutes." 268 U.S. 276, 283 (1925). But, without ever formally overruling *North Laramie*, the Court promptly abandoned the fiction of the constantly vigilant property owner, noting in *Mullane* v. *Cent. Hanover Bank & Trust* that "it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests." 339 U.S. 306, 320 (1950).

Lower courts have heeded this shift—particularly in the context of eminent-domain statutes that require property owners to preemptively assert their rights. The Second Circuit, for example, has held that a New York law violated due process because (among other things) its notices were substantively deficient because they failed to "explicit[ly]" inform property owners that they would lose certain rights if they failed to appeal a determination within 30 days. *Brody* v. *Vill. of Port Chester*, 434 F.3d 121, 132 (2d Cir. 2005); see also *id.* at 130–32 (noting unresolved tension between *North Laramie* and *Mullane*). As interpreted by the *Brody* court, then, this Court's Due Process cases would require FERC to specifically tell property owners that they stood to lose their future as-applied claims. But other courts disagree with *Brody*. *M.A.K. Inv. Grp., LLC* v. *City of Glendale*, 897 F.3d 1303, 1318–19 (10th Cir. 2018) (rejecting *Brody*'s conclusion that due process requires substantive information in notices).

Regardless of whether this Court ultimately agrees with the *Brody* approach or the *M.A.K.*

approach, there is no need to read the Natural Gas Act in a way that presents the question at all. See *Clark* v. *Suarez Martinez*, 543 U.S. 371, 385 (2005) (noting that the constitutional-avoidance canon functions as means of choosing between two possible constructions of a statute). There may come a time when this Court must resolve the due-process implications of a law that strips property owners of claims before they could even be sure those claims existed. But for today, the easier path is to simply correctly note that Congress has done no such thing.

CONCLUSION

The government's jurisdictional arguments should be rejected.

Respectfully submitted.

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