No. 19-1039

In the Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC, PETITIONER

v.

STATE OF NEW JERSEY, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
JONATHAN D. BRIGHTBILL
ERIC GRANT
Deputy Assistant Attorneys General
JONATHAN Y. ELLIS
Assistant to the Solicitor General
MICHAEL BUSCHBACHER
RACHEL HERON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

DAVID L. MORENOFF
Acting General Counsel
JOHN LEE SHEPHERD, JR.
Director of Legal Policy
ROBERT H. SOLOMON
Solicitor
ANAND R. VISWANATHAN
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Pursuant to the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, the Federal Energy Regulatory Commission (FERC) authorized petitioner to construct an interstate natural-gas pipeline along a particular route and to acquire all necessary land for that pipeline, including, if necessary, by eminent domain. When petitioner later initiated an eminent-domain proceeding to acquire land in which respondents claim an interest, respondents challenged petitioner's authority to initiate that condemnation suit. The question presented is as follows:

Whether the NGA's eminent-domain provision, 15 U.S.C. 717f(h), authorizes private entities like petitioner to initiate condemnation suits to acquire State-owned property that FERC has determined is necessary for the construction of an interstate pipeline.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 19-1039

PENNEAST PIPELINE COMPANY, LLC, PETITIONER

v.

STATE OF NEW JERSEY, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. The Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, declares that "[f]ederal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. 717(a). To advance that interest, the NGA sets forth a detailed regulatory scheme governing "the transportation of natural gas in interstate commerce." 15 U.S.C. 717(b).

The NGA vests the Federal Energy Regulatory Commission (FERC) with primary authority to determine whether additional pipelines and related facilities are needed and, if so, where they should be located and whom they should serve. See, *e.g.*, 15 U.S.C. 717f(a) (providing that FERC may order a natural-gas company "to extend or improve its transportation facilities" upon finding that expansion is "in the public interest"); 15 U.S.C. 717f(b) (requiring natural-gas companies to obtain FERC's approval before abandoning any such facilities); 15 U.S.C. 717f(c) (authorizing FERC to authorize construction of additional interstate pipelines); 15 U.S.C. 717f(f) (authorizing FERC to determine the area to be served).

To that end, the NGA authorizes FERC to issue a "certificate of public convenience and necessity * * * authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition" of certain natural-gas facilities, including interstate pipelines. 15 U.S.C. 717f(e). A company seeking such a certificate must submit an application to FERC, identifying, *inter alia*, the proposed interstate pipeline's "[l]ocation, length, and size." 15 U.S.C. 717f(d); see 18 C.F.R. 157.14(a)(6) (requiring the submission of maps of all facilities proposed to be constructed or acquired); see also, *e.g.*, PennEast Pipeline Project Maps, https://go.usa.gov/x7tTn. Applicants are also required to make a "good faith effort to notify all affected landowners" whose property may be crossed by the proposed pipeline or used during construction. 18 C.F.R. 157.6(d).

If FERC determines that the proposed interstate pipeline "is or will be required by the present or future public convenience and necessity," FERC issues a certificate authorizing its construction, attaching "such

reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. 717f(e). Those terms and conditions include the specific location authorized for construction of the pipeline. See, *e.g.*, 162 FERC ¶ 61,053, slip op. 2-16.[1] The NGA does not restrict where FERC may authorize interstate pipelines to be built or what types of land a pipeline's route may cross, so long as the route chosen meets the public-convenience-and-necessity standard.

Upon FERC's issuance of a certificate of public convenience and necessity, the NGA authorizes the certificate's holder to acquire by eminent domain all property "necessary" for construction of the authorized interstate pipeline if it cannot acquire the property by voluntary agreement. 15 U.S.C. 717f(h). Specifically, Section 717f(h) provides:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas * * * , it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

Ibid.

---

[1] FERC regulations also provide for, in some instances, a "blanket certificate" that authorizes the holder to undertake future construction activities, sometimes outside of the specifically authorized right of way, without seeking further approval. 18 C.F.R. 157.203. The meaning and validity of that regulation are not presented here.

As originally enacted, the NGA did not authorize certificate holders to acquire land by eminent domain pursuant to federal law. See S. Rep. No. 429, 80th Cong., 1st Sess. 1 (1947) (Senate Report). Pipeline companies relied instead on state-law mechanisms to acquire the needed land. *Ibid.* States could (and did) withhold authority to take land for projects that they disfavored, for example, those of foreign corporations. *Id.* at 2-3. Congress added Section 717f(h) in 1947 to prevent States from "defeat[ing] the very objectives of the Natural Gas Act" and "nullif[ying]" the Federal Power Commission's (now FERC's) exercise of its "exclusive jurisdiction to regulate the transportation of natural gas in interstate commerce." *Id.* at 3-4.

2. In 2015, petitioner applied to FERC for a certificate of public convenience and necessity under the NGA, requesting authorization to construct a 116-mile pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey, serving natural-gas markets in Pennsylvania, New Jersey, and New York. See Pet. App. 36-37. Following a nearly two-year review of the proposed project, including consideration of protests filed by respondents and others, FERC determined that the public convenience and necessity required construction of the proposed pipeline along the particular route proposed, and granted the certificate. Slip op. 1.

In so doing, FERC considered the project's impact on affected property owners, including respondents. Slip op. 16. It also recognized that petitioner had been yet unable "to reach easement agreements with a number of landowners" and that, upon issuance of the certificate, petitioner would be authorized "to acquire the necessary land or property to construct the approved

facilities by exercising the right of eminent domain." *Id.* at 16-17.

Respondents and other parties to the FERC proceeding filed petitions for review of FERC's order in the D.C. Circuit under 15 U.S.C. 717r(b). *Delaware Riverkeeper Network* v. *FERC*, No. 18-1128 (filed Dec. 21, 2018). Those consolidated petitions are being held in abeyance pending disposition of this case.

3. Meanwhile, petitioner filed this action against respondents and other property owners, seeking an award of possession by eminent domain of the parcels necessary to construct the authorized pipeline. See Pet. App. 50-51. The district court granted petitioner's application for condemnation orders, rejecting respondent's argument that state sovereign immunity barred the proceeding against them, and appointed a panel of special masters to determine just compensation. *Id.* at 34-102. The court of appeals reversed. *Id.* at 1-31.

In the court of appeals' view, it was "essential * * * to distinguish between the two powers at issue here: the federal government's eminent domain power and its exemption from Eleventh Amendment immunity." Pet. App. 12. The court concluded that the NGA validly delegated the federal power of eminent domain to holders of a certificate of public convenience and necessity. *Id.* at 3. But it reasoned that Congress had not spoken sufficiently clearly to delegate what it regarded as the "separate and distinct" "power to hale [a] State[] into federal court" for the purpose of exercising that eminent-domain authority. *Id.* at 2-3. The court explained that it doubted that the federal government could, as a constitutional matter, delegate its exemption from a defendant State's Eleventh Amendment immunity to private parties. *Id.* at 14-26. It then reasoned, based on

that constitutional doubt, that it would require a clear statement from Congress before recognizing such a delegation. *Id.* at 27. The court found no such statement in the NGA. *Id.* at 28-30.

In response to petitioner's warning that the court of appeals' holding would give States a veto power over interstate pipelines, the court recognized that its holding "may disrupt how the natural gas industry" has operated under the NGA for the "past eighty years." Pet. App. 30. The court suggested that a federal official might be able to file any necessary condemnation actions and then transfer the property to the certificate holder. *Ibid.* But it reasoned that, even if FERC lacked that authority, "that is an issue for Congress, not a reason to disregard sovereign immunity." *Id.* at 31.

4. Following the court of appeals' decision, petitioner sought a declaratory order from FERC to explain the agency's view of the scope of Section 717f(h). After examining the NGA's text, context, and history, FERC concluded that Section 717f(h) "was enacted by Congress to enable certificate holders to overcome attempts by states to block the construction of natural-gas facilities the Commission determined to be in the public convenience and necessity" and included the authority to acquire by eminent domain all property necessary to construct an authorized pipeline, whether owned by private parties or by a State. 170 FERC ¶ 61,064, 61,497; see *id.* at 61,491-61,497.

Contrary to the court of appeals' suggestion, the Commission determined that the agency lacked statutory authority to itself condemn property (State-owned or otherwise) under the NGA. 170 FERC at 61,497-61,499. And it found that, absent another mechanism for obtaining the necessary property rights, the Third

Circuit's opinion could have "profoundly adverse impacts on the development of the nation's interstate natural gas transportation system." *Id.* at 61,499.

DISCUSSION

The court of appeals' decision is incorrect. Section 717f(h) authorizes "any holder of a certificate of public convenience and necessity" to acquire "the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas * * * by the exercise of the right of eminent domain," whenever the holder cannot acquire the property by voluntary agreement. 15 U.S.C. 717f(h). That authority fully applies to property in which a State claims an interest. And the court of appeals erred in concluding that principles of state sovereign immunity require a different result.

The court of appeals erred at the threshold, however, in exercising jurisdiction over that issue. The NGA provides for direct review of a certificate of public convenience and necessity issued by FERC in the D.C. Circuit or the circuit in which the natural-gas company has its principal place of business. 15 U.S.C. 717r(b). In *City of Tacoma* v. *Taxpayers*, 357 U.S. 320 (1958), this Court interpreted a materially identical provision in the Federal Power Act (FPA), 16 U.S.C. 825*l*, to require any objections to an equivalent order under the FPA, including "to the legal competence of the licensee to execute its terms," to be made in that direct review proceeding "or not at all." 357 U.S. at 336. The court of appeals therefore should not have entertained respondents' collateral attack on petitioner's authority to execute the terms of the FERC-issued certificate here.

Both these errors warrant this Court's review. As the court of appeals itself recognized, if permitted to

stand, the court's decision threatens to significantly disrupt FERC's ability to administer the Nation's natural-gas supply. The court's jurisdictional error provides no reason to permit that erroneous decision to stand. And contrary to respondents' assertion, neither does the fact that, in the more-than-70-year history of Section 717f(h), the court below is the first appellate court to discover an unwritten exception for State-owned property. The petition for a writ of certiorari should be granted.

A. The Court Of Appeals' Decision Is Incorrect

1. As a threshold matter, the court of appeals lacked jurisdiction to entertain respondents' challenge to petitioner's authority to acquire by eminent domain the property rights necessary to build the FERC-approved natural-gas pipeline. The certificate of public convenience and necessity expressly provided for petitioner's exercise of eminent domain for that purpose. Any challenge to petitioner's authority to execute those terms must be brought, if at all, through a challenge to the certificate itself, not through a collateral attack like the one below.

The NGA provides that a certificate of public convenience and necessity issued by FERC is reviewable in the D.C. Circuit or the circuit in which the natural-gas company has its principal place of business. 15 U.S.C. 717r(b). To obtain judicial review, a party to the administrative proceeding must first seek rehearing from FERC, then file a petition for review in the court of appeals within 60 days of FERC's decision on the rehearing petition. *Ibid.* "Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part." *Ibid.*

In *City of Tacoma*, *supra*, this Court interpreted the Federal Power Act's substantively identical judicial-review provision, 16 U.S.C. 825*l*, to preclude landowners from collaterally attacking in other proceedings the licensee's authority to acquire the necessary property. When the State of Washington responded to a subsequent state proceeding brought to finance the federally licensed project by asserting that the Commission could not authorize a licensee to condemn the State's fish hatchery, this Court explained that, "upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all." *City of Tacoma*, 357 U.S. at 336.

Section 717r(b) of the NGA likewise bars respondent's collateral attack in this eminent-domain proceeding. FERC has authorized construction of an instrumentality of interstate commerce—a pipeline—at a specified location. Slip op. 2-16. FERC's order states that upon issuance of the certificate, petitioner will have authority "to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain." *Id.* at 17. And Section 717r(b) vests exclusive jurisdiction to review that order in an appropriate court of appeals. As in *City of Tacoma*, respondents are thus required to raise "all objections * * * to the legal competence of [petitioner] to execute" the certificate's terms—including the authority to acquire by eminent domain any parcels of land included in the pipeline route—in such a review proceeding "or not at all." 357 U.S. at 336.

As one court of appeals put it: "Exclusive means exclusive, and the Natural Gas Act nowhere permits an

aggrieved party otherwise to pursue collateral review of a FERC certificate in state court or federal district court." *American Energy Corp.* v. *Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010); see *Adorers of the Blood of Christ* v. *FERC*, 897 F.3d 187, 195 (3d Cir. 2018). That includes review in condemnation proceedings expressly contemplated by the certificate and initiated under its authority.

Because the Section 717r(b) question goes to the court of appeals' jurisdiction, this Court has an obligation to consider it, even though no party has previously raised it. See *Gonzalez* v. *Thaler*, 565 U.S. 134, 141 (2012). And the court of appeals' erroneous consideration of respondents' collateral attack on a certificate of public necessity and convenience outside the exclusive review scheme of the NGA provides ample ground to vacate the decision below.

2. In addition to erroneously considering the merits of respondents' challenge, the court of appeals erred in resolving that challenge. As the text, structure, and history of the NGA make clear, Section 717f(h) authorizes certificate holders to acquire State-owned property necessary for constructing a FERC-approved interstate pipeline.

a. The plain text of Section 717f(h) authorizes any holder of a certificate of public convenience and necessity to obtain by eminent domain the rights of way needed to construct and operate a federally authorized interstate pipeline. On its face, that authority extends to *any* property "necessary" for the "construct[ion], operat[ion], and maint[enance]" of the pipeline, 15 U.S.C. 717f(h), without regard to whether a State claims any possessory or non-possessory interest. "[T]his Court may not narrow a provision's reach by inserting words

Congress chose to omit." *Lomax* v. *Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020). The Court's "duty [is] to respect not only what Congress wrote but, as importantly, what it didn't write." *Virginia Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1900 (2019) (plurality opinion).

Reading the words of the statute "in their context and with a view to their place in the overall statutory scheme," *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1888 (2019) (citation omitted), reinforces that conclusion. The NGA provides the sole mechanism through which the federal government determines whether and where pipelines and other facilities needed for interstate transportation of natural gas will be built. Those decisions are at the core of the federal government's authority to regulate the "channels" and "instrumentalities" of interstate commerce. *United States* v. *Morrison*, 529 U.S. 598, 609 (2000) (citation omitted); see U.S. Const. Art. I, § 8, Cl. 3. Nothing in the NGA purports to limit FERC's authority to site interstate natural-gas projects on land owned by a State. And contrary to the Third Circuit's suggestion (Pet. App. 31), Section 717f(h) supplies the only authority to overcome any barriers to implementing those decisions created by holdout property owners, by providing for the *certificate holder* to exercise any necessary eminent domain.[2]

---

[2] Respondents' suggestion (Br. in Opp. 19) that FERC's authority to site an interstate pipeline "implied[ly]" authorizes FERC to acquire the necessary property by eminent domain is implausible in light of Section 717f(h)'s express delegation. See 170 FERC ¶ 61,064, 61,497-61,499; see also *id.* at 61,503 n.1 (Glick, Comm'r, dissenting).

In this context, the lack of any express carve-out for State-owned land in Section 717f(h) is particularly instructive. Congress should not lightly be assumed to have designed a system that vests FERC with the power to authorize the construction of an interstate pipeline through a specifically approved corridor, including through State-owned parcels, while simultaneously and silently withholding from the party granted the certificate of public convenience and necessity the authority necessary to overcome a State's objection to such a plan.

The lack of any State-owned property exception to Section 717f(h) is confirmed by the existence of such exceptions in other statutes delegating federal eminent-domain power. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Most prominently, Section 21 of the FPA similarly authorizes private entities that have obtained a license from FERC to acquire by eminent domain the property rights "necessary to the construction, maintenance, or operation of any dam, reservoir, [or] diversion structure." 16 U.S.C. 814. In 1947, Congress modeled Section 717f(h) on that earlier-enacted provision using wording that "follow[ed] substantially" the predecessor's. Senate Report 1. In 1992, however, Congress amended the FPA provision, withdrawing from licensees the power to condemn "any lands or other property that, prior to [October 24, 1992], were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law." Pub. L. No. 102-486, Tit. XVII, § 1701(d), 106 Stat. 3009. That amendment is instructive in two respects.

First, it demonstrates that Congress understood the then-existing wording of the FPA's eminent-domain provision—which was materially identical to the wording of Section 717f(h)—to authorize condemnation of State-owned land. Otherwise, there would have been no need to exempt certain types of State-owned property. See H.R. Rep. No. 474, 102d Cong., 2d Sess. Pt. 8, at 99-100 (1992) (federal eminent-domain power under FPA "includes the power to condemn lands owned by States").

Second, the 1992 FPA amendment demonstrates that Congress knows how to exempt State-owned property from general federal eminent-domain authority if it intends to do so. See *Department of Homeland Sec.* v. *MacLean*, 574 U.S. 383, 394 (2015); see also, *e.g.*, Pub. L. No. 93-496, § 6, 88 Stat. 1528-1530 (authorizing Amtrak to acquire by eminent domain interests in property "necessary to provide intercity rail passenger service," except "property of a railroad or property of a State or political subdivision thereof or of any other government agency"); Pub. L. No. 89-774, 80 Stat. 1350-1351 (authorizing Washington Metropolitan Transit Authority to acquire property by condemnation "except property owned by," among other entities, state signatories to the governing compact). Yet Congress did not create a comparable exemption to Section 717f(h) in 1992, and it has not since.[3]

---

[3] The court of appeals dismissed (Pet. App. 28 n.20) the relevance of the 1992 amendment, on the ground that it was enacted during a seven-year period in which this Court's precedent held that Congress could abrogate state sovereign immunity pursuant to its Commerce Clause power. But the FPA and NGA delegate federal eminent domain authority; they do not purport to abrogate state sovereign immunity. And in any event, the court of appeals' reasoning

b. The court of appeals declined to interpret Section 717f(h) according to its plain text primarily based on its "doubt that the United States can delegate its exemption from state sovereign immunity to private parties." Pet. App. 26-27. It reasoned that the federal government's "ability to condemn State land" was actually "the function of two separate powers: the government's eminent domain power and its exemption from Eleventh Amendment immunity." *Id.* at 12. Although the court agreed that the NGA validly delegates the former, in light of its constitutional doubts, the court declined to find a delegation of the latter. *Id.* at 3, 26-30. That reasoning is misguided.

As an initial matter, the court of appeals erred in drawing a sharp distinction between the government's authority to exercise eminent domain and the authority to file a condemnation action. This Court has not previously made such a distinction. Cf. *Georgia* v. *City of Chattanooga*, 264 U.S. 472, 479-480, 482 (1924) (Because State-owned land was subject to the power of eminent domain, the State could be "made a party to condemnation proceedings."). And it makes little sense. Initiating a condemnation action merely effectuates the right, validly conferred through delegation of the power of eminent domain, to acquire title to land that the owner does not wish to sell and provides a mechanism for the delegee to pay just compensation if it cannot reach agreement with the owner.

More fundamentally, the court of appeals erred in suggesting any constitutional impediment to Section 717f(h). To be sure, "States entered the federal system

---

cannot explain other instances in which Congress has expressly withheld power to condemn State-owned lands from a delegation of federal eminent domain outside that narrow time period.

with their sovereignty intact," *Alden* v. *Maine*, 527 U.S. 706, 713 (1999) (citation omitted)—an "integral component" of which is "immunity from private suits," *Franchise Tax Bd.* v. *Hyatt*, 139 S. Ct. 1485, 1493 (2019) (citation omitted). "[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear," States "retain today" the same immunity from suit they "enjoyed before the ratification of the Constitution." *Alden*, 527 U.S. at 713. A State is thus generally not "subject to suit in federal court unless it has consented to suit, either expressly or in the plan of the convention." *Blatchford* v. *Native Village*, 501 U.S. 775, 779 (1991) (internal quotation marks omitted). Giving effect to the plain terms of Section 717f(h), however, would not subject States to any suit to which they did not consent "in the 'plan of the convention.'" *Ibid.* (citation omitted).

There is no question that the States consented in the plan of the convention to suits brought by the federal government. *United States* v. *Texas*, 143 U.S. 621, 646 (1892). And it is common ground that the eminent-domain power granted to the federal government includes the power to acquire property owned by a State. See Pet. 32; Br. in Opp. 18-19; see also *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 511-512 (1941). The only question, then, is whether the States' consent to federal condemnation suits against State-owned land includes consent to such suits brought by private entities that have been delegated the federal power of eminent domain. The answer is yes.

The power of eminent domain has been understood since before the Founding as a sovereign power that may be delegated to private entities for projects that the sovereign deems in the public interest. Colonial

governments, for example, passed so-called Mill Acts, which authorized land to be taken or inundated for the construction and maintenance of mills in light of the public need for the grain produced. In the first Mill Act in 1667, Virginia authorized any landowner willing to erect a mill and possessing land on one side of a creek to invoke the authority of the county court to obtain rights to land on the other side from any owner refusing to sell. 1667 Va. Mill Act, *reprinted in* William Waller Hening, Act IV, 2 Stat. 260-261 (R. & W. & G. Bartow eds., 1823). Similar statutes were enacted prior to ratification and in the early years of the Republic in at least 18 other States. See *Head* v. *Amoskeag Mfg. Co.*, 113 U.S. 9, 16-17 & n.* (1885); see also *Kelo* v. *New London*, 545 U.S. 469, 512 (2005) (Thomas, J., dissenting) (describing these laws as early examples of "States employ[ing] the eminent domain power").

Moreover, "in most, if not all, of the colonies," other statutes authorized the exercise of eminent domain for the construction of public and private roadways. 1 *Nichols on Eminent Domain* § 1.22[7] (2020); see *Kelo*, 545 U.S. at 513 (Thomas, J., dissenting). In Pennsylvania, for example, any person could apply to a justice of the peace for a "road to be laid out from or to the plantation or dwelling-place of any person or persons to or from the highway." 1735 Pa. Highway Act, *reprinted in* 4 James T. Mitchell & Henry Flanders, *The Statutes at Large of Pennsylvania* § 1, at 296-297 (Clarence M. Busch ed. 1897). If "a road shall be found necessary," it would be laid out and recorded as "a common road or cartway, as well for the use and conveniency of the person or persons" who requested it, with payment made by those same persons to any property owner whose "improved ground" was taken. *Id.* §§ 1-2, at 297-298.

Such provisions continued after ratification. "In the nineteenth century, every state in the union delegated the power of eminent domain to turnpike, bridge, canal, and railroad companies." Abraham Bell, *Private Takings*, 76 U. Chi. L. Rev. 517, 545 (2009). Congress too delegated the power of eminent domain to private actors in like circumstances from its earliest days. In 1809, for example, Congress authorized a corporation to build a turnpike through Alexandria (then a part of the District of Columbia) and to condemn property as needed to construct the project. See Act of Mar. 3, 1809, ch. 31, § 7, 2 Stat. 541-542. Throughout the nineteenth century, Congress authorized railroad companies to condemn land across the territories. See, *e.g.*, Act of Mar. 2, 1831, ch. 85, 4 Stat. 477; Act of Feb. 18, 1888, ch. 13, § 3, 25 Stat. 36-37. And since 1876, when this Court set to rest any doubts that the federal government's power of eminent domain may be exercised within state boundaries, see *Kohl* v. *United States*, 91 U.S. 367, 371-372 (1876), Congress has regularly delegated that power to private companies for the construction of bridges, energy infrastructure, and other projects that Congress deems in the public interest. See, *e.g.*, Act of July 11, 1890, ch. 669, § 4, 26 Stat. 269-270 (incorporating and authorizing company to condemn land needed to build bridge across Hudson River); General Bridge Act of 1946, ch. 753, Tit. V, § 509, 60 Stat. 849 (authorizing corporations to condemn property for building bridges between two or more States); see p. 13, *supra*.

In light of this long unbroken history, there can be little doubt that States would have understood at the Founding that the authority to acquire property by eminent domain—and the institution of legal proceedings

necessary to effect that acquisition—may be delegated to a private entity.

c. The court of appeals offered (Pet. App. 14) three reasons to doubt that the United States could delegate the authority to bring condemnation actions against state property interests. None is persuasive.

First, the court of appeals found (Pet. App. 14) "no support in the caselaw" for such a delegation. But the *absence* of case law is not enough to establish unconstitutionality. If anything, given the long history of such provisions in the NGA and other statutes, the dearth of decisions prohibiting or even seriously questioning their application to state property interests is evidence that no constitutional concerns exist. Cf. *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2326 (2020); *NLRB* v. *Noel Canning*, 573 U.S. 513, 525 (2014); *Dames & Moore* v. *Regan*, 453 U.S. 654, 686 (1981).

This Court's decisions in *Blatchford* and *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), are not to the contrary. Those decisions expressed skepticism about the federal government's ability to delegate its exemption from state sovereign immunity to private parties for the purpose of enforcing the law. See *Blatchford*, 501 U.S. at 785-786; *Stevens*, 529 U.S. at 787. But delegation of the government's authority to enforce the law and impose monetary liability on States presents distinct concerns that do not arise with respect to the delegation of the right of eminent domain, exercised here with approval by FERC of the parcels to be acquired, where the purpose of the proceeding is to determine the amount of compensation to be paid *to* the State. See, *e.g.*, *Alden*, 527 U.S. at 750 ("Private suits against nonconsenting

States—especially suits for money damages—may threaten the financial integrity of the States.").

Second, the court of appeals expressed (Pet. App. 17-18) concerns about political accountability. To the extent such concerns could overcome the history of such provisions, however, the NGA stays well within permissible bounds. Although it is the certificate holder that actually files the condemnation action, it is *FERC* that makes the controlling decision that State-owned land (like other specified land) shall be included in the pipeline route and thus (if necessary) subject to eminent domain through a condemnation action. See 15 U.S.C. 717f(e). Moreover, in seeking a certificate, pipeline operators are required to make a "good faith effort to notify all affected landowners." 18 C.F.R. 157.6(d). Those property owners, including the State, may object to the route and to the possible need to acquire their property by eminent domain before any siting decision is made, and may invoke the jurisdiction of an Article III court to challenge the inclusion of their land and the corresponding delegation of the eminent-domain authority to acquire that land.

In addition, FERC is authorized to attach any "terms and conditions" to its issuance of a certificate of public convenience and necessity, including conditions related to the certificate holder's potential exercise of eminent domain. See Slip op., App. A, ¶ 4. And even then, the certificate holder is authorized to bring a condemnation action against State-owned property (or any property) only where (1) doing so is "necessary" for the construction, operation, or maintenance of the FERC-authorized interstate pipeline, and (2) the certificate holder "cannot acquire" the necessary rights by contract or negotiation. 15 U.S.C. 717f(h).

To be sure, even given those substantial limitations on the certificate holders' authority, the condemnation proceeding is not an entirely mechanical exercise. See Pet. App. 18. But FERC's control of siting ensures "the exercise of political responsibility for each [condemnation] suit" in a manner that "is absent from a broad delegation to private persons to sue nonconsenting States" to enforce the law. *Alden*, 527 U.S. at 755-756. Respect for States' sovereignty does not compel this Court to prohibit Congress—acting at the core of its Commerce Clause power and drawing upon a long history in the United States of delegating to private entities the right of eminent domain to construct similar infrastructure to serve the public—from relying on private entities to implement that federal determination.

Third, the court of appeals appeared to believe (Pet. App. 20) that it could not recognize the delegability of the federal government's eminent-domain authority without recognizing the delegability of an exemption from Eleventh Amendment immunity for any type of suit. But as explained above, that concern is misplaced. Delegating the sovereign power of eminent domain has a history distinct from vesting private persons with the power to enforce the law and impose monetary liability, and the latter presents distinct concerns not present in the exercise of eminent domain under the NGA.

B. The Court Of Appeals' Decision Warrants Review

1. The court of appeals' errors warrant this Court's review. As the court of appeals itself recognized (Pet. App. 30), the decision below will have significant practical effects on FERC's ability to coordinate the Nation's natural-gas supply. If permitted to stand, the decision below will threaten to enable States to functionally nullify FERC's pipeline siting decisions whenever they

would affect either land owned by a State in fee or private land in which a State asserts a non-possessory interest—potentially even when the State obtains the land or interest after FERC has approved the pipeline route. 170 FERC ¶ 61,064, 61,499-61,500.

It is common for pipelines to cross lands in which a State may hold (or readily acquire) some form of interest. See Pet. 32; 170 FERC at 61,500 & n.228 (noting that New Jersey claims a property interest in more than 1300 square miles, more than 15% of the land within that State). Requiring all interstate natural-gas pipelines to be re-routed (if possible) over exclusively private land would significantly restrict FERC's ability to approve those projects, pose a substantial risk of increasing the costs and environmental impacts of the Nation's natural-gas infrastructure, and threaten abandonment of some projects that FERC would otherwise find to be in the public interest. 170 FERC at 61,500 n.221.

Granting such veto power to the States would be directly at odds with the NGA's general purpose of ensuring a reliable and affordable interstate supply of natural gas, and the purpose of the eminent-domain provision in particular. See pp. 1-4, *supra*. As Congress recognized when adding the provision, if a State may stand in the way of an interstate natural-gas pipeline's ability to acquire the requisite property by eminent domain, "it is obvious that the orders of [FERC] may be nullified," undermining the "very objectives of the Natural Gas Act." Senate Report 3-4.

2. Respondents contend that certiorari is unwarranted because the decision below does not conflict with a decision of another court of appeals. But the Third Circuit itself observed, and respondents do not dispute, that the decision does conflict with the industry's

longstanding reliance on the NGA "to construct interstate pipelines over State-owned land." Pet. App. 30a; see 170 FERC at 61,499. Indeed, the district court recognized that New Jersey itself had previously participated in actions brought by pipelines to condemn the State's land, without asserting any Eleventh Amendment objection. See Pet. 24; Pet. App. 66 n.30. Given the importance of the natural-gas industry to the Nation's economy and well-being, this is not the sort of legal question in which the Court should wait years for further percolation while the States of Pennsylvania, New Jersey, and Delaware enjoy a veto over FERC's authority to efficiently and effectively manage the natural-gas supply in those and surrounding States.[4]

Nor should the jurisdictional question dissuade the Court from granting review. Although no party raised the question below, this Court has the authority and obligation to address it in the first instance. See p. 10, *supra*. And in the government's view, the disruptive nature of the court of appeals' decision on a vital sector of the economy is too significant to leave it undisturbed. If the Court agrees that the importance of the issue would otherwise warrant review, it should not decline certiorari simply because there is an additional, straightforward ground for reversal. The Court should instead

---

[4] Although respondents suggest that the Fourth Circuit may soon weigh in on the question presented, the case they identify is also an appeal from a condemnation proceeding. See Br. in Opp. 7 (citing *Columbia Gas Transmission* v. *0.12 Acres of Land*, No. 19-2040 (4th Cir.)). Thus, even if the parties do not settle, see *id.* at 7 n.2, the Fourth Circuit will face the same jurisdictional obstacle that should have precluded the Third Circuit from reaching and resolving the merits here.

grant review to consider both the jurisdictional question and, if necessary, the merits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
JONATHAN D. BRIGHTBILL
ERIC GRANT
Deputy Assistant Attorneys General
JONATHAN Y. ELLIS
Assistant to the Solicitor General
MICHAEL BUSCHBACHER
RACHEL HERON
Attorneys

DAVID L. MORENOFF
Acting General Counsel
JOHN LEE SHEPHERD, JR.
Director of Legal Policy
ROBERT H. SOLOMON
Solicitor
ANAND R. VISWANATHAN
Attorney
Federal Energy Regulatory Commission

DECEMBER 2020