

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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PENNEAST PIPELINE COMPANY, LLC,)
 Petitioner,)
 v.) No. 19-1039
NEW JERSEY, ET AL.,)
 Respondents.)
- - - - -

Pages: 1 through 95
Place: Washington, D.C.
Date: April 28, 2021

HERITAGE REPORTING CORPORATION
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9
10 Washington, D.C.
11 Wednesday, April 28, 2021

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13 The above-entitled matter came on
14 for oral argument before the Supreme Court of the
15 United States at 11:55 a.m.

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7 supporting the Petitioner.
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1 P R O C E E D I N G S

2 (11:55 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 19-1039, PennEast Pipeline
5 versus New Jersey.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

9 MR. CLEMENT: Mr. Chief Justice, and
10 may it please the Court:

11 Long before the framing, it was clear
12 that eminent domain was an essential element of
13 sovereignty and that private parties could
14 be deputized to exercise that power for
15 infrastructure projects. Once the federal
16 eminent-domain power was exercised, this Court
17 made clear that state lands are not immune, but
18 states are entitled to just compensation like
19 other property owners.

20 New Jersey does not take issue with
21 those precedents but still asserts immunity from
22 the process used to ensure just compensation if
23 not initiated by the federal government itself.

24 That claim fails for two interrelated
25 reasons. First, states acceded to the federal

1 government's superior eminent-domain authority
2 in the Plan of the Convention. In our system of
3 dual sovereignty, only one sovereign can
4 have the ultimate authority over land when the
5 federal and state governments assert conflicting
6 claims. The Supremacy Clause largely settles
7 that debate, and New Jersey concedes that its
8 sovereignty must yield when the federal
9 government decides to take state property.

10 But, once it concedes that, it has no
11 immunity left to assert in the proceedings
12 necessary to effectuate the taking. That
13 follows from the immovable property exception,
14 which long predates the framing. No sovereign
15 has ever had immunity from the eminent domain
16 authority of the superior sovereign over
17 immovable property. It also follows from the
18 very nature of eminent domain. Eminent domain
19 that depends on consent is an oxymoron.

20 Second, the proceedings here are in
21 rem and can only augment the state treasury.
22 This Court has recognized that in rem
23 proceedings pose a lesser threat to state
24 sovereignty. Justices Washington and Story made
25 the same point when the Eleventh Amendment was

1 new. And of all in rem actions, eminent-domain
2 proceedings pose the least concerns. They
3 allege no wrongdoing, they impose no liability,
4 and they cannot be brought without federal
5 authorization. The whole point of the
6 proceeding is to ensure just compensation for a
7 taking.

8 New Jersey's effort to convert a
9 constitutional remedy into a veto over the
10 federally authorized taking is simply
11 incompatible with our constitutional design.

12 CHIEF JUSTICE ROBERTS: Mr. Clement,
13 do you have any other examples outside the area
14 of eminent domain where the federal government
15 can delegate its powers to a private party and
16 then the private party can exercise those --
17 those powers in a way that's inconsistent with
18 state rights?

19 MR. CLEMENT: I'm not sure we do, Your
20 Honor, I mean, in the sense that, you know, I do
21 think there is a long and unbroken tradition of
22 the eminent-domain power being delegated, or
23 maybe the better way to think about it is that a
24 private entity is deputized to exercise the
25 power. And I don't think we're asking for any

1 ruling that would extend outside the
2 eminent-domain context, but I think all
3 sovereigns, including New Jersey, have
4 recognized that the ability to deputize the
5 private actors to exercise the eminent-domain
6 power is really essential to developing
7 infrastructure.

8 CHIEF JUSTICE ROBERTS: Well, what --
9 what is it that makes the eminent-domain power
10 so unique? That it's the only --

11 MR. CLEMENT: So the difference --

12 CHIEF JUSTICE ROBERTS: -- the only
13 example we have? It's really quite
14 extraordinary to have private parties overriding
15 state immunities.

16 MR. CLEMENT: Well, first of all,
17 Mr. Chief Justice, I'm not sure that's the right
18 way to think about it, which is to say I think,
19 when somebody like PennEast asks -- acts
20 pursuant to a deputized eminent-domain power, it
21 really is exercising the federal power directly
22 and it's not an ordinary citizen. I think one
23 way to understand that is, if PennEast doesn't
24 provide sufficient compensation, it has violated
25 the Just Compensation Clause or the Takings

1 Clause.

2 Now we generally don't think that the
3 Takings Clause applies to anyone other than a
4 federal actor. It applies here because
5 distinctly you have somebody exercising the
6 federal eminent-domain authority.

7 CHIEF JUSTICE ROBERTS: Why -- why is
8 this such a problem? Why can't the private
9 party join a federal officer as an indispensable
10 party or whatever so that the federal government
11 is part of the condemnation proceedings?

12 MR. CLEMENT: So, Your Honor, I
13 suppose Congress could alter the statute and do
14 that, but, you know, Congress has been
15 delegating or deputizing parties to exercise its
16 eminent-domain authority for well over a hundred
17 years. It's never done that, and I don't think
18 there any -- there is any reason that they need
19 to do that in order to save the authority.

20 And, again, New Jersey exercises the
21 ability to delegate or deputize private parties,
22 and they don't appear in those proceedings
23 either to my knowledge.

24 CHIEF JUSTICE ROBERTS: Justice
25 Thomas.

1 JUSTICE THOMAS: Thank you, Mr. Chief
2 Justice.

3 Mr. Clement, could you give me the
4 language here that effectuates the deputizing of
5 -- of PennEast?

6 MR. CLEMENT: Sure, Your Honor. I
7 think it comes right from 15 U.S.C. 1717f(h),
8 and it says when any holder of a certificate of
9 public convenience and necessity cannot acquire
10 by contract or is unable to agree with the owner
11 of the property to compensation to be paid for
12 the -- the necessary right-of-way to construct,
13 operate, and maintain a pipeline for the
14 transportation of natural gas, it may acquire
15 the same by exercise of the right of eminent
16 domain.

17 JUSTICE THOMAS: So is that -- how is
18 that deputizing versus simply delegating?

19 MR. CLEMENT: So I -- I -- I -- look,
20 it's a fine line, Your Honor. I think the
21 reason I would think of it as -- it's -- it's
22 better as deputizing is for two reasons. One,
23 even if you go back to the old treatises, like
24 the -- I believe it's the Lewis treatise from
25 1888 that you relied on in your Kelo dissent,

1 you know, he says it's really wrong to think
2 about delegating the eminent-domain authority
3 because it is an inherently sovereign authority.
4 So that's one reason I think of it more as
5 deputizing rather than delegating.

6 But the other reason is what I alluded
7 to with the Chief Justice, which is it seems to
8 me that when a private party does exercise the
9 eminent-domain authority, it is a
10 limited-purpose federal actor for purposes of
11 the Takings Clause, and by parity of reasoning,
12 it seems like it is also a federal actor for
13 purposes of the Eleventh Amendment.

14 JUSTICE THOMAS: Is there anything in
15 any of the pleadings that suggests that, say,
16 the -- that PennEast is bringing this on behalf
17 of itself and the United States?

18 MR. CLEMENT: I don't think we really
19 put it in those terms, Your Honor. I guess what
20 I would say, though, is one thing that is
21 evident from the pleadings is this is
22 principally an in rem proceeding. So, you know,
23 the proceeding is PennEast versus 1.90 Acres of
24 -- of Land for Purposes of an Easement. So I --
25 I do think it matters that this is not an action

1 directly against the state in -- in personam but
2 is an in rem action.

3 JUSTICE THOMAS: You know, I think you
4 might have a better argument, in rem argument if
5 possession of the land or the rem was in the
6 custody of the courts, but this is -- the
7 interest we're talking about is in New Jersey
8 and it's under either possessory or control of
9 New Jersey. It's not in -- under the control of
10 a court.

11 MR. CLEMENT: Well, two things, Your
12 Honor. First, 40 of the 42 parcels here are not
13 possessory interests of the state, they're just
14 environmental easements and the like. And,
15 second, I -- I think, as a matter of doctrine,
16 immovable property in the jurisdiction is always
17 in the possession of the court.

18 It's not like personal property, where
19 maybe the court has to issue in personam process
20 to a defendant to bring the property within the
21 jurisdiction of the court. The land itself is
22 in the territorial jurisdiction of the court,
23 and that's why there's never been a sovereign
24 immunity defense to an eminent domain action by
25 the superior sovereign, because of the immovable

1 property exception.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer.

5 JUSTICE BREYER: There are a number of
6 cases where this Court has said if you're going
7 to interfere with the sovereign immunity rights
8 of the state, Congress has to do so clearly.
9 You've read them.

10 What are the ones -- take the ones,
11 whatever three or two or three you think are the
12 strongest against you, and then explain to me
13 how you distinguish them. I'd appreciate that.

14 MR. CLEMENT: Thank you, Justice
15 Breyer. What I would say is all the cases that
16 are looking for a clear statement are looking
17 for it in the abrogation context. So they
18 assume that there is a sovereign immunity that
19 has to be abrogated.

20 And we don't think there is any
21 sovereign immunity here that needs to be
22 abrogated at all, and I think that's true for
23 two -- two primary reasons.

24 One is because no sovereign has ever
25 had a sovereign immunity defense to an

1 eminent-domain proceeding by the superior
2 sovereign, ever, in the history of the world. I
3 mean, the immovable property exception was
4 established well before the framing of the
5 republic, and so we think there's just no
6 sovereign immunity here to abrogate for that
7 reason.

8 But we also think you can get to the
9 same result simply by looking at this as not
10 just an in rem proceeding that is against the
11 property and not against the state but an
12 extraordinary in rem proceeding where there is
13 no allegation of wrongdoing, no effort to impose
14 liability on the state, and the action can't be
15 brought at all unless it's authorized by the
16 federal government here in the process of a FERC
17 certificate.

18 JUSTICE BREYER: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Alito.

20 JUSTICE ALITO: Mr. Clement, let's
21 start with the reason why a state may be sued by
22 the United States.

23 Is this a correct understanding of the
24 reason for that rule? When New Jersey and other
25 states entered the union and they read the

1 Constitution, they saw the federal structure
2 that was set up, and they read the -- the scope
3 of federal power -- federal judicial power under
4 Article III, they had to realize that this meant
5 that they were surrendering that portion of
6 their sovereign immunity.

7 MR. CLEMENT: I think that's fair,
8 Justice Alito, though I would emphasize I think
9 what principally did it for them and what they
10 should have read is the Supremacy Clause as
11 opposed to necessarily Article III.

12 JUSTICE ALITO: All right.

13 MR. CLEMENT: And you have a case like
14 United --

15 JUSTICE ALITO: Okay. The Supremacy
16 Clause and Article III. But this was something
17 that this Court thought they must have realized
18 when they entered the union. This was part of
19 the bargain.

20 Now I understand your argument that
21 they must also have realized that a sovereign
22 can deputize a private party to exercise a
23 condemnation power, and, therefore, because they
24 were surrendering their immunity from a
25 condemnation suit by the United States, they

1 necessarily were also surrendering their
2 immunity with respect to a private party that
3 might be deputized to exercise that power.

4 But is that a fair inference? Is it a
5 -- is it a sufficient inference? Would it not
6 have been entirely reasonable for a state to
7 think, look, okay, we understand we're giving up
8 our sovereign immunity against a condemnation
9 suit by the United States, but we don't think
10 that we necessarily are giving up our sovereign
11 immunity with respect to a condemnation suit by
12 a delegee, even though this is a rule that
13 applies in other contexts?

14 MR. CLEMENT: So, Justice Alito, I
15 don't think that would have been a reasonable
16 inference because the eminent-domain power has
17 always been delegable. That is something that
18 was well-established before the framing. So, if
19 they accepted it at -- at the framing, as I
20 think they must have, because of the Supremacy
21 Clause, that they would not be able to assert a
22 sovereign immunity from an eminent-domain action
23 brought by the federal government because they
24 would presumably know about the immovable
25 property exception and they would understand

1 that it's essentially an oxymoron to say that
2 I'm going to assert a sovereign immunity defense
3 against the superior sovereign, who had
4 eminent-domain over everything in the realm.

5 I think they would have understood
6 that that was equally true whether the federal
7 government exercised that through it -- itself
8 or by delegating a -- a limited-purpose federal
9 agent.

10 JUSTICE ALITO: Is -- is that a
11 correct understanding of what the constitutional
12 question boils down to? In -- in a word,
13 because my time has run out.

14 MR. CLEMENT: Well, I think that's one
15 way for us to prevail, but I don't think the
16 constitutional question boils down just to that
17 because I do think that you could decide this
18 case just on the ground that there is properly
19 understood no action against the state, it's
20 against the property, and along the lines of
21 Hood and other decisions that have said in rem
22 is different.

23 JUSTICE ALITO: All right. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor.

1 JUSTICE SOTOMAYOR: Mr. Clement,
2 perhaps I don't understand these features,
3 and -- and delegation is troublesome for me.
4 And this doesn't apply to FERC, but can a -- can
5 -- if -- if we didn't have FERC, could the
6 government have delegated in your use of the
7 term to a private entity the decision as to what
8 route was necessary and to then condemn those
9 portions of the route that it thought necessary?

10 MR. CLEMENT: So, Justice Sotomayor, I
11 think there would be a separate question there
12 about whether the delegation was essentially
13 sort of, you know, ascertainable enough for
14 these purposes. I would say, though, if you go
15 back to the exercise of eminent-domain power
16 historically, there have certainly been
17 situations where the federal government gave
18 less direction than you have here with respect
19 to FERC.

20 So, for example, you know, when the
21 railroads were built, there was, you know, a
22 fair amount of discretion given to the railroads
23 to determine what land that they would be able
24 to condemn.

25 Now I -- I would say also that I think

1 particularly when the -- the sort of delegee has
2 greater discretion, that's when you would
3 probably look for Congress to put in more
4 restrictions that certain line -- land is off
5 limits, and I do think, when you have a
6 situation like this, where no pipeline traverses
7 any land without the approval of FERC and they
8 can take into account whether, you know, this is
9 excessive or whether not going through this
10 particular piece of state land would require the
11 pipeline to be substantially rerouted that would
12 create additional environmental problems and the
13 like, especially when the federal government is
14 playing that role, it seems like most of the
15 concerns that you have under the Eleventh
16 Amendment with some private party with an
17 unfettered right to sue are just simply
18 misplaced.

19 JUSTICE SOTOMAYOR: Counsel, your
20 adversaries point to certain aspects of a
21 condemnation proceeding that seem to lend
22 themselves to sovereign-to-sovereign
23 decisionmaking.

24 I do agree with you that just the
25 simple appraisal is different, how much is this

1 land worth, and you could -- you hire a lawyer
2 and the lawyer helps you with that. You can
3 hire a party that does the same thing. That's
4 basically your argument.

5 But how about the negotiation aspects?
6 The state argues that there is a
7 sovereign-to-sovereign part of this process,
8 which is you're not supposed to start
9 condemnation until you had negotiation, and why
10 should I be forced as a sovereign to negotiate
11 with a nonsovereign?

12 MR. CLEMENT: So, Your Honor, I guess
13 I would say that, you know, that is part of
14 their concern, but I think it's an odd concern
15 because, you know, sovereign immunity, the
16 Eleventh Amendment immunity doesn't kick in
17 until you really get to court.

18 And, you know, honestly, if, at the
19 end of the day, their problem was with -- that
20 they had to negotiate with us, I still don't
21 think that that would sound in any kind of
22 normal sovereign immunity.

23 I also think that it's not really the
24 challenge that they have preserved for that sort
25 of negotiation. And I still think they would be

1 negotiating with FERC's agent. And I think it
2 is important to keep in mind that in this
3 process uniquely, PennEast is a limited federal
4 actor for purposes of the Takings Clause, and
5 the same logic should apply to the Eleventh
6 Amendment.

7 JUSTICE SOTOMAYOR: Thank you,
8 counsel.

9 CHIEF JUSTICE ROBERTS: Justice Kagan.

10 JUSTICE KAGAN: Mr. Clement, you told
11 the Chief Justice that we shouldn't think of
12 this as a case about a private party condemning
13 land, that we should think that -- that PennEast
14 essentially steps into the shoes of the
15 government.

16 And that raises questions in my mind
17 as to what the government involvement in this
18 case was. In other words, was there any
19 supervision by the government? Was there any
20 participation by the government? Did any
21 lawyers for the United States approve the timing
22 of the condemnation action? Did any lawyers for
23 the United States approve the parcels to be
24 condemned? Is there anything that the -- that
25 the U.S. itself was involved in in this case?

1 MR. CLEMENT: Well, Justice Kagan, I
2 guess you have to distinguish between what
3 happened at FERC through the FERC agents and
4 what happened sort of after that point. And,
5 you know, I'm not here to tell you that -- after
6 the specific route of the pipeline was approved
7 by FERC in a process where objections were heard
8 from all the property owners, including the
9 state, and over 70 route modifications were
10 made. That was all done under the auspices of
11 the federal government. They approved the route
12 and the certificate right down to which parcels
13 were affected.

14 Now, once that happened, the way it
15 has worked for 70 years is that the certificate
16 holder then gets to go into federal court. And,
17 certainly, FERC can, by its -- by its -- by its
18 rulemaking, sort of determine, you know,
19 generally speaking, when the timing is. It
20 could, as it suggested and has done recently,
21 promulgate a rule that says that the -- that the
22 certificate holder should not initiate the
23 condemnation proceedings until the rehearing
24 period at FERC is closed. It could change that
25 timing. All of that's within their control.

1 But -- but I don't want to suggest
2 that FERC is kind of directly sitting over our
3 shoulder in --

4 JUSTICE KAGAN: Right.

5 MR. CLEMENT: -- the district court
6 action.

7 JUSTICE KAGAN: So New Jersey says
8 that there were a whole range of things that
9 PennEast did that the U.S. Government would not
10 have done. You know, New Jersey says the U.S.
11 has an obligation to negotiate in good faith,
12 while New -- while you refused to negotiate,
13 that -- that you rushed to condemn the land
14 before the route was finalized in a way that the
15 U.S. Government would have -- wouldn't have,
16 that your interest in land valuation is
17 different, in other words, that there were a
18 whole set of litigation tactics or moves that a
19 private party would have been -- would have
20 perfectly legitimately made that the U.S.
21 Government would not have.

22 MR. CLEMENT: So, Justice Kagan, I --
23 I don't think that's true, and, you know, if you
24 go through each of those things, I mean, we
25 didn't do anything here in terms of the timing

1 that FERC didn't approve. And so I -- I don't
2 think FERC will say we did anything wrong in
3 that respect, and I don't think, if FERC were
4 forced to do this differently, they would have
5 necessarily done anything different.

6 With respect to the negotiations, the
7 district court found that, in fact, we did
8 negotiate in good faith here. And so I don't
9 think that's a material difference.

10 And in terms of the valuation and the
11 paying of just compensation, I mean, the way the
12 federal government has been doing this for a
13 hundred years is for some of these
14 infrastructure projects, they think that it's
15 just much more efficient to have the private
16 party act as the federal actor deputy, and
17 they're not doing that to shortchange the
18 property owner. And I would bet, if you ran the
19 empirical numbers, the property owners probably
20 did better. But, in all events, it's something
21 that has been done by all sides --

22 JUSTICE KAGAN: Thank you,
23 Mr. Clement.

24 MR. CLEMENT: -- including New Jersey,
25 for a long time. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch.

3 JUSTICE GORSUCH: We focused a lot
4 on what -- what I call structural immunity under
5 the Constitution and maybe a little less on the
6 Eleventh Amendment. I -- I'd just like to ask a
7 question about that.

8 I -- I understand the argument that
9 PennEast steps into the shoes of the federal
10 government in many senses, but -- and I
11 understand that PennEast is a citizen of
12 Delaware. That's what the lower court said. We
13 have before us a suit in law or equity. Kohl
14 says that. So why doesn't this case fall within
15 the plain text of the Eleventh Amendment itself,
16 which limits the judicial power of the United
17 States in cases by a citizen of one state
18 against another state?

19 MR. CLEMENT: So thank you, Justice
20 Gorsuch. I think there's three answers to that.
21 One is that this is not an action against the
22 state within the meaning of the Eleventh
23 Amendment. It's an action against property. I
24 also think, although PennEast here --

25 JUSTICE GORSUCH: Put -- putting aside

1 the in rem argument, right.

2 MR. CLEMENT: Sure.

3 JUSTICE GORSUCH: Yeah. Fair enough.
4 Yeah. Okay. Put that aside.

5 MR. CLEMENT: And the second -- the
6 second is that although PennEast is a citizen of
7 Delaware for all other purposes, I think, for
8 these purposes, it is a fed -- a limited-purpose
9 federal actor and it has liability under the
10 Takings Clause. So I think that's another
11 reason why the text is not a problem.

12 And then the third reason is that even
13 the most textualist justices, such as Justice
14 Scalia, have kind of understood that the
15 Eleventh Amendment -- what it's really doing is
16 kind of restoring the immunity that was there at
17 the framing and --

18 JUSTICE GORSUCH: Yeah. Got it. The
19 Eleventh Amendment does other things, has been
20 read to do structural immunity, but just on its
21 plain terms, we have a citizen of one state
22 suing another state, right?

23 MR. CLEMENT: Again, I would beg to
24 differ on both counts because I think what you
25 have is a federal deputy suing land.

1 JUSTICE GORSUCH: Okay.

2 MR. CLEMENT: And if you look at the
3 principal captions of these cases below, they
4 are PennEast versus --

5 JUSTICE GORSUCH: But the federal
6 deputy exists as a -- as a citizen of a state.
7 It -- it -- it doesn't lose its citizenship,
8 does it? How would that work? What authority
9 is there for that?

10 MR. CLEMENT: I -- I don't think it
11 loses its citizenship, but I don't think that's
12 the capacity in which it's suing. And as a --
13 as a mere citizen of Delaware, it doesn't have
14 takings liability. It has takings liability
15 because it is a limited-purpose federal actor,
16 and that is really the posture in which it's
17 coming into court.

18 JUSTICE GORSUCH: But it is a citizen
19 of Delaware. It doesn't lose that by virtue of
20 being deputized. It's just a deputy from
21 Delaware.

22 MR. CLEMENT: It -- it -- it's a
23 deputy from Delaware, but, you know, if -- if
24 they were a human being who was a federal deputy
25 from Delaware, they would still be a citizen of

1 Delaware, but, when they walked into federal
2 court and filed an action, they wouldn't be
3 filing it in that capacity. And I -- and I do
4 think that's what ultimately matters.

5 But I also think, you know, as to the
6 text, you -- you -- you know, I mean, obviously,
7 we put the in rem matter to one side, but, you
8 know, I -- I -- I do think that is an important
9 distinction here, and I think this is very
10 parallel to this Court's decision in Hood.

11 JUSTICE GORSUCH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh.

14 JUSTICE KAVANAUGH: Thank you, Chief
15 Justice.

16 And good afternoon, Mr. Clement. I
17 just want to ask a question that might be both a
18 softball and a fastball, but, if you lose this
19 case, what will happen?

20 MR. CLEMENT: So, Justice Kavanaugh,
21 if we lose this case, then, you know, this
22 pipeline will, you know, not be built at least
23 in anything like its current configuration, and
24 depending on exactly how we lose this case, I
25 think this pipeline would -- this federal

1 interstate pipeline, until the law is changed,
2 will, you know, be at the mercy of New Jersey,
3 because I don't think there is a way to reroute
4 this pipeline in a way that doesn't implicate a
5 state interest in land.

6 The parcels at issue here don't
7 implicate it, but this pipeline has to cross the
8 Delaware River somewhere, and half of the
9 Delaware River belongs to New Jersey. So
10 there's just no way for this pipeline to exist
11 under the current law.

12 And I think that does show why there
13 is something fundamentally wrong here. I mean,
14 New Jersey would be operating as a property
15 owner in this context, and yet, as a property
16 owner, they would be trying to do something that
17 they can't do as a sovereign, which is to
18 exercise a veto over a interstate infrastructure
19 problem that they recognize is concededly
20 legitimate under FERC's authority, at least for
21 purposes of this case.

22 JUSTICE KAVANAUGH: I think your
23 answer encompassed this, but does that mean you
24 don't think FERC has any way to get involved and
25 to avoid the problem that would be in your way

1 if you were to lose this case?

2 MR. CLEMENT: That's correct, Your
3 Honor. I don't think there's any way, short of
4 an amendment of the statute, for FERC to deal
5 with this problem.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett.

9 JUSTICE BARRETT: Good morning,
10 Mr. Clement. I want to talk about your Plan of
11 the Convention argument.

12 At least as I read the briefs, I don't
13 see any historical support for the proposition
14 that a state could be sued by a private party,
15 you know, standing in the stead -- the private
16 party standing in the stead of the federal
17 government's eminent-domain power.

18 The cases that you cite, like
19 immovable property cases, like Georgia versus
20 Chattanooga, all kind of rely on inference.
21 And, I mean, so far as I can tell too, it wasn't
22 until 1876 in Kohl that the federal government
23 even instituted a condemnation action against a
24 state.

25 So is your Plan of the Convention

1 argument not really your strongest one, and is
2 your in rem and Hood argument better?

3 MR. CLEMENT: I think they're both
4 pretty good, Your Honor. And if I could just
5 try to convince you that the Plan of the
6 Convention argument is a little better than you
7 suggested, I'd just point out that the situation
8 here is almost directly parallel to the
9 situation in United States against Texas, which
10 New Jersey, of course, says is a legitimate Plan
11 of the Convention ceding of sovereign immunity.

12 As a matter of fact, it look longer
13 for the federal government to assert an original
14 jurisdiction action against the state than it
15 took the federal government to exercise its
16 federal eminent-domain authority in the states.
17 By -- by my count, the first original action
18 against a state was against -- U.S. against
19 North Carolina in 1890.

20 But, in both cases, even though it
21 took 70 to 100 years for the federal government
22 to exercise the power, the courts still looked
23 and said, okay, going back to the framing, we
24 understand that the Supremacy Clause, which is
25 part, obviously, of the Plan of the Convention,

1 has certain implications, and one implication
2 that is here is that once New Jersey concedes,
3 as it does and I think it must, that the federal
4 government has the eminent-domain authority over
5 this property, then no sovereign ever has had an
6 immunity defense against the taking of property
7 pursuant to the eminent-domain authority by the
8 superior sovereign without respect to whether
9 it's been delegated.

10 JUSTICE BARRETT: Okay. Immovable
11 property doctrine, don't you think that the
12 Chattanooga case had more to do with the fact
13 that the land that Georgia had was located
14 within another sovereign's borders as opposed to
15 here, where this is land within New Jersey's own
16 borders? Do we have to read that case your way?

17 MR. CLEMENT: Well, obviously, Your
18 Honor, you don't have to read it that way, our
19 way. But -- but what I would say is I think the
20 principle is the same, which is, in both cases,
21 there's a recognition that there is a superior
22 sovereign. The mechanism for making that
23 recognition is different.

24 In the Chattanooga case, Tennessee is
25 the superior sovereign because the property is

1 territorially within Tennessee. Here, this
2 property is subject to the superior
3 eminent-domain claim of the federal government
4 because of the Supremacy Clause, and what's so
5 odd about New Jersey's position is they -- they
6 concede that the federal government has the
7 power to take this property from them, which is
8 the principal sort of, you know, recognition of
9 eminent domain, yet they still think they can
10 assert a sovereign immunity defense, and that's
11 never been the case since before the framing.

12 JUSTICE BARRETT: Thank you, Mr.
13 Clement.

14 CHIEF JUSTICE ROBERTS: A minute to
15 wrap up, counsel.

16 MR. CLEMENT: Thank you, Mr. Chief
17 Justice.

18 In the end, New Jersey's position
19 amounts to a claim that the federal government
20 has less eminent-domain authority than any other
21 sovereign. New Jersey itself not only exercises
22 eminent domain but freely deputizes a wide range
23 of utilities, including pipelines, to exercise
24 that power and provide just compensation.

25 The claim that the federal government

1 is only a junior varsity sovereign was rejected
2 in the Plan of the Convention. Where the
3 federal eminent-domain power exists, it is
4 complete and there can be no sovereign immunity
5 defense to its implementation.

6 Indeed, thanks to the immovable
7 property exception, a sovereign immunity defense
8 to the ultimate sovereign's eminent-domain
9 authority is an oxymoron. That is particularly
10 true because eminent-domain proceedings are
11 unique in rem proceedings that assert no
12 wrongdoing, impose no liability, and can only
13 augment the state treasury.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 General Kneedler. General Kneedler.

17 ORAL ARGUMENT OF EDWIN S. KNEEDLER
18 FOR THE UNITED STATES, AS AMICUS
19 CURIAE, SUPPORTING THE PETITIONER

20 MR. KNEEDLER: I'm sorry. Mr. Chief
21 Justice, and may it please the Court:

22 Under the Natural Gas Act and this
23 Court's decision in City of Tacoma, the courts
24 below were without jurisdiction to resolve
25 Respondents' statutory challenge to PennEast's

1 exercise of the right of eminent domain. By
2 contrast, the courts below were not precluded
3 from resolving the state's contention that the
4 Eleventh Amendment bars PennEast's condemnation
5 actions, but there is no such Eleventh Amendment
6 bar.

7 This Court held in Kohl that the
8 federal government's power of eminent domain is
9 complete in itself and that no state can
10 prescribe the manner in which it may be
11 exercised. That power indisputably extends to
12 state-owned property, and it has been
13 established since before the founding that the
14 sovereign's right of eminent domain includes the
15 power to authorize private entities to exercise
16 that right for roads, canals, and other
17 infrastructure projects.

18 The district court, therefore, may
19 proceed with these actions to determine the
20 amount of compensation that is owed to the state
21 for this federally authorized taking of its
22 property.

23 CHIEF JUSTICE ROBERTS: Putting aside
24 your jurisdictional issue, Mr. Kneedler, a
25 private party with a certificate under the

1 Natural Gas Act, could they bring a condemnation
2 action against federally owned land?

3 MR. KNEEDLER: No -- no, they could
4 not, Mr. Chief Justice. There are separate
5 statutes that deal with the acquisition of a
6 right-of-way across federal property. The
7 Court's decision last year -- excuse me -- in
8 the Atlantic Coast Pipeline case dealt with --
9 with some of those issues in terms of getting a
10 right-of-way for a property -- across federal
11 property, and this statute would not authorize
12 that.

13 CHIEF JUSTICE ROBERTS: Well, but I --
14 I thought the idea was that the private parties
15 are actual -- actually federal delegees and that
16 would be the capacity in which they would be
17 acting.

18 MR. KNEEDLER: They would be federal
19 delegees, but they would still have to comply
20 with the statutory structure that Congress has
21 established for acquiring rights-of-way over --
22 over federal land. And -- and also, a -- a
23 statute would ordinarily not be regarded as
24 dealing with the enacting sovereign's own rights
25 and own rights in property.

1 This -- this is a statute that deals
2 with -- with nonfederal property, with
3 state-owned property in this case or -- or
4 private property.

5 CHIEF JUSTICE ROBERTS: Your client
6 wants this pipeline to be built. Why don't you
7 just have a federal official join the action and
8 then, you know, advise the court that -- that
9 the federal government is proceeding along with
10 PennEast?

11 MR. KNEEDLER: I -- I don't think that
12 the -- I -- I think, in order for the United
13 States to become a party, there would have to be
14 some statutory authorization for the United
15 States to conduct the eminent-domain proceeding.
16 You know, I suppose a federal attorney could
17 attend and -- and advise and -- and participate
18 in some sense, but that doesn't seem to be the
19 -- the defense being offered by -- by the State.

20 Congress --

21 CHIEF JUSTICE ROBERTS: Thank -- thank
22 you, counsel.

23 Justice Thomas.

24 JUSTICE THOMAS: Thank you, Mr. Chief
25 Justice.

1 Mr. Kneedler, the -- do you agree with
2 Petitioner that they are somehow a
3 limited-purpose federal actor or that they've
4 been deputized by the U.S. to condemn property?

5 MR. KNEEDLER: I -- I think,
6 basically, yes. I mean, various terminologies
7 have been used. Cooley describes it that the
8 person is a public agent. This Court in
9 Cherokee Nation said that it's -- that a private
10 person is an instrumentality of the government,
11 a delegee, and a lot of labels are used, but,
12 basically, the Constitution authorizes Congress
13 to vest the or allow a private party to exercise
14 the right of eminent domain.

15 So I -- I think saying that the
16 private party is deputized is a -- is a fair
17 characterization, but I don't think anything
18 turns on the particular label.

19 JUSTICE THOMAS: The -- would -- do
20 you need a clear statement to -- in order to
21 accomplish that, or do we just simply imply
22 that?

23 MR. KNEEDLER: You do not need a clear
24 statement. The clear statement issue comes in
25 where the question is whether Congress has

1 abrogated an existing immunity. In our view,
2 and we agree with Petitioner on this, there is
3 no immunity to abrogate to begin with.

4 So the question is applying ordinary
5 principles of statutory construction, whether
6 the statute authorizes a private party to
7 commence the eminent-domain proceeding, and,
8 here, we think it's clear that it does.

9 Respondent acknowledges that FERC
10 could properly site this pipeline across state
11 lands, and the statutory provision here says
12 that whenever a certificate is issued, the
13 certificate holder can exercise the right of
14 eminent domain if it can't acquire the property
15 by agreement in order to complete the project.
16 And that authorization has to be -- has to apply
17 to all the land over which the pipeline has
18 issued. Otherwise, the pipeline couldn't be
19 built.

20 JUSTICE THOMAS: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Breyer.

23 JUSTICE BREYER: Yes, thank you.

24 If you were to lose this case, what
25 would happen to the network of pipelines across

1 the country now, at least those segments which
2 were taken from states or on state land that
3 were taken through eminent domain?

4 MR. KNEEDLER: Well, those that -- I
5 -- I assume those that were acquired by
6 agreement or acquired by --

7 JUSTICE BREYER: No, no, forget that.
8 Those taken by eminent domain.

9 MR. KNEEDLER: To the extent there are
10 ones taken by eminent domain, I think the
11 judgments in those cases would stand. I -- you
12 know, perhaps the states in those cases might
13 try to have those judgments reconsidered, but
14 I -- but I think they would --

15 JUSTICE BREYER: Suppose -- suppose
16 that a -- an owner of the -- one of those
17 segments states that we do not want inspectors
18 or repair people to come onto our property which
19 was taken by eminent domain, though improperly?

20 MR. KNEEDLER: I think -- I think the
21 eminent-domain judgment would still stand. Now
22 there could be situations in which the -- what
23 the pipeline acquired was a -- a time-limited
24 easement and so, if that had to be renewed, even
25 though the pipeline is now in place, if the

1 state said, well, we don't want -- we don't want
2 this pipeline anymore and we're not going to
3 renew your easement, that -- that could be a
4 problem. That would be a problem. So, in that
5 situation, the Court's decision could have an
6 impact on existing pipelines.

7 JUSTICE BREYER: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice Alito.

9 JUSTICE ALITO: Do you agree that the
10 condemnation actions here are really in rem
11 proceedings that don't implicate sovereign
12 immunity at all?

13 MR. KNEEDLER: They -- they are in
14 rem. I -- it is not our position that the mere
15 fact that something is in rem means that it is
16 not -- that sovereign immunity principles don't
17 apply at all. I mean, that's an important
18 principle for the United States Government, that
19 a suit against the government's property is a
20 suit -- a suit against the United States. We've
21 got Minnesota versus United States and United
22 States versus Alabama for that proposition.

23 But we do think that in the end,
24 the -- the -- the nature of the proceeding as in
25 rem, when coupled with the -- with the

1 longstanding tradition of -- of enabling private
2 parties to exercise it, we think those things in
3 -- in combination do support the validity of it,
4 because what's left after -- I mean, what's left
5 after FERC has approved the pipeline route?
6 It's a federally authorized taking. All that is
7 at issue anymore is the amount of compensation
8 to be paid to the state. It -- it's not -- it's
9 not the -- the sort of situation involved in
10 Blatchford or other cases where the -- where
11 it's a claim for money from the state based on
12 state wrongdoing.

13 So I think that the -- the nature of
14 it as an in rem procedure that is triggered by
15 federal authorization -- we do think that that
16 supports the position that there is no sovereign
17 immunity.

18 JUSTICE ALITO: All right. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor.

21 JUSTICE SOTOMAYOR: I'd like to
22 address your jurisdictional argument. It does
23 seem strange to require a state to initiate
24 litigation in one court of appeals, in D.C., in
25 order to invoke sovereign immunity in another

1 when it hasn't been sued yet, so there's no
2 existing claim against it that it could raise a
3 defense in. How does that make sense?

4 MR. KNEEDLER: Well, the statutory
5 question of PennEast's capacity to sue is not an
6 immunity question. It is a question of whether
7 they have the power under the certificate issued
8 by FERC to execute that certificate, which is
9 the way the Court put it in the City of Tacoma
10 case, to execute that specifically with respect
11 to exercising the right of eminent domain
12 against state property. That was the very
13 question at issue in City of Tacoma, and the
14 Court held that that had to be litigated, if at
15 all, on direct review of the -- of FERC's
16 petition. So --

17 JUSTICE SOTOMAYOR: Well, isn't
18 this -- I mean, instead of requiring a suit in
19 -- in the D.C. Circuit to decide this issue, why
20 couldn't you just -- why couldn't PennEast have
21 just raised this as, I guess, collateral
22 estoppel? Because that's really its argument,
23 isn't it? That the delegation to PennEast could
24 have and wasn't -- wasn't challenged in the D.C.
25 Circuit, so it's collateral estoppel?

1 MR. KNEEDLER: Well, I would --

2 JUSTICE SOTOMAYOR: Or claim
3 preclusion? I always --

4 MR. KNEEDLER: -- I guess it would be
5 claim preclusion.

6 JUSTICE SOTOMAYOR: Yes, claim
7 preclusion.

8 MR. KNEEDLER: I -- I suppose they
9 could --

10 JUSTICE SOTOMAYOR: I think you're
11 right.

12 MR. KNEEDLER: I -- I -- I think that
13 -- I mean, that would apply, but I think City of
14 Tacoma and the statute are statutory strong
15 forms of claim preclusion because they also
16 require that the issue be raised before the
17 agency. And, in fact, FERC did address various
18 questions about the right of eminent domain, but
19 the State did not make this argument and didn't
20 raise it on -- on judicial review. And we
21 think, under City of Tacoma, it can't be raised
22 in the -- in the district court.

23 But that doesn't mean that the actual
24 immunity -- Eleventh Amendment immunity question
25 can't be raised, and that -- that's properly

1 before the Court, and we think there is no such
2 Eleventh Amendment immunity.

3 JUSTICE SOTOMAYOR: Thank you,
4 counsel.

5 CHIEF JUSTICE ROBERTS: Justice Kagan.

6 JUSTICE KAGAN: Mr. Kneedler, suppose
7 the federal government didn't like something
8 about the way PennEast was conducting this
9 litigation, whether it had to do with
10 negotiating with New Jersey or with valuation
11 decisions or anything else. If the U.S. didn't
12 approve of something, could it do anything and,
13 if so, what?

14 MR. KNEEDLER: Well, I -- I'm not --
15 we -- we haven't addressed that. I suppose
16 it -- it -- it's possible. I don't know what
17 the FERC procedures would be. But I -- but it
18 -- it might be possible for the state to request
19 suspension or a stay of the certificate. I
20 don't know if that would be something would --
21 that FERC could do. It -- it -- it could be
22 asked to do that. I -- perhaps some appeal to
23 FERC to exercise some sort of persuasion in the
24 conduct of this. I mean, after all, FERC does
25 not have an interest in a -- in a pipeline

1 behaving badly. But I don't think there's any
2 basis for -- for -- for thinking that that's
3 going to be true. These are ordinary --
4 JUSTICE KAGAN: I guess --
5 MR. KNEEDLER: -- condemnation-type --
6 JUSTICE KAGAN: -- I guess, Mr.
7 Kneedler, my concern here is that, I mean, in
8 several cases, we've talked about the need for a
9 suit against states to be conducted by
10 politically responsible actors, federal lawyers,
11 and -- and whether there's not something that's
12 really lost by giving this over to private
13 parties, who have their own interests separate
14 and apart from what the government's might be.
15 MR. KNEEDLER: Well, the -- the
16 critical decision with respect to these
17 condemnation actions, whether the state's
18 property will be taken, has been made by FERC,
19 which is politically responsible. There's no
20 question that FERC is responsible --
21 JUSTICE KAGAN: Right, but --
22 MR. KNEEDLER: -- for --
23 JUSTICE KAGAN: -- in the conduct of
24 the suit, and we all know that the conduct of
25 the suit can involve important questions.

1 MR. KNEEDLER: Well, here, it is a
2 very narrow question in terms of the amount of
3 compensation, and that's the sort of -- that's
4 the sort of issue that courts decide all the
5 time with -- with a party on one side and, in
6 this case, a state on the other side. But it --
7 but condemnation proceedings are handled in
8 court all the time. And --

9 JUSTICE KAGAN: Thank you,
10 Mr. Kneedler.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch.

13 JUSTICE GORSUCH: So, Mr. Kneedler,
14 I'd just like to return to the Eleventh
15 Amendment itself, putting aside larger questions
16 of structural or sovereign immunity. And we --
17 I discussed with Mr. Clement, you know, whether
18 PennEast is a citizen of Delaware. That's one
19 issue. And then the other is whether we have a
20 suit in law and equity, and the in rem was --
21 was proffered as a way to get around that.

22 But I'm not sure how that happens when
23 this Court has said repeatedly, as far back as
24 1875 in Kohl versus United States, that a
25 proceeding to take land and determine

1 compensation is a proceeding in -- at common
2 law, would seem to be a suit in law and equity,
3 whatever else it is.

4 So what -- what -- what's wrong with
5 that? Why -- why -- why doesn't this fall
6 within the plain text of the Eleventh Amendment
7 itself?

8 MR. KNEEDLER: Well, I -- I -- I think
9 there is the -- the -- the argument that the --
10 that PennEast is -- in its capacity is suing as
11 a -- as an agent, or -- or however you want to
12 describe it, of the federal government --

13 JUSTICE GORSUCH: Yeah. No, I
14 understand it's a delegate, an agent, a -- we've
15 got a lot of words -- a deputy. But a deputy
16 has a residence, and -- and this deputy's
17 residence is Delaware.

18 MR. KNEEDLER: Right, and -- and I --
19 I -- I accept that and -- and we're not saying
20 that it's not -- that the company is not a
21 citizen of Delaware. Whether this is a -- a
22 suit against the state under the particular
23 circumstances of this case is another -- is
24 another question given the in rem nature of it.
25 But we think the basic point --

1 JUSTICE GORSUCH: Well, just -- but, I
2 mean, help me with that, because a suit against
3 the state at -- at law or in equity, and this
4 Court has said a taking -- a proceeding to take
5 land and determine compensation is just such a
6 thing.

7 MR. KNEEDLER: It is a suit in law or
8 equity, and there's the further question of
9 whether it is against the state, but -- because
10 of the in rem nature. But our -- our basic
11 point, though, is that the federal -- that the
12 Eleventh Amendment --

13 JUSTICE GORSUCH: I mean --

14 MR. KNEEDLER: -- wouldn't make a real
15 --

16 JUSTICE GORSUCH: -- the state's the
17 one entitled to compensation, right?

18 MR. KNEEDLER: Yes.

19 JUSTICE GORSUCH: Money will be
20 provided to the state?

21 MR. KNEEDLER: Right.

22 JUSTICE GORSUCH: So how is it not a
23 suit against the state at -- at common law?

24 MR. KNEEDLER: I -- I think probably
25 the better understanding is that it -- that it

1 is a suit against the state, but -- but -- but I
2 -- I -- I think -- I think the point is that
3 it -- that it -- this is a proceeding of a
4 distinct character, and the Eleventh Amendment
5 was simply meant to restore an immunity that --
6 that had been taken away by -- by the Court, and
7 that preexisting immunity was one that
8 structurally did not bar this sort of action by
9 someone whom Congress has vested with
10 eminent-domain authority.

11 JUSTICE GORSUCH: Thank -- thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh.

14 JUSTICE KAVANAUGH: Thank you. I have
15 no additional questions.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett.

18 JUSTICE BARRETT: Mr. Kneedler, I have
19 a question just to follow up on one that Justice
20 Gorsuch asked you. You said that you thought,
21 when he was asking you about the Eleventh
22 Amendment, that maybe the better way to think of
23 this was that it was a suit against the state.

24 And I've been trying to get my mind
25 around what role this in rem issue plays in all

1 this and particularly because Federal Rule of
2 Civil Procedure 71.1 required the state to be
3 joined as a -- as a party, as the property
4 owner. So, if you say the better way to think
5 of it is really as a suit against the state, you
6 said you've accepted PennEast's argument about
7 the in rem nature of the proceeding, how does
8 71.1 and the in rem nature of the proceeding and
9 your concession to Justice Gorsuch bear on that?

10 MR. KNEEDLER: Well, the -- the --
11 71.1 requires that the property owner be
12 identified for purposes of getting notice. What
13 the consequence of that is in terms of -- of
14 party status and the Eleventh Amendment, I
15 think, is a -- is a different question.

16 But -- but, again, our basic point is
17 that this is not the sort of action to which the
18 states were immune to begin with. And the --

19 JUSTICE BARRETT: Well, no, no, no, I
20 understand that, but I'm asking specifically,
21 you said to Justice Gorsuch that the better way
22 to think of this is that it's a party against
23 the state. So I was asking how that bears on
24 how we should think about this specifically as
25 an in rem proceeding, because that's one of

1 PennEast's arguments, of course, that -- that
2 sovereign immunity doesn't apply here.

3 So is it in rem or is it more in
4 personam?

5 MR. KNEEDLER: I -- I think it's -- I
6 think that, frankly, its character is more in
7 rem. The state obviously has an interest in it.
8 But it -- and it's a particular kind of in rem
9 where the consequence is the payment of money to
10 the state in exchange for its property. It's
11 sort of a contractual exchange in that -- in
12 that respect.

13 So it's not the sort of -- it -- it --
14 it's not the sort of proceeding that the
15 Eleventh Amendment, as this Court has described,
16 is most concerned about, which is a -- a suit
17 for damages against the state where the state
18 might be a wrongdoer and -- and, here, where the
19 federal government itself has decided that the
20 particular land should be taken. The only
21 question is -- is the compensation.

22 So it's in that respect, we think,
23 that the in rem character of the suit matters
24 and -- and -- and also plays into or -- or
25 coincides with the fact that the states were not

1 immune from this sort of action by the federal
2 government or its agent at the founding --

3 JUSTICE BARRETT: Thank you, Mr.
4 Kneedler.

5 CHIEF JUSTICE ROBERTS: A minute to
6 wrap up, Mr. Kneedler.

7 MR. KNEEDLER: Yes. I'd like to
8 underscore the -- the importance of the
9 immovable property exception in City of
10 Chattanooga here because, in -- in City of
11 Chattanooga, the city, a delegee of Tennessee,
12 which was the superior sovereign in that case,
13 was permitted to sue Georgia and there was no
14 immunity in that situation.

15 What we had -- and that's the same as
16 the immovable property exception that the Court
17 discussed in the Permanent Mission of India.
18 What we have here is the equivalent in the
19 Supremacy Clause where the superior sovereign
20 comes from the fact that the United States has
21 to have complete authority with respect to the
22 exercise of the -- of eminent domain, and the
23 state is not immune from an action by the United
24 States through its agent for these purposes.
25 With respect to property within the territory of

1 the United States, that's the relevant
2 situation.

3 And Justice Bradley's decision in
4 Stockton is also instructable on -- on this
5 point, which was quoted in the Cherokee Nation
6 case extensively, that Congress can utilize
7 private entities to carry out public functions.
8 It's more efficient. The -- the pipeline here
9 is the entity that is going to construct, to
10 profit from it, and to require the United States
11 to become involved in a suit like this in aid of
12 something that has already been federally
13 approved would not promote the values of --
14 of -- of sovereign immunity.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 General Feigenbaum.

18 ORAL ARGUMENT OF JEREMY M. FEIGENBAUM

19 ON BEHALF OF THE RESPONDENTS

20 MR. FEIGENBAUM: Mr. Chief Justice,
21 and may it please the Court:

22 PennEast cannot hale New Jersey into
23 federal court for two independent reasons.
24 First, the Eleventh Amendment bars this suit.
25 The United States has a necessary and proper

1 power to file condemnation suits against the
2 state to effectuate all its other enumerated
3 powers.

4 But private companies like PennEast do
5 not because, as Alden held, private party suits
6 against the states are never proper. State
7 consent to sue by the United States was not
8 consent to sue by those the U.S. might select,
9 and there are important differences between
10 lawsuits by responsible and politically
11 accountable sovereigns and those by private
12 parties.

13 The only way to justify this private
14 site against the state is to provide evidence of
15 founding era consent. But condemnation lawsuits
16 against nonconsenting states were unheard of at
17 the framing.

18 Second, even where Congress can
19 subject a state to private suit, its choice must
20 be explicit in the statute. Congress would not
21 subject the states to private suit without doing
22 so clearly, and this approach advances
23 fundamental protections for fellow sovereigns.

24 That rule also dictates the result
25 here because the NGA is silent as to the states.

1 That leaves PennEast's complaint about the
2 practical consequences, but those concerns have
3 not been borne out in reality.

4 Other industries expressly lack the
5 power to file condemnation suits against
6 nonconsenting states in federal court. Yet oil
7 pipelines and electric transmissions, like other
8 infrastructure projects, proceed apace. And New
9 Jersey itself has continued to grant
10 rights-of-way to other natural gas projects even
11 after the decision below.

12 In any event, this is the rare
13 constitutional case in which the parade of
14 horrors can be easily fixed by Congress, and
15 it provides no basis for eliminating the state's
16 immunity to private suit.

17 I welcome this Court's questions.

18 CHIEF JUSTICE ROBERTS: Counsel, you
19 talked near the end there about the practical
20 problems. Does the State oppose the pipeline?

21 MR. FEIGENBAUM: The State has opposed
22 the pipeline in a separate D.C. Circuit
23 proceeding, although that's distinct from the
24 challenge we've raised below in this case.

25 CHIEF JUSTICE ROBERTS: Well, that

1 seems to present a significant practical
2 problem.

3 MR. FEIGENBAUM: So I don't think it
4 does. I don't think that the sort of landowner
5 veto concern that PennEast raises holds up for
6 two reasons. The first is that other industries
7 expressly lack the power to file these sorts of
8 actions. And as I noted, oil pipelines proceed,
9 electric transmissions proceed and so on.

10 CHIEF JUSTICE ROBERTS: Well, I don't
11 know, maybe those did or did not cross state
12 property or maybe the state didn't oppose those,
13 but you oppose this one and it crosses state
14 property. That seems to be a pretty practical
15 problem.

16 MR. FEIGENBAUM: So there's no reason
17 to think that other industries have to cross
18 state land any more frequently than the natural
19 gas industry does. And we've included in our
20 briefing examples from other states and in the
21 New Jersey Conservation Foundation
22 briefing indicating that those other industries
23 do cross state land all the time. But what --

24 CHIEF JUSTICE ROBERTS: Well, but
25 you -- your -- your -- your -- your client

1 opposes this pipeline. So, if they say no,
2 it -- it doesn't -- it doesn't go forward.

3 MR. FEIGENBAUM: So, to the degree
4 that this Court has concerns about that, this is
5 the rare constitutional case in which all of the
6 consequences can be remedied by Congress, and it
7 requires a sort of double speculation on
8 PennEast's part.

9 PennEast is speculating that states
10 will impermissibly try to wield veto powers when
11 there's no evidence from any industry to support
12 that view, and New Jersey itself has granted
13 rights-of-way to other natural gas pipelines
14 even after the decision below.

15 And then it's again speculating that
16 Congress won't step in, even though Congress has
17 consistently passed new statutes to address
18 problems that industries confront in the
19 condemnation context. I don't think that sort
20 of double speculation is enough to justify
21 eliminating the State's sort of historic
22 immunity to private suit without evidence of
23 founding era consent.

24 CHIEF JUSTICE ROBERTS: No, no, I --
25 I'm not suggesting that it's enough to eliminate

1 the immunity, but it does strike me as a concern
2 why supporting Mr. Clement and Mr. Kneedler's
3 argument that you're dealing here with a federal
4 delegee.

5 And what the State is doing is -- in
6 other words, the -- the federal government in
7 this scenario does become a junior varsity
8 sovereign. The state is blocking the NGA
9 certificate issued by the -- by the federal
10 sovereign.

11 Do you have a response to that?

12 MR. FEIGENBAUM: Absolutely. I don't
13 think the United States is becoming a junior
14 varsity sovereign. I do think that the United
15 States still has the complete power of eminent
16 domain. I just don't think that resolves this
17 case.

18 The United States has all kinds of
19 complete or superior powers, like the power to
20 recover federal dollars or the power to set
21 patents and punish infringers, but it can't
22 subject the states to private party suit as a
23 means of effectuating that power. And that's, I
24 think, especially true in condemnation.

25 Eminent domain itself is an implied

1 power, meaning it's a necessary and proper way
2 to accomplish other enumerated powers, like the
3 Commerce Clause. But we know that when states
4 are acting under the Commerce Clause, private
5 suits -- or when Congress is acting, private
6 suits can't be implied against the state because
7 they aren't necessary and proper.

8 And the way to square that is easy.
9 The United States can condemn sovereign land
10 when it takes responsibility and ownership of
11 the suit, but it can't select a private party to
12 do so over a state's objection, exactly as
13 Justice Scalia put it in *Blatchford*.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas.

17 JUSTICE THOMAS: Thank you, Mr. Chief
18 Justice.

19 Counsel, what difference would it make
20 if the U.S. sanctioned the proceedings, the
21 condemnation proceedings that -- or efforts that
22 PennEast is now making?

23 MR. FEIGENBAUM: I think it would make
24 both dignitary and practical differences for the
25 states. So, obviously, as to the dignitary

1 harms, I don't think we should forget that
2 PennEast is trying to directly subject the state
3 to the jurisdiction of a federal court over its
4 objection, which is the sort of offense to the
5 dignity of coequal sovereigns that is exactly
6 what the framers were talking --

7 JUSTICE THOMAS: But, in the end, what
8 does that all mean?

9 MR. FEIGENBAUM: So, in practical
10 sense, our concern in this case is that a
11 private plaintiff is the one that gets to decide
12 whether to take state land it might never need,
13 while the pipeline and the route remain subject
14 to so much change, which is something we think a
15 more responsible and politically accountable
16 sovereign would be less likely to do.

17 So, at pages 168, 175, and 235 of the
18 record, there's considerable evidence that
19 PennEast's actual route might change, and FERC
20 itself instructed the company to consider a
21 change of the final two miles of the route and
22 it -- as part of the future permitting stage and
23 as the process unfolds.

24 But PennEast went and sought eminent
25 domain along the entire original route, which is

1 something that we think the United States would
2 be less likely to do relative to our sovereign
3 land when all of this process is still ongoing.

4 JUSTICE THOMAS: Well, you said --
5 you've said a number of times that it's your
6 sovereign land. How much of this land do you
7 have a possessory interest in?

8 MR. FEIGENBAUM: Of the 49 parcels
9 that we're talking about, we have nine in fee
10 and 40 we have other sorts of property interests
11 to which we hold title.

12 JUSTICE THOMAS: What kind of property
13 interests?

14 MR. FEIGENBAUM: It depends.
15 Sometimes agricultural easements, development
16 easements and the like. They -- they're not all
17 the same kind across the 40.

18 JUSTICE THOMAS: So the -- let me ask
19 you, just an opportunity, I'd like you to -- to
20 respond to the Petitioner and to some extent the
21 U.S.'s argument that because this is an in rem
22 action it doesn't implicate sovereign immunity
23 at all.

24 MR. FEIGENBAUM: I appreciate the
25 opportunity, Justice Thomas. As I think the

1 United States admitted, there are a number of
2 cases from this Court that suggest just the
3 opposite, that parcels to which the United
4 States or a state have an interest in are
5 lawsuits against the state or the United States
6 itself.

7 And that makes sense. The United
8 States is the one that actually has to litigate
9 this case. The United -- the state is the one
10 that has to. The state is the one that's going
11 to lose its parcels where a private plaintiff is
12 deciding when that happens. And the state is
13 the one that has to participate in an
14 adversarial compensation trial.

15 The immovable property doctrine on
16 which Petitioner and the United States are
17 relying was about something else entirely. It
18 wasn't about a general in rem exception or an in
19 rem exception that would extend to New Jersey's
20 land that we own within our borders. It was
21 about property that we own outside of our
22 borders where we "assumed the character" of a
23 private landowner and don't function as a
24 sovereign. This Court said that in *Chattanooga*
25 and *Schooner Exchange* and in the separate

1 opinions in Upper Skagit.

2 And the reason that matters is that
3 the immovable property doctrine would also open
4 us up to private suits, as this Court may
5 remember from the Upper Skagit case and the
6 Lundgren quiet title suit against a tribe.

7 Immovable property isn't just about
8 eminent domain but is about property suits
9 generally, and everyone agrees New Jersey is not
10 open to that sort of private property suit for
11 land we own within our borders.

12 JUSTICE THOMAS: Finally, I'd like you
13 to take an opportunity to comment specifically
14 on the delegation, the U.S.'s delegation of a
15 sovereign -- of its sovereign exemption.

16 MR. FEIGENBAUM: So I don't think
17 anything changes because PennEast is relying on
18 delegated or deputized authority. As Alden and
19 Blatchford explain, the United States can always
20 sue the states and, when it does so, it takes
21 political responsibility for the lawsuit itself,
22 controls the decisions in the lawsuit, and
23 doesn't offend our sovereignty. But a private
24 lawsuit is different because it leaves the
25 private parties --

1 JUSTICE THOMAS: But what would it
2 take for this to happen, though? Can the U.S.
3 even delegate this, its exemption?

4 MR. FEIGENBAUM: We don't think so,
5 no, because, as Justice Scalia put it, consented
6 to by the United States is not consented to by
7 those who the U.S. might select. So select or
8 delegate or deputize, whatever word we want to
9 use, I don't think this sort of workaround from
10 the usual abrogation rules can really exist in
11 our constitutional scheme.

12 JUSTICE THOMAS: Okay. And on what
13 base -- on what do you base that?

14 MR. FEIGENBAUM: I think we base that
15 on Alden and Blatchford and the lack of any
16 evidence at the founding or at any time since
17 that there's an understanding that simply
18 because the U.S. can bring suit, that it can
19 delegate or deputize to someone the ability to
20 bring that same lawsuit. It would really blow a
21 hole in the way this Court has always understood
22 sovereign immunity.

23 JUSTICE THOMAS: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Breyer.

1 JUSTICE BREYER: Yeah. Thank you.
2 Go back for a minute to the late
3 1940s, early 1950s. Most of the natural gas was
4 in the Permian Basin in Oklahoma and in Texas,
5 and they were on the verge of or had built
6 pipelines to carry that natural gas to
7 California, San Diego, El Paso Natural Gas, or
8 up to Pennsylvania, over to Illinois, up to
9 Massachusetts. A lot of the states -- not a
10 lot, but some were objecting in a whole variety
11 of complex ways. And so Congress passed the
12 Natural Gas Act.

13 Now they couldn't have built the
14 pipelines unless they had this power, I think,
15 I'm not certain of that, but I don't see how
16 they could have because they need -- go look at
17 the map on the -- the map of waterways in which
18 Pennsylvania claims an interest in the Marcellus
19 Shale Coalition. They zone water beds. They
20 own all kinds of obstacles. But this was passed
21 to build a pipeline. How could they have done
22 it? I don't see it.

23 And having known a little bit about
24 that, since you need the federal power or a
25 government power to -- for a private person to

1 use eminent domain for anything against a
2 private land or by a state, I don't understand
3 how they would have -- how any reasonable person
4 would have delegated any eminent-domain power to
5 the Natural Gas Act, which was for interstate
6 pipelines, without including the power to
7 proceed against the state.

8 Am I right about that? And, if I am
9 right and, therefore, it is clearly in this
10 statute, why in heaven's name can't the Federal
11 Power Commission then, or FERC now, have done
12 the same thing? And if they could have done the
13 same thing under law of Congress, why can't they
14 hire somebody, just as Mississippi hires private
15 prosecutors sometimes in criminal cases? Or
16 there are dozens of examples where private
17 persons are delegated under supervision, and,
18 here, the supervision is close, to go and do
19 something that the public can do by bringing a
20 criminal case, et cetera, et cetera.

21 Do you see the thrust of my argument?
22 Very historical. But that's been the
23 understanding for the last 80 years.

24 MR. FEIGENBAUM: So I think I have
25 three responses to that, Your Honor, if I might.

1 JUSTICE BREYER: Please.

2 MR. FEIGENBAUM: The first is that I
3 think the premise of that question relies on the
4 same misconception that's at the heart of
5 PennEast's brief, which is a speculation about
6 the way that states behave.

7 We know from other industries,
8 including the interstate oil pipeline
9 industry --

10 JUSTICE BREYER: No, sorry. My -- the
11 thrust of my question, why I kept saying
12 historical, is I do know how states behaved in
13 the late '40s and early '50s. And from reading
14 the newspapers, I know that natural gas is a
15 subject of a big argument politically in a lot
16 of states, some thinking it's great for the
17 environment and others think -- others thinking
18 it doesn't go far enough, it has risks. Those
19 are the two things I know. Not speculation.

20 MR. FEIGENBAUM: So I appreciate that,
21 Your Honor. I think those same things could be
22 said about the oil industry, but we don't see
23 the concerns being raised here even though they
24 don't have any sort of federal eminent-domain
25 authority that anyone would purport allows them

1 to hale a non-consenting state into court, and
2 yet they are built anyway. There was no
3 evidence --

4 JUSTICE BREYER: Are there building
5 now big oil pipelines, like, down from Canada to
6 New Orleans?

7 MR. FEIGENBAUM: Sure, but there
8 hasn't been any evidence that a problem in that
9 process has been sovereign immunity, even though
10 everyone agrees that there's no ability to raise
11 federal eminent-domain claims against
12 nonconsenting states in that context.

13 And I think what that shows is that
14 there's plenty of reasons why pipelines might
15 not get built having nothing to do with
16 sovereign immunity, but that uncertainty does
17 exist in the industry, which is one of the
18 reasons why we were so nervous about
19 condemnations even before the permitting process
20 had finished.

21 But, to take your point on the
22 statutory question for a moment, it's also
23 notable that other times that Congress has
24 spoken to the issue, it has understood that
25 sometimes it wanted the statutes to include

1 state land and sometimes it didn't and sometimes
2 it excluded them, which, if it was true that
3 every industry going through state lands was
4 going to need this power, well, then it would be
5 very strange to see those inclusion --
6 exclusions. Congress was silent here, and it
7 doesn't give us much to work with.

8 JUSTICE BREYER: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Alito.

10 JUSTICE ALITO: Counsel, sometimes
11 form is dispositive and you may in the end have
12 a winning formal argument, but what I want to
13 look into is whether you have anything more than
14 a purely formal argument.

15 Now you argue that things might have
16 worked out better for you if FERC as opposed to
17 PennEast were conducting the proceeding because
18 the federal government is obligated to negotiate
19 in bad faith and there's the issue of timing.
20 But I take it your constitutional argument would
21 be in the end exactly the same if none of those
22 features appeared in the statute that's involved
23 here, would it not?

24 MR. FEIGENBAUM: So I think formally
25 it would, although I would agree with you that

1 functionally, in what's at stake, we'd be
2 talking about something different.

3 JUSTICE ALITO: So, really, it's just
4 about the form? It's the fact that it's
5 PennEast and it's not FERC?

6 MR. FEIGENBAUM: So I -- I don't think
7 that's right. It's not just about the form for
8 New Jersey. In your hypothetical, you, of
9 course, took out the substantive concerns that
10 we were afraid of. But, in this case, in the
11 case we're actually facing, we do have
12 substantive concerns about this litigation and
13 the calls that PennEast rather than the United
14 States are making. We think it should be --

15 JUSTICE ALITO: Yeah. No, I -- I
16 understand that, but if PennEast were require --
17 required to negotiate in good faith, if all of
18 this was -- the timing was they couldn't bring a
19 condemnation action until the route had been
20 finalized so that FERC had approved the very
21 route in question and knew that it was going
22 over state land and wanted the -- presumably
23 wanted the land condemned, and all that was left
24 to be done was to file a condemnation action,
25 ascertain the value of the property, you would

1 have exactly the same constitutional objection?

2 MR. FEIGENBAUM: As a formal matter,
3 yes, because it's still a lawsuit directly filed
4 against the state by a private party, which we
5 think is exactly what the framers thought would
6 be an offense to the fundamental dignity of
7 sovereigns who can't be haled into court without
8 their consent.

9 JUSTICE ALITO: Is New Jersey's
10 dignity really, in any kind of practical terms,
11 compromised to a greater degree based on the
12 caption of the lawsuit?

13 MR. FEIGENBAUM: We think yes because,
14 if it were otherwise, then all manner of this
15 Court's cases would have to come out, I think,
16 differently. In Alden, for example, the Court
17 was facing a private suit that everyone agreed
18 the United States could have brought instead.
19 But it was the fact the private party was
20 bringing it, instead of the United States, that
21 created an offense, even if it was sort of just
22 the state as employer, just like New Jersey as
23 landowner.

24 The fact is the offense to a state's
25 dignity is the private party lawsuit, and that's

1 the through line of all of this Court's cases in
2 sovereign immunity.

3 JUSTICE ALITO: No, I understand that,
4 but it is a purely formal -- it is a purely
5 argument. Okay. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor.

8 JUSTICE SOTOMAYOR: Counsel, just to
9 be clear, other than your argument that PennEast
10 didn't negotiate in good faith, contrary to the
11 finding of the court below, all of the other
12 arguments you mentioned throughout your
13 presentation to Justice Alito and others are
14 about issues that you litigated in the D.C.
15 courts, didn't you --

16 MR. FEIGENBAUM: No, Your Honor.

17 JUSTICE SOTOMAYOR: -- about -- well,
18 you litigated about whether they should wait,
19 and -- and the government responded, not in the
20 way you liked, but it did. What else -- what
21 else did you not have an opportunity to or
22 didn't litigate in that case?

23 MR. FEIGENBAUM: So two things, Your
24 Honor. First, the adversarial compensation
25 trial, to which we're going to be subject if

1 PennEast prevails on its posture in this case,
2 is a contested compensation trial over the value
3 of sovereign land where a company can fight
4 tooth and nail to keep away from us the money to
5 which we think we're entitled. So none of that
6 is ever going to come out --

7 JUSTICE SOTOMAYOR: Well, that's true,
8 but that would be true whether it was the
9 government or you.

10 MR. FEIGENBAUM: That's right.

11 JUSTICE SOTOMAYOR: And you're -- once
12 the -- once the decision is made that land is
13 necessary for a public service, that you're
14 subject to anyway. What was the second thing,
15 counsel?

16 MR. FEIGENBAUM: The second thing was
17 that we did raise issues around the timing, but
18 FERC didn't just say we disagree with you on the
19 timing, we want it to go forward. At page 239
20 and 240 of the record, FERC said the timing is
21 something to be worked out in the district court
22 with the private party and New Jersey. So it
23 was sort of washing its hands clean, exactly as
24 we say shouldn't be able to be done by a
25 responsible sovereign. And so --

1 JUSTICE SOTOMAYOR: Well, you had --
2 you had the opportunity to litigate that, and
3 you lost, correct?

4 MR. FEIGENBAUM: So we raised it, but
5 they didn't say you had the opportunity and you
6 lose.

7 JUSTICE SOTOMAYOR: But, counsel --

8 MR. FEIGENBAUM: They said go raise it
9 somewhere else. So we did.

10 JUSTICE SOTOMAYOR: Well, but you
11 could have appealed that.

12 Going to Justice Alito's question
13 about formalistic, it seems to me that --
14 history is very important to me, and I think
15 that was the point of Justice Breyer's position,
16 which is that for at least 150 years, states,
17 some states, not all, have been delegating to
18 private parties their power -- their -- the
19 power of eminent domain, and the federal
20 government and other agencies have done it, and
21 no one has raised this argument because, if one
22 accepts Mr. Clement's argument, there was no
23 sense that there was a sovereign immunity to
24 eminent domain, the exercise of eminent domain
25 by the federal government or by a state against

1 its own citizens, and, hence, who they delegate
2 that power to, unlike the other cases that we've
3 addressed this issue or this issue has been
4 around that only the state can do, and at least
5 in this narrow field, the in rem nature of this
6 proceeding has gone differently in history than
7 in the normal cases.

8 MR. FEIGENBAUM: I don't --

9 JUSTICE SOTOMAYOR: How do you respond
10 to that?

11 MR. FEIGENBAUM: I don't think that's
12 what the history shows for a couple of reasons.

13 First, the history of the fact that
14 states haven't asserted this argument before I
15 don't think is all that telling, because the
16 Natural Gas Act is Commerce Clause legislation,
17 and it wasn't crystal-clear until 1996 in
18 Seminole Tribe that Congress lacked the
19 authority to subject states to private suit
20 under that power.

21 Since that time, a couple of states
22 have raised this. Texas raised it in 2017.
23 Connecticut raised it in 2003. And we know from
24 1992 legislative materials that New York did
25 even earlier.

1 But, more importantly, I think it
2 makes sense that this comes up infrequently
3 because PennEast is, again, wrong about the way
4 that states behave. Even where states clearly
5 have the authority to withhold consent, we
6 frequently allow for rights-of-way, which is why
7 this hasn't been a problem for other industries
8 and why New Jersey itself granted multiple
9 rights-of-way to pending natural gas pipeline
10 projects even after the decision below.

11 But, finally, as FMC put it, modern
12 practice can't overcome the lack of founding-era
13 consent. And so, in addition to being not that
14 compelling, I think, in the unique context of
15 sovereign immunity itself, the sort of practice
16 to which PennEast and the Solicitor General's
17 Office are pointing just isn't that relevant and
18 certainly can't overcome the very clear
19 historical evidence from the founding that no
20 one would have contemplated private condemnation
21 suits against nonconsenting states.

22 JUSTICE SOTOMAYOR: Thank you,
23 counsel.

24 CHIEF JUSTICE ROBERTS: Justice Kagan.

25 JUSTICE KAGAN: Mr. Feigenbaum, does

1 this suit have to be labeled United States
2 versus New Jersey? I mean, what if there was
3 meaningful supervision by the federal government
4 over PennEast's conduct? Would that be enough?

5 MR. FEIGENBAUM: So you're right, Your
6 Honor, this suit does not have to be named as
7 United States versus New Jersey. It is PennEast
8 versus New Jersey, as the Court's caption
9 suggests, and -- and there's no naming
10 convention that would have it be the United
11 States in this case. However --

12 JUSTICE KAGAN: No, no, no. I -- I
13 meant, is -- is there -- could the U.S. delegate
14 the power to PennEast, in your view, but keep
15 some sort of supervisory capacity over the suit?
16 Would that satisfy the Eleventh Amendment?

17 MR. FEIGENBAUM: So I think the answer
18 in that case is probably the same one this Court
19 gave in Stevens, which is I doubt it, but what
20 would make that case hard makes this one easy.
21 If the United States actually contained -- or
22 oversaw and directly supervised the litigation
23 itself in some meaningful way, it would look a
24 lot more like the kind of control that led to
25 the circuit split over qui tam, and, therefore,

1 you could see a different result with the
2 U.S. being the real party in interest. But none
3 of that exists here.

4 JUSTICE KAGAN: You spoke to Justice
5 Alito about the state's dignitary interest and
6 said that this has been a consistent through
7 line in our sovereign immunity cases.

8 Most of those cases in the modern era
9 have had powerful dissents attached to them, and
10 those dissents have -- have -- have basically
11 said, what are you talking about, about this
12 dignitary interest? What dignitary interest
13 does a state have in -- in being -- why is it --
14 why is it any less or greater if a private party
15 or the United States is involved?

16 So can you explain that to me? Like,
17 what is the supposed dignitary interest?

18 MR. FEIGENBAUM: The dignitary
19 interest, which I think comes from the founding
20 era documents, is that it was always understood
21 for any sovereign that you could not be haled
22 into court without your consent. That was sort
23 of black-letter, free-sounding understanding,
24 and so, if it was true that states really did
25 retain the true sovereignty that everyone had

1 promised them when they joined the union, then
2 they would -- as a matter of actually being
3 co-equal sovereigns treated with that
4 sovereignty, they would have the ability to
5 withhold consent as well.

6 Now it's not true vis-à-vis other
7 states and the United States because, as we know
8 in international law as well, it's always looked
9 different for sovereign-on-sovereign sort of
10 litigation, in part because of their
11 responsibility and control and in part because
12 that's never been understood to offend
13 sovereignty.

14 But, if you allow private suits
15 forward against the states when they don't
16 consent to them, it suggests that states really
17 aren't the kind of sovereigns that they were
18 promised and that the founders understood them
19 to be.

20 JUSTICE KAGAN: If you go back to this
21 question of whether there was founding-era
22 consent, I think what PennEast would say is that
23 you knew you were consenting to suits against
24 the federal government and you knew that
25 governments routinely use delegations to -- to

1 effectuate eminent-domain suits. So you put
2 those two things together, why didn't you
3 consent to suits of exactly this kind?

4 MR. FEIGENBAUM: So I don't think you
5 can just put those two things together because
6 that syllogism would cause all sorts of
7 problems. Imagine in, say, a normal property
8 context or in the patent context, you know that
9 the United States would be able to have a patent
10 power and file patent lawsuits against
11 infringing states if it saw fit. You know that
12 the United States would be able to empower
13 private patent holders to sue private patent --
14 patent infringers, so why can't private patent
15 holders sue state infringers?

16 Everyone understands that that last
17 step in the syllogism doesn't follow from the
18 others, because what we're actually looking for
19 in sovereign immunity cases is state
20 understanding and consent to the idea that they
21 could be haled into court, not if a federal
22 power existed but if a private party could use
23 them against their consent.

24 JUSTICE KAGAN: Thank you, Mr.
25 Feigenbaum.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch.

3 JUSTICE GORSUCH: I'd like to return
4 to the question of whether this is a suit
5 against the state. In some respects, it seems
6 pretty hard to dispute that the state is named
7 as a party, and under Rule 71.1, the complaint
8 had to file suit against both property and at
9 least one of the property owners. And, of
10 course, there's going to be compensation due to
11 the state. That would seem to be more in
12 personam than -- than in rem.

13 But there's also a long strand of
14 thinking about condemnation proceedings as in
15 rem, as the notes to the rule make clear. And,
16 of course, we've heard some argument today that
17 this -- that's the better way to conceive of
18 these kinds of suits. Can you speak to that a
19 little further?

20 MR. FEIGENBAUM: Absolutely, Your
21 Honor. So I don't think there's any sort of
22 general in rem exception to sovereign immunity.
23 As this Court has recognized, a suit directly
24 against a sovereign's property is a lawsuit
25 directly against the state both formally and

1 functionally, and that's why the Rule 71.1 --

2 JUSTICE GORSUCH: And what -- what's
3 your best common law authority for that?

4 MR. FEIGENBAUM: So I think the best
5 authority that we have actually could come from
6 the immovable property doctrine, which existed
7 specifically to draw a contrast to the land that
8 states owned within their borders.

9 So the idea of the immovable property
10 doctrine being cited by both PennEast and the
11 United States was that states, when they owned
12 property outside of their borders and got sued,
13 that wasn't --

14 JUSTICE GORSUCH: No, I -- I -- I'm
15 sorry to cut you off there, but I -- I
16 understand that. I remember Upper Skagit. I
17 may be the only person who does, but I do having
18 gotten saddled with that one, but it was a
19 delightful assignment. But that -- that has to
20 do with property outside the state. What about
21 inside the state?

22 MR. FEIGENBAUM: Well, I think it's
23 Kohl and I think it's Minnesota versus United
24 States explaining that these are suits at law
25 and that a lawsuit against the United States in

1 which -- or a lawsuit against land in which the
2 United States has an interest is a lawsuit
3 against the United States.

4 That's why states can't condemn, for
5 example, tribal land where the United States
6 holds a fee interest. And we can't condemn that
7 land simply by naming the land and choosing not
8 to name the United States, because that is in
9 both form and function a lawsuit against the
10 United States we don't have the ability to
11 bring.

12 It was entirely different in cases
13 like admiralty and bankruptcy, which are the
14 only exceptions where this Court has allowed in
15 rem to move forward in that way based on really
16 unique founding-era history that's not present
17 here. In admiralty, it was that admiralty
18 issues were not understood to be law or equity
19 and, therefore, didn't trigger the application
20 of the Eleventh Amendment clause, as we know
21 from Justice Story. And then, in Hood, it was
22 specifically about the uniqueness of the
23 Bankruptcy Clause and the fact that jurisdiction
24 is over the debtor's property, not the state's
25 property, and so it isn't formally seeking any

1 affirmative relief from the state. That's put
2 at page 450.

3 There's no historical evidence and no
4 example that anyone can point to that would
5 allow for a direct lawsuit against a state's
6 land as somehow distinct from a direct lawsuit
7 against a state.

8 JUSTICE GORSUCH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh.

11 JUSTICE KAVANAUGH: Thank you.

12 And welcome, General. I just want to
13 ask one question. In your brief, you respond to
14 PennEast's arguments about what will happen if
15 you were to prevail in this case, and you
16 respond by saying, well, of course, Congress
17 could take action. And then you say -- this is
18 page 45 -- but even absent congressional action,
19 PennEast is hardly without options.

20 And then I want to focus on your first
21 one there. First, while the United States
22 disclaims authority under the NGA to condemn
23 property, the lower courts have had no occasion
24 to consider this question, and this issue
25 deserves greater exploration.

1 So is that a real thing or -- or -- or
2 not, what you're offering there?

3 MR. FEIGENBAUM: So below before the
4 Third Circuit -- and you can find this, I think,
5 most clearly at pages 20 to 22 of our reply
6 brief -- we articulated a theory in which the
7 United States might have an implied power under
8 the structure of the NGA to itself step in
9 essentially on the theory like the Third Circuit
10 suggested, that it's strange to think of FERC
11 being able to grant private parties the ability
12 to file these suits and not retain that power
13 itself.

14 Since that time, the United States
15 itself has come in at PennEast's urging to say
16 we actually don't have that authority. They
17 obviously say it in the gray brief, but they
18 said it in the declaratory order as well. So I
19 don't want to pull this Court's leg and say
20 they're definitely going to move forward with
21 that. We thought it was a workable theory
22 worthy of exploration, but the U.S. continues to
23 disclaim it.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett.

2 JUSTICE BARRETT: Is there any space
3 for an inverse condemnation proceeding in this
4 scheme, you know, where the FERC certificate
5 could issue and PennEast could just take over
6 the property and then you could pursue
7 an inverse condemnation proceeding?

8 MR. FEIGENBAUM: I don't think so,
9 Your Honor, because, as this Court held recently
10 in Knick, a taking without compensation violates
11 the self-executing Fifth Amendment at the time
12 of the taking.

13 And so, you know, PennEast basically
14 says this lawsuit is to remedy a Fifth Amendment
15 problem, but we think it's a false choice
16 between the Fifth Amendment and the Eleventh
17 Amendment because the U.S. could bring this
18 lawsuit in a way that is absolutely coherent
19 with the Fifth Amendment and with the Eleventh
20 Amendment simultaneously.

21 JUSTICE BARRETT: Let me ask you about
22 the Fifth Amendment and how it might relate to
23 the immovable property doctrine. Do you agree
24 that all of your land or your property is
25 private property for Fifth Amendment purposes,

1 which is what permits you to have a takings
2 claim in the first place?

3 MR. FEIGENBAUM: Yes, we agree with
4 the Court that state land, sovereign land, can
5 be condemned and we have the same rights under
6 the Takings Clause.

7 JUSTICE BARRETT: Okay. So, if it's
8 -- if it's private property for purposes of the
9 Fifth Amendment, why shouldn't we treat it as
10 private property for purposes of state sovereign
11 immunity as well?

12 MR. FEIGENBAUM: So I think the Court
13 didn't say it was actually private but just that
14 it was sort of incomprehensible under the
15 Takings Clause that you would be able to have
16 condemnations of sovereign land to which the
17 sovereign was even less entitled to relief than
18 for a private party, and that's how they
19 reasoned it.

20 There's no sort of reasoning here that
21 I think would justify a private lawsuit against
22 a state as somehow necessary and proper from
23 that reading of the Takings Clause.

24 JUSTICE BARRETT: Well, doesn't it
25 bear on the immovable property argument that

1 PennEast is making that, you know, if a state
2 has property, if Georgia has property within the
3 borders of Tennessee, you know, the immovable
4 property, Georgia can be sued because it's
5 treated basically as the equivalent of a private
6 landowner because it's not land within its
7 sovereign territory, but if the Fifth Amendment
8 treats this as private property for those
9 purposes, doesn't that strengthen PennEast's
10 argument about the immovable property doctrine?

11 MR. FEIGENBAUM: I don't think so,
12 because the reason that the property was private
13 property outside of our borders was specifically
14 because a state can't be a sovereign in another
15 state's territory. So Switzerland can't be
16 sovereign in the United States. We can't be
17 sovereign in Georgia or in Pennsylvania.

18 And the consequence of that and why I
19 think the theory proves far too much is that it
20 opens the state up to private property suits
21 like the Lundgrens' quiet title suit in Upper
22 Skagit. So suggesting that immovable property
23 doctrine has a role to play here goes well
24 beyond eminent domain because it is not a theory
25 that is actually linked at all to the -- the

1 teachings of the Takings Clause.

2 JUSTICE BARRETT: I want to go back to
3 something you said to Justice Thomas about
4 possessory and -- or the kinds of property
5 interests at stake. You told Justice Thomas
6 that the state had nine possessory property
7 interests. If that's right -- is that right?

8 MR. FEIGENBAUM: That's right. So
9 this action has 42, and then there are seven
10 that are stayed. So, when you combine out of
11 those 49, we get to nine possessory interests.

12 JUSTICE BARRETT: Should we treat that
13 as significant? I mean, Deep Sea Research, we
14 treated that line as -- as mattering. Should we
15 treat that line as mattering here in distinction
16 between possessory and non-possessory interests
17 --

18 MR. FEIGENBAUM: So I'd put --

19 JUSTICE BARRETT: -- for sovereign
20 immunity purposes?

21 MR. FEIGENBAUM: With one important
22 caveat, which is that everyone has always
23 understood for intangible property interests,
24 which is what an easement is, there's no such
25 thing as sort of actual possession in that way,

1 and so the Restatements define possession for
2 intangible interests as having title, and we
3 have title to all of the easement interests that
4 we have in this case. So even drawing that line
5 would sweep in all of New Jersey's interests in
6 this particular dispute.

7 JUSTICE BARRETT: Okay. Last
8 question. In your view, would there be anything
9 to stop you or any other state from waiting
10 until FERC approves the pipeline's route and
11 then purchasing a property interest in land
12 within the pipeline's path and then asserting
13 state sovereign immunity?

14 MR. FEIGENBAUM: Anything to formally
15 stop, no, but there's no evidence any state has
16 ever done that in any --

17 JUSTICE BARRETT: No, no, no, no, I
18 just asked if there was anything formal you need
19 to stop?

20 MR. FEIGENBAUM: No.

21 JUSTICE BARRETT: Thank you.

22 CHIEF JUSTICE ROBERTS: A minute to
23 wrap up, counsel.

24 MR. FEIGENBAUM: Thank you, Mr. Chief
25 Justice.

1 A ruling for PennEast would be
2 unprecedented because it would allow a private
3 party to subject the state to the indignity of a
4 federal suit without their consent because it
5 would allow a private company rather than a
6 responsible and accountable sovereign to control
7 the litigation and because it would allow
8 PennEast to decide whether to risk needless
9 condemnations of state land while the pipeline
10 and route remain subject to so much challenge
11 and change and to decide how much sovereign land
12 is worth in an adversarial compensation trial.

13 But PennEast lacks the evidence to
14 justify that drastic step. When it comes to the
15 Constitution, PennEast provides no founding-era
16 evidence that states contemplated private
17 condemnation suits. And when it comes to the
18 NGA, PennEast identifies nothing in the text to
19 show that Congress explicitly endorsed private
20 suits against them. PennEast's condemnation
21 carveout thus relies on the very evidence this
22 Court has rejected so many times before:
23 silence in the Constitution, silence at the
24 founding, and silence in the text of the
25 statute.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Rebuttal, Mr. Clement.

5 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

6 ON BEHALF OF THE PETITIONER

7 MR. CLEMENT: Thank you, Mr. Chief
8 Justice, and may it please the Court:

9 I'd just like to make three basic
10 points in rebuttal.

11 First, on the delegation or
12 deputization point, I don't think it's right for
13 the State to suggest that this is just like
14 Blatchford or this is just like Stevens. This
15 is a power that's constrained completely by the
16 federal government.

17 PennEast cannot get into court at all
18 unless it is given a certificate for particular
19 properties. FERC continues to have the
20 authority to oversee the -- the actions and
21 could modify the certificate, and the authority
22 that FERC asserts for that -- and this is
23 directly responsive to Justice Kagan's question
24 -- is 15 U.S.C. 717(o).

25 But even beyond that, eminent domain

1 is not like the ability to have a delegated
2 chance to bring a damages action against the
3 state. It's an inherently government function.
4 The state's treasury will be augmented. And for
5 purposes of the action, PennEast is a federal
6 actor for Fifth Amendment purposes. So all
7 we're asking is to extend this parallel logic to
8 the Eleventh Amendment.

9 Second, I want to talk about the in
10 rem and form versus substance. As Justice
11 Alito's colloquy showed, the position of New
12 Jersey here is entirely a formal argument, but
13 if we're going to go on form, and I'm going to
14 talk about substance in a minute, but if we're
15 going to go on form, the form of an in rem
16 action is an action against the land, or if you
17 want a historical framing-era source, look at
18 Bushrod Washington's decision in United States
19 against Bright, where he talks about an in rem
20 action being an action against the world.

21 What you're doing is you're settling
22 the rights of the land, and that's why in rem
23 actions are fundamentally different. They are
24 not in personam actions. A foreign owner of
25 land can't block eminent domain or other in rem

1 proceedings just by not showing up because the
2 territorial process of the court doesn't reach
3 them.

4 And importantly, Rule 71.1 does say
5 that the -- PennEast is supposed to name the
6 state as a property owner, but this Court in
7 Hood specifically said the provisions of the
8 rules don't change the fundamental form of the
9 action. It was in rem there, it is in rem here,
10 and it is a fortiori specifically an in rem
11 action that can only augment the state treasury.
12 And as to dignity interests, there's not even an
13 allegation of wrongdoing here.

14 So lastly, let me just close by --
15 by -- by inserting the point that to insert a
16 sovereign immunity defense to the eminent-domain
17 authority is to lose the forest for the trees.

18 Sovereign immunity is a stranger in a
19 strange land when it comes to an assertion of
20 eminent domain. And they -- the -- New Jersey
21 concedes the validity of the federal exercise of
22 eminent domain here. They just want to insist
23 on how it's exercised, and that is not an
24 authority that an inferior sovereign gets under
25 any authority, especially when they're wielding

1 that authority as a property owner to veto a
2 federal infrastructure project.

3 Thank you, Your Honors.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel. The case is submitted.

6 (Whereupon, at 1:24 p.m., the case was
7 submitted.)

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