No. 19-1039

IN THE

Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC,

Petitioner,

v.

NEW JERSEY, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE STATES OF OREGON, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW MEXICO, NEW YORK, NORTH CAROLINA, RHODE ISLAND, VERMONT, VIRGINIA AND WASHINGTON, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does a State retain sovereign immunity from suit in a condemnation proceeding brought by a private party under the Natural Gas Act's eminent domain provision, 15 U.S.C. § 717f(h)?

2. If so, is a State entitled to assert its immunity as a defense to the condemnation suit rather than being required to litigate it in collateral administrative proceedings before the Federal Energy Regulatory Commission?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases Cited

Constitutional and Statutory Provisions

Administrative Rules

Other Authorities

INTEREST OF AMICI STATES

This case raises important questions about the nature of state sovereignty and the relationship among the States, the federal government, and private litigants. The amici States have a strong interest in the answers to those questions, both in the specific context of private condemnation of state-owned land to construct a pipeline and more generally about whether the federal government can delegate to a private party the authority to hale an unconsenting State into court.

Some of the amici States face the prospect of suits by private parties seeking to condemn state-owned land to build pipelines on those lands, even before the underlying project has final approval. In Oregon, for example, the Federal Energy Regulatory Commission (FERC) recently issued a certificate of public convenience and necessity for construction and operation of the Jordan Cove pipeline. *See Jordan Cove Energy Project L.P., Pac. Connector Gas Pipeline, LP*, 170 FERC ¶ 61,202 (2020). If constructed, the pipeline will stretch 229 miles across southern Oregon, crossing state-owned waterbodies and land. *See id.* at 61356, 62370, 62391. With its FERC certificate, the private company developing the Jordan Cove pipeline is authorized to condemn the rights-of-way and other lands "necessary" for the equipment used to run the pipeline, *see* 15 U.S.C. § 717f(h), even though the legality of FERC's action is still under review in the United States Court of Appeals for the District of Columbia Circuit. *See Evans v. FERC*, No. 20-1161 (D.C. Cir. filed May 22, 2020).

Similarly, in Maryland, the sponsor of the Eastern Panhandle Expansion Project sued to condemn property owned by the Maryland Department of Natural Resources. *Columbia Gas Transmission, LLC v. 0.12 Acres of Land, More or Less, in Washington Cty., Md.*, No. 1:19-cv-01444-GLR (D. Md. Aug. 22, 2019). The pipeline would run under the Western Maryland Rail Trail, a popular destination for hikers and bicyclists. The district court dismissed the action on Eleventh Amendment grounds, See 8/21/19 Hearing Transcript at 12-18, *Columbia Gas*, No. 1:19-cv01444-GLR (Sept. 17, 2019), Dkt. 47, and the case is on appeal to the United States Court of Appeals for the Fourth Circuit.

More generally, all the amici States—regardless of whether they currently face proposed pipelines that cross state lands—have an interest in preserving the fundamental principles of state sovereign immunity and federalism that are at issue here. Petitioner and the United States argue that Congress can delegate to private parties the federal government's power to sue unconsenting States; the United States also urges that States are barred even from asserting their immunity in the very suits that violate it. If accepted, those arguments would bring about a radical change in federal-state relations and undermine the important limits on congressional authority to abrogate state sovereign immunity that this Court has repeatedly confirmed.

SUMMARY OF ARGUMENT

Congress cannot authorize private parties to sue unconsenting States to take state-owned property by condemnation. States are sovereigns, and immunity

from private suit is inherent in the nature of sovereignty. The States did not surrender their sovereign immunity from private suit through ratification of the Constitution. Congress has no authority to abrogate that immunity when exercising its Commerce Clause powers.

Nor can Congress circumvent that limitation by delegating to private parties the federal government's own authority to sue States. Delegation of authority over that litigation to a politically unaccountable entity would be inconsistent with the States' constitutional status as co-sovereigns in our federal system.

Concern for state sovereignty is particularly strong when the private suit affects a State's authority over its own property. The States hold property for public purposes, including recreation, conservation, and public amenities like schools and roads, or to generate income for the State's governance. Congress cannot cede the power to take property from an unconsenting State—which, it bears emphasizing, is already putting that property to a public use—to a private party.

Congress also cannot preclude States from asserting their sovereign immunity as a defense to suit by a private party. The United States argues that States must assert that immunity in administrative proceedings before FERC and on direct judicial review of FERC's determination. But because those proceedings may not be completed until after the condemnation suit is adjudicated, the practical effect of the United States' argument would be to abrogate state sovereign immunity from private suit. Congress

can no more deprive States of immunity indirectly through jurisdiction-stripping rules than directly through abrogation.

ARGUMENT

Respondents New Jersey and its agencies explain why the Natural Gas Act (NGA) does not authorize private parties to sue States and does not require States to raise that argument in the collateral FERC proceedings. The amici States focus instead on the constitutional questions that undergird that statutory analysis: whether Congress has the power to authorize those suits or to prevent States from raising their immunity as a defense in the suits. As explained below, it does not.

A. Congress cannot delegate to a private party the federal government's authority to sue unconsenting States to take state lands.

"[E]ach State is a sovereign entity in our federal system[.]" *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996). And "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual' without [the sovereign's] consent." *Id.* (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)). Although the States agreed through the "plan of the Convention" that they would be subject to suit by the federal government itself, *Alden v. Maine*, 527 U.S. 706, 755 (1999), they did not surrender their sovereign immunity from suits by private parties.

Congress cannot circumvent the limits on its ability to abrogate state sovereign immunity by delegating to private parties the federal government's authority to sue States. "[O]ur federalism requires

that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden*, 527 U.S. at 748. This Court has long rejected similar attempts at transgressing the confines of "the structure of the original Constitution itself." *Id.* at 728. It should do so here, too, and reject the delegation exception to sovereign immunity that petitioner and the United States seek.

As explained below, state sovereign immunity inheres in our constitutional structure. A delegation exception would be fundamentally inconsistent with that structure. And it would be particularly intolerable in the context of condemnation proceedings, which undermine the States' core sovereignty interests over state lands.

1. Sovereign immunity is an integral part of the States' status as sovereigns in our federalist system.

Two foundational principles underpin this Court's sovereign immunity jurisprudence: (1) an antecedent, extratextual understanding of States' sovereign immunity, and (2) respect for States as sovereigns in our federal system.

The first principle derives from the history of the Eleventh Amendment, which demonstrates the central role that state sovereign immunity plays in the constitutional structure. That history shows that sovereign immunity is antecedent to the Constitution and not limited by its text. *See Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) ("Manifestly, we cannot rest with a mere literal application of the

words of section 2 of article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States.").

The framers thoroughly debated the issue of state immunity. *See* 3 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 526–27 (Jonathan Elliot ed., Washington, 2d ed. 1836) (describing those debates). At the time, many States faced Revolutionary War debts and feared the prospect of answering to their creditors. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821) (describing that apprehension). Alexander Hamilton tried to assure the wary that the States would not be subject to such suits unless the States "surrendered" their inherent immunity "through the plan of this convention." The Federalist No. 81, at 548–49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Nonetheless, the text of Article III of the United States Constitution suggested that States did *not* enjoy immunity from a suit brought by a private party in federal court. *See* U.S. Const. Art. III, § 2 (among the "Cases" and "Controversies" justiciable in a federal forum are those "between a State and Citizens of another State[.]").

Soon after ratification the debtor States' fears were realized. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), this Court ordered an unwilling State to honor a bond that the State had issued during the war.

The reaction to *Chisholm* was swift. The Eleventh Amendment was ratified less than two years later, thereby nullifying *Chisholm*'s interpretation of

Article III. *See* Cong. Research Serv., The Constitution of the United States of America: Analysis and Interpretation, Centennial Edition—Interim, S. Doc. No. 112-9, at 28 n.3 (2014) (describing ratification history). The Eleventh Amendment provides:

> The 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. It thus directly undid this Court's interpretation of the provision of Article III that had abrogated state sovereign immunity from suit in federal court.

As this Court has recognized, the Eleventh Amendment reflects state sovereign immunity but does not define it. For example, although the Eleventh Amendment on its face does not bar a federal suit against a State brought by one of its *own* citizens, the State nonetheless retains sovereign immunity against such a suit. *See Hans*, 134 U.S. at 15. Allowing a State to be sued by one of its own citizens but not a citizen of a different State would be as "startling and unexpected" as the outcome of *Chisholm*, because "[t]he suability of a State without its consent was a thing unknown to the law." *Id.* at 11, 16.

Similarly, this Court held in *Alden v. Maine*, 527 U.S. 706 (1999), that—even though the Eleventh Amendment addresses only the "Judicial power of the United States"—sovereign immunity is not limited to

federal court. In *Alden*, private parties sued the State for violations of the Fair Labor Standards Act in state, not federal, court. This Court determined that the suit was barred by sovereign immunity. *Alden*, 527 U.S. at 712. The Court noted that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Id.* at 728. "The Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle[.]" *Id.* at 728–29. Thus, "it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Id.* at 729. Because the States retain a measure of sovereignty under that constitutional design, they must be "'immune from suit, without their consent,'" unless a State voluntarily surrenders its immunity. *Id.* at 730 (quoting The Federalist No. 81, at 548–49).

Alden also reflects the second foundational principle that animates this Court's sovereign immunity jurisprudence: respect for the States as sovereigns in our federal system. The Court recognized the "indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Id.* at 749 (quotation marks omitted). State sovereignty is a "separate and distinct structural principle" arising out of the federalism-based system of governance established in the Constitution. *See id.* at 730.

Respect for States as sovereigns also figured in this Court's recent decision in *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019). The

question in *Franchise Tax Board* was whether to overrule *Nevada v. Hall*, 440 U. S. 410 (1979), in which this Court held that the Constitution does not bar a private suit against a State in the courts of another State. *See Hall*, 440 U. S. at 416–21. The *Hall* Court had concluded that the States maintained sovereign immunity in each other's courts the same way that foreign nations do—that is, immunity is available to the defendant State only if the forum State "voluntar[ily]" chooses "to respect the dignity of the [defendant State] as a matter of comity." *Id.* at 416.

This Court overruled *Hall* and concluded that "interstate sovereign immunity is preserved in the constitutional design[.]" *Franchise Tax Bd.*, 139 S. Ct. at 1496. In reaching that conclusion, this Court noted "that the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns. Each State's equal dignity and sovereignty under the Constitution implies certain constitutional limitations on the sovereignty of all of its sister States." *Id.* at 1497 (quotation marks and brackets omitted). Thus, the States are not left to afford one another immunity as a matter of comity. Rather, the Constitution "embeds interstate sovereign immunity within the constitutional design." *Id.*

This Court's decisions in *Alden* and *Franchise Tax Board* highlight an important point: State sovereign immunity protects the dignity of the States *as sovereigns*. "The preeminent purpose of state sovereign immunity is to accord States the dignity

that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 760 (2002); *see also id.* (holding that States have sovereign immunity from administrative as well as judicial proceedings).

Of course, the States agreed, through the "plan of the Convention," that they would be subject to suit in certain circumstances. *Alden*, 527 U.S. at 713. Thus, under Article III, section 2, States are subject to suit brought by another State in a federal forum. *See* U.S. Const. Art III, § 2; *Alden*, 527 U.S. at 755. And States are subject to suit brought by the United States. *See Principality of Monaco*, 292 U.S. at 328. But any exception to sovereign immunity must be grounded in our constitutional structure and respect the States' dignity within that structure.

2. The proposed delegation exception is inconsistent with our constitutional structure and respect for States' dignity.

This Court has distinguished between the enumerated powers under which Congress can abrogate state sovereign immunity from private suit, like the Fourteenth Amendment, and those under which it cannot, like the Commerce Clause. The NGA is Commerce Clause legislation. Congress cannot directly abrogate the States' immunity from private suit in the NGA, and it should not be allowed to circumvent that limit through the fiction of delegating federal authority to private parties.

a. Delegation would circumvent the ban on abrogating, under the Commerce Clause, state immunity to private suits.

Even if Congress had sought in the NGA to authorize private parties to sue States—and the Court of Appeals properly found no such intent—that authorization would not have been justified as an abrogation of sovereign immunity. Congress is empowered to abrogate state sovereign immunity to private suits only in limited circumstances. For example, Congress may do so when enforcing the protections enshrined in the Fourteenth Amendment through "appropriate legislation." U.S. Const. Amend. XIV, § 5. The Fourteenth Amendment, of course, represents a substantial restriction on the use of state power and prohibits state action that denies equal protection or deprives persons of life, liberty, or property without due process. This Court has held that the express constitutional power to enforce the substantive protections of the Fourteenth Amendment justifies congressional abrogation of state sovereign immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (stating that the Fourteenth Amendment allows Congress to "provide for private suits against States or state officials which are constitutionally impermissible in other contexts"). This Court also has held that the Bankruptcy Clause abrogates state sovereign immunity, explaining that "the States agreed in the plan of the Convention not to assert that immunity" because of the importance of uniform bankruptcy laws. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 373 (2006).

But by now it is well settled that Congress cannot abrogate state sovereign immunity when exercising its Commerce Clause powers. *See Seminole Tribe*, 517 U.S. at 66 (overruling *Pennsylvania v. Union Gas Company*, 491 U.S. 1 (1989)). *Seminole Tribe* "reconfirm[ed] that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government." *Id.* at 72. Thus, in *Seminole Tribe*, the Court held that Congress could not subject unconsenting States to suit by a tribe to enforce the Indian Gaming Regulatory Act. *Id.* at 47. Similarly, *Alden* held that Congress could not subject unconsenting States to suits by private parties to enforce the Fair Labor Standards Act. 527 U.S. at 712. In both cases the Court noted that the federal government itself could sue to enforce the statute. *See Seminole Tribe*, 517 U.S. at 71 n.14; *Alden*, 527 U.S. at 755. But that did not justify allowing private suits.

The NGA is an exercise of congressional authority to regulate interstate commerce in natural gas under the Commerce Clause. *See* 15 U.S.C. § 717(a). Accordingly, Congress cannot abrogate state sovereign immunity for purposes of enforcing the NGA.

Petitioner and the United States do not dispute that conclusion, but they seek an end run around it by contending that the Constitution allows the federal government to delegate its authority to sue to private parties. But if the federal government possesses that authority, *Seminole Tribe* and *Alden*

merely identified a minor drafting error in the statutes they struck down, not a deep constitutional flaw. In other words, if petitioner and the United States were right, the suits in those cases would have been allowed if the statutes had not directly abrogated State immunity from private suit but instead delegated to private parties the federal government's own authority to sue to enforce the statutes.

Nothing supports such a radical reinterpretation of those seminal decisions on sovereign immunity. Just as this Court noted that it would be "quite strange" to prohibit Congress from abrogating immunity in court but allow it to abrogate immunity before an administrative tribunal, *Fed. Mar. Comm'n*, 535 U.S. at 761, it would be quite strange—indeed, absurd—to prohibit Congress from abrogating immunity from private suit but allow it to circumvent immunity through the fiction of labeling the same suit a delegation of federal authority to a private party. *Cf. Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786-77 (1991) ("[A]ssuming that delegation of exemption from state sovereign immunity is theoretically possible, there is no reason to believe that Congress ever contemplated such a strange notion."). There is no basis in constitutional structure or this Court's case law for such a rule of law, which would radically rework bedrock principles of state sovereign immunity.

b. A private suit is not constitutionally equivalent to a suit by the United States.

In addition to being an end run around the limits of congressional power, delegation of federal authority to sue states fails to respect the dignity of States as sovereigns in our constitutional structure. For that reason, too, this Court should reject the proposed delegation exception to sovereign immunity.

The States agreed, through the "plan of the Convention," that they would be subject to suit by the federal government itself. *Alden*, 527 U. S. at 755 (citing *Principality of Monaco*, 292 U. S. at 328–29). But there is a constitutionally significant difference between a suit brought by another sovereign and a suit brought by a private party. Federal officials are "entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed,' U. S. Const., Art. II, § 3." *Alden*, 527 U.S. at 755. A suit by an official entrusted with that duty "differs in kind from the suit of an individual" who has no such duty. *Id.* "Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States." *Id.* at 756.

This Court's *Federal Maritime Commission* decision highlights the difference between those two types of suits. In that case, the question was whether a State had sovereign immunity from a private party's complaint before a federal administrative agency. 535 U.S. at 747–49. The United States argued that the State could be required to participate

in the administrative proceedings because "the States have consented to actions brought by the Federal Government." *Id.* at 764. But this Court rejected that argument, noting that "the prosecution of a complaint filed by a private party" before the federal agency "is plainly not controlled by the United States, but rather is controlled by that private party[.]" *Id.* "As a result, the United States plainly does not exercise political responsibility for such complaints, but instead has impermissibly effected a broad delegation to private persons to sue nonconsenting States." *Id.* (quotation marks and ellipsis in original omitted).

The same is true here. Although FERC may have approved construction of the pipeline along a particular route, it has not exercised political responsibility for filing or prosecuting a condemnation proceeding in court. That proceeding "is plainly not controlled by the United States, but rather is controlled by [a] private party[.]" *Id.* As in *Federal Maritime Commission*, state sovereign immunity bars that proceeding.

As the holding of *Federal Maritime Commission* reflects, delegating federal authority to a private party is fundamentally inconsistent with our constitutional structure. The States' consent to suit by the United States through the plan of the convention did not amount to "consent to suit by anyone whom the United States might select." *Blatchford*, 501 U.S. at 785; *see also id.* (expressing "doubt . . . that sovereign exemption *can* be delegated—even if one limits the permissibility of delegation . . . to persons on whose behalf the United States itself might sue." (emphasis in original)). Thus,

as this Court's precedents make clear, the federal government's undisputed authority to bring suit against a State does not mean that the federal government can authorize a private party to do the same.

A contrary rule would be untenable. This Court has original and exclusive jurisdiction over suits between two States. U.S. Const., Art. III, § 2; 28 U.S.C. § 1251(a). If a State could delegate that authority to one of its residents, the result would be a suit that flatly conflicted with the plain text of the Eleventh Amendment. But the logic of petitioners' and the United States' position here would allow that subterfuge. This Court should confirm that neither Congress nor States can delegate to private parties the authority to sue a State.

3. Delegation is particularly intolerable in the context of private condemnation suits.

a. State authority over state land has special importance in the analysis of sovereign immunity.

For the reasons explained above, Congress cannot delegate the federal government's authority to sue a State. Allowing it to do so would open a loophole in this Court's abrogation jurisprudence and conflict with basic principles of state sovereignty.

But even if that principle did not hold in all contexts, it would hold in the context of suits to condemn state property. In addition to lands held in a proprietary capacity, States hold tidelands, submerged lands, and navigable waterways as sovereign lands subject to the public trust. *Ill. Cent.*

R. Co. v. Illinois, 146 U.S. 387, 435 (1892). This Court has recognized the special importance of state authority over state land in the analysis of sovereign immunity. In *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), the plaintiff tribe sought a declaration of ownership and a right to quiet enjoyment of submerged lands surrounding a lake in Northern Idaho. This Court held that the State was immune from the suit even though the tribe sought prospective injunctive relief—relief that otherwise would be allowed under the reasoning of *Ex parte Young*, 209 U.S. 123, 160 (1908). *Coeur d'Alene Tribe*, 521 U.S. at 282–88.

In reaching that conclusion, this Court explained that States have "special sovereignty interests" when a suit seeks to transfer "substantially all benefits of ownership and control" from the State to the plaintiff. *Id.* at 281–82. That is particularly so when the suit could "divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect." *Id.* at 283. A State's title to navigable waters and the soils under them was conferred "'by the Constitution itself.'" *Id.* (quoting *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977)). "The dignity and status of its statehood" allowed the State to invoke sovereign immunity even though *Ex parte Young*'s "fictional distinction" between a suit against a state official and a suit against the sovereign otherwise would have allowed the suit. *Coeur d'Alene Tribe*, 521 U.S. at 269, 287.

The same special sovereignty interests are implicated here since this case, too, concerns state-owned lands. The eminent domain proceedings at issue seek to transfer ownership and control of real property from a State to a private party. And when the pipeline route crosses navigable waters or tidelands—as they frequently do—eminent domain divests the State of control over those "unique" lands that are "infused with a public trust." *Id.* at 283.

Petitioner and the United States ask this Court to allow the suit on the fiction that it is brought under the aegis of the federal government rather than by a private party. But that sort of "empty formalism" cannot defeat state sovereign immunity. *Id.* at 270. In *Coeur d'Alene Tribe*, the tribe could not circumvent the State's immunity from suit over its ownership of land by purporting to bring it against a state official rather than the State itself. For the same reason, a private party cannot circumvent the State's immunity from suit over its ownership of land by purporting to bring it on behalf of the federal government rather than itself. Immunity turns on the impact to the State's special sovereign interests in its property, not the form of the suit.

b. Intergovernmental takings require an exercise of political responsibility that cannot be delegated to a private party.

Beyond the doctrinal reasons for being especially accommodating of state sovereignty in condemnation proceedings, there are practical reasons to do so as well. States hold property for the benefit of the public. When the federal government takes that property for a different public use, it deprives the public of the

uses to which the property previously was put. The competing public uses at issue in an intergovernmental taking are a strong reason to require the federal government itself—politically accountable and charged with public duties—to take responsibility for exercising eminent domain.

1. Intergovernmental takings by the federal government are a relatively recent development in the law. "At the Founding, the federal government was not understood to have the power to exercise eminent domain inside a state's borders." William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1741 (2013); *see also Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845) (The United States has "no constitutional capacity to exercise . . . eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted."). When the federal government needed land, it relied on the States to condemn it. *See* Baude, *supra*, at 1741. In 1875, this Court held for the first time that the federal government had the power to condemn private property without the consent of the State in which the property was located. *Kohl v. United States*, 91 U.S. 367, 374 (1875). And by the mid-twentieth century, this Court recognized that the federal condemnation power included the power to take state-owned property. *United States v. Carmack*, 329 U.S. 230, 236 (1946); *see also United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (holding that public condemnees must receive the same compensation as private condemnees). While the federal government's *authority* to take state property

is no longer in dispute, it remains a consequential act that demands a considered exercise of political responsibility. The power to condemn is the power to take property for a "public use." U.S. Const. Amend. V. But property owned by the State is already being put to a public use. In our federalist system the States have primary responsibility for protecting and using their public lands for the benefit of their citizens. This Court's "jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances." *Kelo v. City of New London*, 545 U.S. 469, 482 (2005). To that end, the "earliest cases" decided by this Court "in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs." *Id.* (citing *Hariston v. Danville & Western R. Co.*, 208 U.S. 598, 606–07 (1908)).

Intergovernmental takings are a departure from that "strong theme of federalism." They represent the federal government overruling the State's own determination of how best to meet local needs and serve the interests of its residents. To take state property, the federal government must determine that some other public use is more important than the one to which the property is already being put. That is not a determination that the federal government makes lightly, because it directly infringes on a core aspect of state sovereignty. *Cf.* 42 U.S.C. § 4651 (stating policy that federal agencies

"make every reasonable effort" to acquire real property by negotiation rather than condemnation).

2. The difficulty of providing just compensation also highlights the gravity of the decision to carry out intergovernmental takings. Because States focus not just on profiting from their property but on preserving and enhancing the public benefits that derive from the property, financial compensation for the market value of property is not likely to make the State whole. *See United States v. Miller*, 317 U.S. 369, 373–74 (1943) (explaining that just compensation, for purposes of the Fifth Amendment, means "the full and perfect equivalent in money of the property taken" and is generally the "fair market value"). That is, the public use to which a State has already put public property—which may be connected to how the State uses other adjacent or similar parcels of property—may not be fully compensated by the market value of the property. *See 50 Acres of Land*, 469 U.S. at 26 ("a public condemnee," such as a municipality is not "entitled to compensation measured by the cost of acquiring a substitute facility if it has a duty to replace the condemned facility" as long as the "market value of the condemned property is ascertainable"). The State might decide that other values—like public health or cultural preservation—outweigh any financial compensation it could obtain for the property. *See, e.g.*, N.Y. Const., Art. XIV, § 1 (the State's forest preserve "shall be forever kept as wild forest lands"); Or. Admin. R. § 141-123-0020(8)(d) (the Oregon Division of State Lands cannot grant an easement on certain lands if it would have "unacceptable impacts on public health, safety or

welfare, or would result in the loss of, or damage to natural, historical, cultural or archaeological resources").

3. When the party exercising eminent domain is another sovereign like the federal government, the concerns about public use and just compensation—although significant—are mitigated by the exercise of political responsibility that accompanies the decision to bring a condemnation suit. The federal government also owes duties to the public and is politically accountable for the decisions it makes about how to balance the competing public uses.

But those protections are not present when the ultimate decision to sue is left to a private party. A private party is not beholden to the interests of the public when it condemns state-owned property. That offends state sovereignty far more than the same exercise of power by the federal government directly.

There is no merit to petitioner's argument (Pet. Br. 35–36) that FERC bears sufficient responsibility for the condemnation proceedings because it approves the pipeline route. FERC's approval of the route does not lead directly to condemnation proceedings. Those proceedings happen only if the private company and State cannot agree on the terms of the conveyance. And because it is up to the private company to decide when (if at all) to file condemnation proceedings—including before the pipeline itself has all necessary approvals—FERC does not bear political responsibility for the decision to infringe on state sovereignty.

Even with respect to private property, the NGA requires the pipeline company to try to acquire any necessary rights-of-way or property through consensual negotiation before it resorts to a condemnation suit. 15 U.S.C. § 717f(h) ("When any holder of a certificate of public convenience and necessity *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 . . . and the necessary land or other property . . . it may acquire the same by the exercise of the right of eminent domain[.]") (emphasis added). And when the route crosses state land, the private company will frequently be able to obtain the necessary interest in land through existing state laws governing conveyance of easements or property. *See, e.g.*, Or. Admin. R. § 141-123-0020 (setting forth the rules for the Oregon Department of State Lands to grant easements on certain lands). Because the private company will often be able to obtain the necessary interest in land in accordance with state law, FERC's approval of a pipeline route does not mean that it has made a politically accountable decision to sue a State.

The consequential decision affecting States is not the pipeline route approval, but the decision to declare negotiations at an impasse and institute condemnation proceedings. And the NGA leaves that decision to the private party—not FERC. As with the administrative proceedings at issue in *Federal Maritime Commission*, the United States itself does not have to take "political responsibility" for the decision to sue rather than negotiate with the State. 535 U.S. at 764.

States retain a strong interest in ensuring that any rights-of-way across state lands respect the many purposes that those lands may serve—an interest that can be protected through negotiation over the terms of the easement. FERC's authorization of a route does not extinguish that state interest in negotiating the terms on which they will cede their property rights. And while the federal government may have the authority to override a State's determination of how best to use its land, allowing a private party to do the same is an intolerable infringement on core state powers.

Petitioner overstates the practical consequences of respecting state sovereign immunity for public infrastructure projects. (Pet. Br. 48–51). As noted above, private companies will often be able to acquire the easements or property they need from the States through negotiation or existing state laws. If they cannot, Congress can authorize the federal government itself to bring condemnation proceedings to allow pipelines or other infrastructure to cross state property. Even if that would require amending the NGA, the need for a statutory change is no reason to disregard the constitutional principles governing state sovereign immunity.

B. Congress cannot abrogate a State's sovereign immunity by requiring it to litigate the defense in collateral proceedings.

The United States argues even if a State otherwise retains sovereign immunity against suits like this one, it cannot assert that immunity in the suit itself because allowing it to do so would amount to a collateral challenge to FERC's decision to

authorize the pipeline. (U.S. Br. 11). The United States contends that the NGA instead requires the immunity issue to be litigated in the FERC proceeding itself, with judicial review thereafter in the court of appeals. (U.S. Br. 14).

If that were the correct reading of the NGA—and for the reasons set out by respondents, it is not—the statute would be unconstitutional. Congress can no more deprive the States of sovereign immunity from suit through such a jurisdiction-stripping provision than it can abrogate that immunity directly. Even if Congress can impose procedural requirements for raising immunity to a suit, the alleged jurisdictional bar here is not such a requirement. It instead would prevent a State from objecting to a suit by a private party in federal court, a direct infringement of state sovereignty.

That is particularly intolerable because the State may not even have an opportunity to litigate its immunity defense though the collateral proceedings before it is subjected to the indignity of suit in federal court. FERC proceedings and judicial review by the court of appeals may not be completed before condemnation suits are commenced. *See Allegheny Def. Project v. FERC*, 932 F.3d 940, 948 (D.C. Cir. 2019) (Millett, J., concurring) (describing FERC's procedures as "a Kafkaesque regime"), *rev'd*, 964 F.3d 1, 10 (D.C. Cir. 2020) (en banc) (describing process of repetitive tolling orders as allowing "the Commission and private certificate holders . . . to split the atom of finality" where the orders "are not final enough for aggrieved parties to seek relief . . . but they are final enough for private pipeline companies to go to court

and take private property by eminent domain"). In this case, for example, petitioner filed the condemnation complaints in federal court less than a month after FERC granted it a certificate of public convenience and necessity. J.A. 26, 35. But FERC did not issue its order on rehearing, thereby allowing judicial review, until more than six months later. J.A. 213; *see also* Petition for Judicial Review, *Del. Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir. filed May 9, 2018).

The procedural history of this case illustrates the untenable position that the States would face if this Court were to accept the jurisdictional argument advanced by the United States. A State might still be asserting its sovereign immunity through the rehearing and review process while at the same time having its sovereignty violated in a separate condemnation action where it had no opportunity to litigate that question.

It also makes little practical sense to require the State to litigate its immunity in the FERC proceeding, because condemnation suits are not an inevitable result of those proceedings. Negotiations between the certificate holder and the State may result in the State agreeing to provide the easement in exchange for just compensation or mitigation of harm to the public lands. In those circumstances, there is no immunity issue to resolve. Litigating immunity issues before FERC and the reviewing court because of the *possibility* that there will be condemnation proceedings is a significant, and unnecessary, expenditure of resources.

The United States' argument finds no support from *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). (U.S. Br. 11). In that case, the city had obtained a license from the Federal Power Commission to construct a hydroelectric dam that would flood a state-owned fish hatchery. The State later objected to the city's authority to construct a dam when, in a separate state-court proceeding, the city sought to sell revenue bonds to finance the construction of the dam. *Id.* at 330. This Court held that the State could not raise that objection in the state-court proceedings. The Federal Power Act, like the NGA, granted the federal court of appeals "'exclusive jurisdiction to affirm, modify, or set aside'" an order of the Commission. *Id.* at 335 (quoting 16 U.S.C. § 825l(b)). This Court concluded that the State's argument was a collateral challenge to the Commission's order approving the project.

The State's sovereign immunity from suit was not at issue in *City of Tacoma*. The city had not haled the state into court. Rather, the underlying action was a state court proceeding "seeking a judgment declaring valid a large issue of revenue bonds" by the city. *City of Tacoma*, 357 U.S. at 329. The State chose to appear in that proceeding and object to the bonds. Nothing this Court said addressed the State's immunity from suit.

And unlike the argument in *City of Tacoma*, the argument advanced by respondents here is not a collateral challenge to the federal agency's decision to authorize the project. Rather, it is an independent assertion of the State's sovereign right not to be haled into federal court by a private party. Although the

FERC certificate vested petitioner with authority to exercise eminent domain power over privately owned lands, it did not and could not abrogate the State's sovereign immunity from suit. Immunity became an issue only when petitioner filed this action against respondents in federal court.

Nor does the logic of *City of Tacoma* require a State to assert its immunity against some speculative, future lawsuit in separate proceedings before a federal administrative agency. The issue in that case was whether the State could challenge the city's authority to proceed with the project at all. The State's argument in state court was that, despite the Commission's issuance of a license to the city to construct the dam, the project conflicted with state law and so the city could not proceed with it. That challenge went to the very heart of what the Commission had authorized—building the dam. Respondents here do not challenge petitioner's authority to build a pipeline; they challenge petitioner's authority to hale them into court to take their property without the State's consent.

When respondents were sued in federal district court, they were entitled to assert their sovereign immunity. Even if the NGA purported to abrogate the States' right to do so, that abrogation itself would violate fundamental principles of state sovereignty and federalism.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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