No. 19-1039

In the Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC, PETITIONER

v.

STATE OF NEW JERSEY, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS 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 this condemnation proceeding to acquire land in which respondents claim an interest, respondents argued that the NGA did not authorize petitioner to commence the suit against them and, if it did, the Eleventh Amendment prohibited it. The questions presented are as follows:

1. Whether the court of appeals properly exercised jurisdiction over respondents' challenge to petitioner's authority to condemn property that FERC determined is necessary for the construction of an interstate pipeline, outside of the NGA's exclusive review scheme for FERC's decision.

2. Whether the NGA's eminent-domain provision, 15 U.S.C. 717f(h), authorizes private entities 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

Page

Interest of the United States 1

Statement:

A. Statutory and regulatory background 2

B. The present controversy 5

Summary of argument 9

Argument:

I. The court of appeals lacked jurisdiction to determine whether the NGA authorizes petitioner to condemn respondents' property 11

II. The NGA authorizes a pipeline company to condemn State-owned property that FERC has determined is necessary for the construction of an interstate pipeline 19

A. The text, structure, history, and purpose of Section 717f(h) amply demonstrate that certificate holders are authorized to condemn State-owned property 19

B. Principles of state sovereign immunity do not require a different conclusion 24

Conclusion 34

TABLE OF AUTHORITIES

Cases:

Adorers of the Blood of Christ v. *FERC*, 897 F.3d 187 (3d Cir. 2018), cert. denied, 139 S. Ct. 1169 (2019) 14

Alden v. *Maine*, 527 U.S. 706 (1999) 25, 33

Allegheny Defense Project v. *FERC*, 964 F.3d 1 (D.C. Cir. 2020) 19

American Energy Corp. v. *Rockies Express Pipeline LLC*, 622 F.3d 602 (6th Cir. 2010) 14

Cases—Continued: Page

Atlantic Coast Pipeline, LLC, 161 F.E.R.C. ¶ 61,042 (2017) 4
Best v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963) 30
Blatchford v. *Native Village*, 501 U.S. 775 (1991) 25, 31
Buckley v. *Valeo*, 424 U.S. 1 (1976) 32
Chesapeake & O. Canal Co. v. *Union Bank*, 5 F. Cas. 570 (C.C.D.C. 1830) 27
Chiafalo v. *Washington*, 140 S. Ct. 2316 (2020) 29
City of Tacoma v. *Taxpayers*, 357 U.S. 320 (1958) 9, 11, 12, 13, 14, 15
Department of Homeland Sec. v. *MacLean*, 574 U.S. 383 (2015) 21
Department of Transp. v. *Association of Am. R.Rs.*, 575 U.S. 43 (2015) 32
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 20
Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 32
Georgia v. *City of Chattanooga*, 264 U.S. 472 (1924) ... 30, 31
Head v. *Amoskeag Mfg. Co.*, 113 U.S. 9 (1885) 26
Kelo v. *New London*, 545 U.S. 469 (2005) 26
Kohl v. *United States*, 91 U.S. 367 (1876) 25, 28, 30
Lomax v. *Ortiz-Marquez*, 140 S. Ct. 1721 (2020) 19
Luxton v. *North River Bridge Co.*, 153 U.S. 525 (1894) 28, 32
Mountain Valley Pipeline, LLC, 161 F.E.R.C. ¶ 61,043 (2017), modified, 172 F.E.R.C. ¶ 61,193 (2020) 4
Northern Natural Gas Co., 164 F.E.R.C. ¶ 61,200 (2018) 15

Cases—Continued: Page

Oklahoma ex rel. Phillips v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941)........ 25
Parker Drilling Mgmt. Servs., Ltd. v. *Newton*, 139 S. Ct. 1881 (2019)........ 20
Pennsylvania v. *Union Gas Co.*, 491 U.S. 1 (1989), overruled by *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996)........ 21
Scudder v. *Trenton Delaware Falls Co.*, 1 N.J. Eq. 694 (N.J. Ch. 1832)........ 27
Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44 (1996)........ 22
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998)........ 16
Stockton v. *Baltimore & N.Y.R. Co.*, 32 F. 9 (C.C.D.N.J. 1887), appeal dismissed, 140 U.S. 699 (1891)........ 29
Thunder Basin Coal Co. v. *Reich*, 510 U.S. 200 (1994)........ 17
Transcontinental Gas Pipe Line Co. v. *0.607 Acres of Land*, No. 15-cv-428 (D.N.J. Feb. 23, 2015)........ 29
Tuscarora Nation of Indians v. *Power Auth.*, 79 S. Ct. 4 (1958)........ 18
United States v. *Carmack*, 329 U.S. 230 (1946)........ 25
Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000)........ 16
Virginia Uranium, Inc. v. *Warren*, 139 S. Ct. 1894 (2019)........ 20
Williams Natural Gas Co. v. *City of Oklahoma City*, 890 F.2d 255 (10th Cir. 1989), cert. denied, 497 U.S. 1003 (1990)........ 14

Constitution, statutes, and regulations: Page

U.S. Const.:

Art. I, § 8, Cl. 3 (Commerce Clause) 21, 34

Art. III 33

Amend. XI .... *passim*

Act of Mar. 3, 1809, ch. 31, § 7, 2 Stat. 541-542 27

Act of Mar. 2, 1831, ch. 85, 4 Stat. 476 28

Act of July 2, 1864, ch. 217, 13 Stat. 365 28

Act of July 27, 1866, ch. 278, 14 Stat. 292 28

Act of Feb. 18, 1888, ch. 13, § 3, 25 Stat. 36-37 28

Act of July 11, 1890, ch. 669, § 4, 26 Stat. 269-270 28

Act of July 24, 1935, ch. 414, § 2, 49 Stat. 496-497 29

Act of Sept. 7, 1950, ch. 905, § 2, 64 Stat. 771 29

Act of Nov. 6, 1966, Pub. L. No. 89-774,
80 Stat. 1324 22

Amtrak Improvement Act of 1974,
Pub. L. No. 93-496, § 6, 88 Stat. 1528 22

Electricity Modernization Act of 2005,
Pub. L. No. 109-58, Tit. XII, § 1221(a),
119 Stat. 946 22

Energy Policy Act of 1992, Pub. L. No. 102-486,
Tit. XVII, § 1701(d), 106 Stat. 3009 21

False Claims Act, 31 U.S.C. 3729 *et seq.* 16

Federal Power Act, 16 U.S.C. 791a *et seq.*:

16 U.S.C. 814 (§ 21) 20, 29

16 U.S.C. 825*l* 9, 11, 12, 13, 14, 15

General Bridge Act of 1946, ch. 753, Tit. V, § 509,
60 Stat. 849 28

Natural Gas Act, 15 U.S.C. 717 *et seq.* 1, 2

15 U.S.C. 717(a) 2

15 U.S.C. 717f 2

Statutes and regulations—Continued: Page

15 U.S.C. 717f(c) ... 4
15 U.S.C. 717f(c)(1)(A) ... 2, 18
15 U.S.C. 717f(d) ... 2
15 U.S.C. 717f(e) ... 2, 3, 33
15 U.S.C. 717f(e)(1)(B) ... 3
15 U.S.C. 717f(h) ... *passim*
15 U.S.C. 717r(a) ... 4
15 U.S.C. 717r(b) ... *passim*
15 U.S.C. 717r(c) ... 18

Act of Feb. 3, 1790, ch. 3, 1790 N.Y. Laws 106 ... 28

Act of Mar. 1794, 1794 R.I. Acts & Resolves 11 ... 28

1735 Pa. Highway Act, ch. 342, *reprinted in* 4 James T. Mitchell & Henry Flanders, *The Statutes at Large of Pennsylvania* (1897):

§ 1 ... 26
§§ 1-2 ... 27

1667 Va. Mill Act, Act IV, *reprinted in* 2 William Waller Hening, *The Statutes at Large* (1823) ... 26

N.J. Stat. Ann. (West):

§ 13:8A-37(d) (2003) ... 24
§ 13:8A-40 (2003) ... 24
§ 13:8A-40(a) (2003) ... 24
§ 20:3-19 (1997) ... 24

7 C.F.R. Pt. 1468 ... 24

18 C.F.R. Pt. 157:

Subpt. A ... 2
Section 157.6(d) ... 3, 15, 33
Section 157.10 ... 3
Section 157.11 ... 3
Section 157.14(a)(6) ... 15

Regulations—Continued: Page

Section 157.14(a)(6)(i) 3

Subpt. F:

Section 157.203 4

Miscellaneous:

Abraham Bell, *Private Takings*, 76 U. Chi. L. Rev. 517 (2009) 27

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S. Rep. No. 429, 80th Cong., 1st Sess. (1947) 20, 23

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INTEREST OF THE UNITED STATES

This case presents the question whether the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, authorizes the holder of a certificate of public convenience and necessity to build an interstate natural-gas pipeline to initiate a condemnation action to acquire State-owned property necessary for the construction of the pipeline. The United States has a substantial interest in the resolution of that question, as the Federal Energy Regulatory Commission (FERC) is responsible for administering the NGA and granting such certificates. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

A. Statutory And Regulatory Background

1. The Natural Gas Act, 15 U.S.C. 717 *et seq.*, declares that federal regulation of the transportation and sale of natural gas in interstate commerce "is necessary in the public interest," 15 U.S.C. 717(a), and sets forth a detailed regulatory scheme to that end. As part of that scheme, the NGA vests FERC with primary authority to determine whether additional natural-gas pipelines and related facilities are needed, where they should be located, and whether and when they may be abandoned. See 15 U.S.C. 717f.

As most relevant here, FERC is authorized 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). "No natural-gas company * * * shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." 15 U.S.C. 717f(c)(1)(A).

2. To obtain a certificate of public convenience and necessity, a pipeline operator must submit an application to FERC, containing such information and providing such notice to interested parties "as the Commission shall, by regulation, require." 15 U.S.C. 717f(d); see 18 C.F.R. Pt. 157, Subpt. A. The Commission's regulations require the applicant to identify, among other things, the proposed interstate pipeline's "[l]ocation,

length, and size," 18 C.F.R. 157.14(a)(6)(i), and 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); see *e.g.*, PennEast Pipeline Project Maps, https://go.usa.gov/x7tTn. Any person seeking to participate in the certificate proceedings may move to intervene and may protest the application. 18 C.F.R. 157.10.

Following public hearings, FERC "performs a flexible balancing process" to determine whether the proposed project would serve the public interest. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 F.E.R.C. ¶ 61,227, at 61,743 (1999), clarified, 90 F.E.R.C. ¶ 61,128 (2000); see 15 U.S.C. 717f(e)(1)(B) and (f); 18 C.F.R. 157.11. Among the factors the Commission considers are the proposal's likely "economic, operational, and competitive benefits," potential environmental impacts, the effect on the applicant's existing customers, the interests of competing existing pipelines and their customers, and "the interests of landowners and surrounding communities," as well as the applicant's "efforts to eliminate or minimize any adverse effects the project might have" on those interests. 88 F.E.R.C. at 61,743-61,747.

If FERC determines that, in light of those considerations, the applicant is "able and willing properly" to complete the project and that the project "is or will be required by the present or future public convenience and necessity," FERC issues a certificate authorizing the project's construction, attaching "such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. 717f(e). As a matter of agency practice, those terms and conditions include the specific locations authorized for construction of the

pipeline. See, *e.g.*, J.A. 170 (issuing certificate "as described and conditioned herein, and as more fully described in the application"); *Mountain Valley Pipeline, LLC*, 161 F.E.R.C. ¶ 61,043, at 61,337 (2017) (same), modified, 172 F.E.R.C. ¶ 61,193 (2020); *Atlantic Coast Pipeline, LLC*, 161 F.E.R.C. ¶ 61,042, at 61,279 (2017) (similar).[1]

The NGA authorizes the certificate's holder to undertake the project on the terms imposed; if the certificate holder is unable to acquire the "necessary" property by voluntary agreement, it may acquire the property "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." 15 U.S.C. 717f(h); see 15 U.S.C. 717f(c).

3. Any "person, State, municipality, or State commission aggrieved by an order issued by the Commission" granting or denying a certificate of public convenience and necessity in a proceeding in which it is a party may obtain judicial review of the Commission's order by, first, seeking rehearing before the Commission and, then, filing a petition for review in the D.C. Circuit or any circuit in which the certificate holder is located or has its principal place of business. 15 U.S.C. 717r(a) and (b). "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." 15 U.S.C. 717r(b). "The judgment and decree of the court, affirming, modifying,

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[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.

or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification." *Ibid.*

B. The Present Controversy

1. a. In 2015, petitioner applied to FERC for a certificate of public convenience and necessity authorizing construction of 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, including consideration of protests from respondents and others, FERC determined that the public convenience and necessity required approval of the proposed pipeline along the route proposed and granted the certificate, subject to various conditions. J.A. 35-200. Then-Commissioner (now-Chairman) Glick dissented. J.A. 206-211.

In determining whether the project met the public-convenience-and-necessity standard, FERC balanced the benefits of the new pipeline against the potential adverse effects on other pipelines, consumers, landowners, and surrounding communities, including "the unneeded exercise of eminent domain." J.A. 43; see J.A. 42-59. The Commission recognized that petitioner had been unable "to reach easement agreements with a number of landowners." J.A. 58. But it found that petitioner had "taken sufficient steps to minimize adverse impacts," including by holding "over 200 meetings with public officials, as well as 15 'informational sessions' for impacted landowners," and "incorporat[ing] 70 of 101 identified route variations into its final proposed pipe-

line route for various reasons, including landowner requests, community impacts, and the avoidance of sensitive resources." J.A. 58-59.

The Commission rejected certain commenters' suggestions that it would be "inappropriate for [petitioner] to obtain property for the project through eminent domain" because it is a for-profit company. J.A. 59. The agency explained that once FERC finds that the construction and operation of a proposed interstate pipeline is in the public interest, Section 717f(h) "authorizes a certificate holder to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain" if it cannot reach an agreement with the landowner, and that "Congress made no distinction between for-profit and non-profit companies." J.A. 60.

b. Respondents and other parties to the FERC proceeding sought rehearing of the Commission's order, which the Commission denied. J.A. 213-335. In so doing, the Commission rejected a series of additional arguments about petitioner's eminent-domain authority. The Commission explained that the NGA does not require a "public use" finding, beyond a determination that the project itself is in the public interest, before a certificate holder can exercise eminent domain. J.A. 235-236. It rejected respondents' argument that the authorization of eminent domain was "premature" because the pipeline route could conceivably change, with Commission approval, throughout the project. J.A. 238-239. And it declined to limit petitioner's exercise of eminent domain to land necessary for the completion of further environmental assessments that FERC had required as conditions on the certificate. J.A. 239-240. Commissioner Glick dissented. J.A. 344-362.

c. Respondents and others subsequently 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 May 9, 2018). The Commission filed a certified index to the record in those proceedings on October 24, 2018. See *ibid.* Those consolidated petitions are being held in abeyance pending disposition of this case. See *ibid.*

2. 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 and appointed a panel of special masters to determine just compensation. *Id.* at 34-102.

The court of appeals reversed. Pet. App. 1-31. In the court's view, "the federal government's ability to condemn State land * * * is, in fact, the function of two separate powers: the government's eminent domain power and its exemption from Eleventh Amendment immunity." *Id.* at 12. The court concluded that the NGA validly delegated to certificate holders the federal power of eminent domain, but it expressed "deep doubt" that Congress could constitutionally delegate 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, 26.

Ultimately, the court of appeals declined to decide that constitutional question, resting its decision instead on its conclusion that Congress in the NGA had not authorized petitioner to file a condemnation action against a State. Based on its constitutional doubt, the court reasoned that it would not recognize such authorization

without something akin to the type of clear statement this Court has required for an abrogation of state sovereign immunity. Pet. App. 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 the court reasoned that, even if FERC lacked that authority, "that is an issue for Congress, not a reason to disregard sovereign immunity." *Id.* at 31.

3. a. Following the court of appeals' decision, FERC issued a declaratory order, explaining the agency's position that Section 717f(h) includes the authority to acquire by eminent domain all property necessary to construct an authorized pipeline, whether owned by a private party or a State. J.A. 363-436. The Commission stated that the agency lacked statutory authority to itself condemn property (State-owned or otherwise) under the NGA. J.A. 419-423. 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." J.A. 426. Commissioner Glick dissented. J.A. 440-459.

b. The Commission subsequently denied rehearing of its declaratory order. J.A. 460-491. In addition to affirming the order, it determined that respondent's collateral attack on the Commission's NGA certificate order in an eminent-domain proceeding was no "more acceptable

than other types of collateral attack on certificate orders that the federal courts routinely dismiss." J.A. 485 n.104 (citation omitted). Commissioner Glick dissented. J.A. 492-502.

SUMMARY OF ARGUMENT

I. The court of appeals lacked jurisdiction to determine whether the NGA authorizes petitioner to condemn respondents' property. A certificate of public convenience and necessity issued by FERC is reviewable only on direct review in a court of appeals. The NGA provides "exclusive" jurisdiction to the court of appeals conducting that direct review to "affirm, modify, or set aside" the Commission's order "in whole or in part," and makes that court's judgment "final," subject to review only by this Court. 15 U.S.C. 717r(b). This Court has interpreted the Federal Power Act's substantively identical judicial-review provision, 16 U.S.C. 825*l*, to preclude all litigation of "issues inhering in the controversy" outside of the direct-review scheme, including whether the licensee is authorized to take State-owned property. *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, 336 (1958). Section 717r(b) likewise precluded the court of appeals from entertaining respondents' attack on petitioner's authority to condemn their property in this proceeding.

II. A. In any event, the NGA authorizes certificate holders to condemn State-owned property that FERC has determined is necessary for the construction of an interstate pipeline. The text of Section 717f(h) authorizes certificate holders to acquire *all* property necessary for the federally approved project, without exception for property in which a State may claim an interest. Nor can the statute be interpreted to contain an unwritten exception, as demonstrated by the fact that no other provision of federal law would permit certificate holders

or FERC to overcome a State's holdout; by the existence of express exceptions for State-owned property in other delegations of federal eminent domain; and by the history and purpose of Section 717f(h), which was specifically intended to prevent States from obstructing the use of eminent domain for FERC-approved interstate pipelines.

B. Principles of state sovereign immunity do not require a different conclusion. While the Eleventh Amendment precludes a State from being subject to suit, absent its consent, the States consented to suits like this one in the plan of the Convention. The right of eminent domain was well-known at the Founding. As the Court has long recognized, the Constitution conferred that authority on the federal government, including the authority to take State-owned land, for projects within the government's enumerated powers. And since before the Founding through the present day, the right of eminent domain has been understood to encompass authority for private parties to exercise the right for projects the sovereign deems in the public interest. In light of the long unbroken history of colonial, state, and federal delegations of such authority, there is no basis to conclude that, when the States granted the federal government the eminent-domain power in the plan of the Convention, they silently retained the right to veto delegations of its exercise, as long as they could first obtain any property interest in the land at issue.

ARGUMENT

I. THE COURT OF APPEALS LACKED JURISDICTION TO DETERMINE WHETHER THE NGA AUTHORIZES PETITIONER TO CONDEMN RESPONDENTS' PROPERTY

The certificate of public convenience and necessity FERC issued to petitioner expressly provides for petitioner's exercise of eminent domain over respondents' property. The NGA provides "exclusive" jurisdiction to the court of appeals conducting the direct review of that certificate to "affirm, modify, or set aside" the Commission's order "in whole or in part," and makes that court's judgment "final," subject to review only by this Court. 15 U.S.C. 717r(b). Any challenge to petitioner's ability to exercise the eminent-domain authority granted by that certificate therefore must be brought, if at all, through a challenge to the certificate on direct review. The courts below lacked jurisdiction to entertain respondents' challenge to that authority in these collateral proceedings.

A. This Court's decision in *City of Tacoma* v. *Taxpayers*, 357 U.S. 320 (1958), is controlling. In that case, the Court considered the scope of the materially identical judicial-review provision of the Federal Power Act (FPA), 16 U.S.C. 825*l*. The City of Tacoma had applied for a license under the FPA from FERC's predecessor, the Federal Power Commission, to construct a hydroelectric power project on the Cowlitz River, a navigable water of the United States located in the State of Washington. *City of Tacoma*, 357 U.S. at 322-324. The "maps, plans, [and] specifications" accompanying the City's application "made clear that," as part of the project, a fish hatchery owned by the State of Washington would be inundated. *Id.* at 324 n.6; see *id.* at 324-325.

The State opposed the license, objecting to the destruction of its "valuable and irreplaceable fish hatchery." *Id.* at 325-326.

Following a public hearing, the Commission issued a license to the City and denied the State's request for rehearing. *City of Tacoma*, 357 U.S. at 326-327. The Ninth Circuit affirmed the Commission's order on direct review, and this Court denied certiorari. *Id.* at 327-328.

While proceedings were pending in the Ninth Circuit, the City commenced an action in Washington state court to declare valid revenue bonds issued to finance the project. *City of Tacoma*, 357 U.S. at 329. The trial court entered judgment in favor of the State and enjoined the City from constructing the project. *Id.* at 331. The Supreme Court of Washington affirmed on the grounds that the City lacked the "power and capacity to condemn the State's fish hatchery" as a matter of state law and that it could not receive that power "from the license issued to it by the [Commission]." *Id.* at 332 (brackets and citation omitted).

This Court reversed, holding that the FPA precluded any court from resolving "whether the license issued by the Commission under the Federal Power Act to the City of Tacoma gave it capacity to act under that federal license in constructing the project and delegated to it federal eminent-domain power to take, upon the payment of just compensation, the State's fish hatchery," outside the exclusive review scheme provided by Section 825*l*. *City of Tacoma*, 357 U.S. at 333, 341. "It can hardly be doubted," the Court observed, that Congress "may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had." *Id.* at 336. The Court reasoned that Section 825*l* "prescribed the

specific, complete and exclusive mode for judicial review of the Commission's orders" under the FPA by providing that "any party aggrieved by the Commission's order may have judicial review" in an appropriate court of appeals, "which 'shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part,' and that '[t]he judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, *shall be final*, subject to review by the Supreme Court of the United States upon certiorari or certification.'" *Ibid.* (quoting 16 U.S.C. 825*l*) (brackets in original).

That language, the Court explained, "necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review." *City of Tacoma*, 357 U.S. at 336. Thus, "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." *Ibid.* "[T]he State may not reserve [any issue] for another round of piecemeal litigation, by remaining silent on the issue while its action to review and reverse the Commission's order was pending in that court." *Id.* at 339.

B. *City of Tacoma* makes clear that Section 717r(b) of the NGA likewise precluded the courts below from entertaining respondents' collateral attack on petitioner's authority to execute the Commission's order here. Like Section 825*l*, Section 717r(b) provides that any party "aggrieved by an order issued by the Commission" may have judicial review in the court of appeals. 15 U.S.C. 717r(b). Like Section 825*l*, Section 717r(b) provides that the court of appeals shall have

"exclusive" jurisdiction "to affirm, modify, or set aside such order in whole or in part." *Ibid.* And like Section 825*l,* Section 717r(b) provides that "[t]he judgment and decree of th[at] court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final," subject to review only by this Court. *Ibid.*

Lower courts have thus correctly interpreted Section 717r(b) to operate in the same manner as Section 825*l*. As Judge Sutton put it, "[e]xclusive 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, *e.g.*, *Adorers of the Blood of Christ* v. *FERC*, 897 F.3d 187, 195 (3d Cir. 2018) (holding that Section 717r(b) "foreclosed judicial review" of landowners' religious objections to use of their land for a pipeline except through the exclusive review provisions of the NGA), cert. denied, 139 S. Ct. 1169 (2019). That includes collateral attacks through the condemnation proceedings brought under the authority of the Commission's order. See *Williams Natural Gas Co.* v. *City of Oklahoma City*, 890 F.2d 255, 264 (10th Cir. 1989), cert. denied, 497 U.S. 1003 (1990).

Respondents' contention that the NGA does not authorize petitioner to condemn their property "could and should have been" raised before the Commission and in the pending direct-review proceedings in the D.C. Circuit. *City of Tacoma*, 357 U.S. at 339. FERC required petitioner, in submitting its application, to provide the precise route its proposed pipeline would follow and to notify respondents and other property owners through

whose property that route would run. 18 C.F.R. 157.6(d), 157.14(a)(6). In evaluating petitioner's submission, the Commission considered numerous issues concerning the scope and legal validity of the eminent-domain authority that would be granted to petitioner in its certificate. See, *e.g.*, J.A. 59-60, 234-240. And in issuing the certificate, the Commission expressly stated that petitioner would have authority "to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain." J.A. 60; see *Northern Natural Gas Co.*, 164 F.E.R.C. ¶ 61,200, at 62,204 (2018) ("The holder of a certificate of convenience and necessity is expected to obtain all land or other property necessary to provide its certificated service.").

Thus, just as Section 825*l* precluded Washington's courts from determining whether the license issued under the FPA authorized the City of Tacoma "to take, upon the payment of just compensation, the State's fish hatchery," *City of Tacoma*, 357 U.S. at 333, Section 717r(b) precluded the courts below from deciding whether the certificate issued under the NGA authorizes petitioner to condemn respondents' property. Because that issue "inher[es] in the controversy" of the certificate proceedings, respondents were required to raise it in those proceedings "or not at all." *Id.* at 336.

C. Respondents' arguments to the contrary are unavailing. They principally argue (Supp. Br. 2-3) that Section 717r(b) cannot preclude a federal court from considering their assertion of Eleventh Amendment immunity because the Eleventh Amendment is itself "a limitation on the jurisdiction of Article III courts." But that ignores what the court of appeals actually decided below. Although the court expressed doubt that the

Eleventh Amendment would permit Congress to authorize petitioner to condemn respondents' property, it ultimately declined to answer that question. See Pet. App. 27. Instead, the court rested its decision on the statutory holding that the NGA did not authorize petitioner to bring the action. See *id.* at 30.

The court of appeals took that course to avoid what it perceived to be a difficult jurisdictional question under the Eleventh Amendment. See Pet. App. 27 (concluding that "even accepting * * * that the federal government can delegate its exemption from Eleventh Amendment immunity," it did not do so in the NGA). But this Court has already rejected that sort of a "hypothetical jurisdiction" approach in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (citation omitted). And in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court made clear that the same principle generally applies in the context of Eleventh Amendment jurisdiction. See *id.* at 778-780.

While the *Stevens* Court determined that it nevertheless could resolve whether the False Claims Act, 31 U.S.C. 3729 *et seq.*, "*permit[ted]* the cause of action it creates to be asserted against States" before considering "whether the Eleventh Amendment [would] forbid[]" it, that was only because there was "no realistic possibility" in that case that doing so would "expand the Court's power beyond the limits that the jurisdictional restriction has imposed." 529 U.S. at 779. The same cannot be said here, where in addition to whatever jurisdictional limits the Eleventh Amendment may impose, but see pp. 24-34, *infra*, Section 717r(b) imposed an independent jurisdictional limitation on the courts below. The court of appeals thus lacked authority to

consider whether the NGA authorizes petitioner to file a condemnation action against State-owned property as a matter of statutory interpretation in this collateral proceeding.

Respondents assert (Supp. Br. 3-4) that the Commission has taken the position elsewhere that eminent-domain issues must be litigated in separate proceedings. While the Commission has refused to limit a certificate holder's eminent-domain authority beyond the limits imposed by the NGA, including in this case, it has not refused to consider the scope of that statutory authority in its certification proceedings. In this very case, the Commission considered several issues related to the scope of Section 717f(h), including whether the rights may extend to for-profit companies and whether the Commission is required to make a separate "public use" determination under the NGA. J.A. 59-60, 234-240.

Regardless of whether the Commission can or will impose additional limits or conditions on the eminent-domain authority granted by a certificate, there are good reasons for Congress to channel such statutory issues into the certificate proceedings and direct judicial review of those proceedings. Statutory questions about "parties' rights and duties" under Section 717f(h) "fall squarely within the Commission's expertise." *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 214 (1994). Moreover, where, as here, a pipeline operator has been unable to obtain easement agreements for a proposed project, those issues may well affect the Commission's determination whether the benefits of the project (which depend on its actually being built) will outweigh any adverse effects, as well as a court of appeals' review of that determination.

Finally, respondents contend (Supp. Br. 4) that respecting the jurisdictional limits imposed by Section 717r(b) "would yield untenable results," because pipeline operators often file condemnation actions before the Commission has resolved requests for rehearing of the certificate orders on which those condemnation suits are based. But that argument proves far too much. After all, petitioner's ability to file a condemnation action depends not just on the scope of its authority under Section 717f(h), but on the validity of the entire certificate. 15 U.S.C. 717f(c)(1)(A); see *Tuscarora Nation of Indians* v. *Power Auth.*, 79 S. Ct. 4, 6 (1958) (Harlan, J., in chambers). Yet Congress has granted the court of appeals "exclusive" jurisdiction to determine the validity of that certificate, has permitted challengers to seek such review only upon the Commission's resolution of any requests for rehearing, and has provided that, "unless specifically ordered by the Commission," a request for rehearing "shall not" stay the Commission's order. 15 U.S.C. 717r(b) and (c).

The Commission is sensitive to concerns about pipeline operators proceeding with approved projects before rehearing requests have been resolved. In light of those concerns, it has recently adopted a regulation that "precludes the issuance of authorizations to proceed with construction of projects * * * while rehearing of the initial orders is pending." *Limiting Authorizations to Proceed With Construction Activities Pending Rehearing*, 171 F.E.R.C. ¶ 61,201, at 62,426 (2020), modified on reh'g, 174 F.E.R.C. ¶ 61,050 (2021). If, despite that limitation, landowners are threatened with irreparable harm by individual condemnation proceedings, they may seek a stay from the Commission or similar

relief from a federal court. See *Allegheny Defense Project* v. *FERC*, 964 F.3d 1, 22 (D.C. Cir. 2020) (en banc) (Griffith, J., concurring). But they may not ignore the NGA's careful and exclusive scheme of direct review.

II. THE NGA AUTHORIZES A PIPELINE COMPANY TO CONDEMN STATE-OWNED PROPERTY THAT FERC HAS DETERMINED IS NECESSARY FOR THE CONSTRUCTION OF AN INTERSTATE PIPELINE

Assuming the court of appeals correctly exercised jurisdiction over respondents' challenge to petitioner's authority to condemn State-owned property, the court erred in its resolution of that challenge. The text, structure, history, and purpose of the NGA demonstrate that Section 717f(h) authorizes certificate holders to condemn all property necessary for constructing a FERC-approved interstate pipeline—whether or not a State claims any interest in such property. Principles of state sovereign immunity require no different result.

A. The Text, Structure, History, And Purpose Of Section 717f(h) Amply Demonstrate That Certificate Holders Are Authorized To Condemn State-Owned Property

1. The plain text of Section 717f(h) authorizes any holder of a certificate of public convenience and necessity to obtain the rights of way needed to construct and operate a federally authorized interstate pipeline "by the exercise of the right of eminent domain in the district court." 15 U.S.C. 717f(h). On its face, that authority extends to *any* property "necessary" for the "construct[ion], operat[ion], and maint[enance]" of the pipeline, *ibid.*, 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).

2. 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. As respondents acknowledge (Br. in Opp. 18), nothing in the NGA limits 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 right of eminent domain. See J.A. 419-423.

3. The lack of any State-owned-property exception to Section 717f(h) is confirmed by the existence of such exceptions in other statutes delegating the federal right of eminent domain. 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 licenses 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 substantially" "follow[ed]" it. S. Rep. No. 429, 80th Cong., 1st

Sess. 1 (1947) (Senate Report). In 1992, however, Congress amended the FPA provision, withdrawing from licensees the authority 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." Energy Policy Act of 1992, 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). And Congress did not do so in the NGA.

The court of appeals dismissed (Pet. App. 28 n.20) the relevance of the 1992 FPA amendment on the ground that, unlike the 1947 amendment adding Section 717f(h) to the NGA, the FPA amendment was enacted during a seven-year period from 1989 to 1996 in which this Court's precedent held that Congress could abrogate state sovereign immunity pursuant to its Commerce Clause power. Compare *Pennsylvania* v. *Union Gas*

Co., 491 U.S. 1, 19 (1989) (plurality opinion), with *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 66 (1996) (overruling *Union Gas*). But the FPA and NGA delegate federal eminent-domain authority; they do not purport to abrogate state sovereign immunity. Moreover, the court of appeals' reasoning cannot explain Congress's decision in 1992 to leave the NGA's broad delegation of eminent-domain authority intact while amending the closely related FPA provision.

In any event, Congress has enacted similar carve-outs from delegations of federal eminent-domain authority outside that narrow time period. See, *e.g.*, Electricity Modernization Act of 2005, Pub. L. No. 109-58, Tit. XII, § 1221(a), 119 Stat. 946, 948 (authorizing FERC permit holders to "acquire the right[s]-of-way by the exercise of the right of eminent domain in the district court" for building electric transmission facilities "to be located on property other than property owned by the United States or a State"); Amtrak Improvement Act of 1974, Pub. L. No. 93-496, § 6, 88 Stat. 1528 (authorizing Amtrak to acquire "by the exercise of eminent domain * * * in the district court" interests in property, except "property of a railroad or property of a State or political subdivision thereof or of any other governmental agency")[2]; Act of Nov. 6, 1966, Pub. L. No. 89-774, 80 Stat. 1324, 1350-1351 (authorizing Washington Metropolitan Area Transit Authority to acquire property "by condemnation," "except property owned by," among other entities, state signatories to the governing compact).

[2] The court of appeals mistakenly stated that Amtrak's carve-out for State-owned property was also enacted during the same seven-year period. Pet. App. 29 n.20. That carve-out, however, has existed since 1974. See Amtrak Improvement Act § 6, 88 Stat. 1528.

4. Finally, the court of appeals' finding of an unwritten exception for State-owned property in Section 717f(h) is belied by the provision's history and purpose. Prior to Section 717f(h)'s enactment in 1947, pipeline companies relied on state-law mechanisms to acquire needed land for their federal projects. Senate Report 1-2. After some States withheld eminent-domain authority for projects they disapproved—for example, where the pipeline operator was a foreign corporation or the project did not serve the State's consumers—Congress added Section 717f(h) to prevent States from "nullif[ying]" the Commission's exercise of its "exclusive jurisdiction to regulate the transportation of natural gas in interstate commerce." *Id.* at 2-4.

The court of appeals' statutory interpretation would defeat the purpose of Section 717f(h), and "impair the NGA's superordinate goal of ensuring the public has access to reliable, affordable supplies of natural gas" in the very same way. J.A. 427; see J.A. 428 n.221. New Jersey, for example, claims a non-fee property interest in 15% of its total land area, even before accounting for fee interests in state forests, parks, and the bed of navigable waterways. J.A. 429 n.228. Although the States' total non-fee interests nationwide are difficult to calculate, one study estimates that, collectively, the States own over 200 million acres in fee, approximately 9% of the Nation's land. Robert H. Nelson, *State-Owned Lands in the Eastern United States* 8 (2018), https://www.perc.org/wp-content/uploads/2018/03/PERC-ELR-web.pdf.

The interests States own today, moreover, are just the beginning. Most States utilize State-owned conservation easements like the ones that respondents rely on

here. See Zach Wright, Note, *Siting Natural Gas Pipelines Post-*PennEast*: The New Power of State-Held Conservation Easements*, 105 Minn. L. Rev. 1053, 1101-1104 & nn. 294-345 (2020) (collecting citations). The federal government generally supports States' efforts to use such easements to protect valuable farmland and open space. See 7 C.F.R. Pt. 1468 (grant programs). But the decision below converts those programs into a sword against federally approved projects.

For example, in New Jersey, the State can acquire new conservation easements by purchase or condemnation. See N.J. Stat. Ann. §§ 13:8A-37(d), 13:8A-40(a) (West 2003). Under the court of appeals' decision, all the State needs to preclude any FERC-approved project it opposes is a willing landowner along the route. Indeed, even if the landowner were unwilling, the State could invoke its own eminent-domain power. *Id.* § 13:8A-40. While a landowner could fight those efforts, New Jersey is a quick-take State that can acquire immediate title upon filing a declaration of taking and depositing estimated compensation. *Id.* § 20:3-19 (West 1997).

With similar procedures available across the Nation, the effect on FERC's ability to administer the interstate natural-gas system could be "profound[]." J.A. 426. It is implausible to think that the same Congress that enacted Section 717f(h) to prevent States from interfering with FERC-approved pipelines by refusing to allow pipelines to use state eminent-domain procedures intended to allow States to accomplish the same obstruction by invoking those procedures themselves.

B. Principles Of State Sovereign Immunity Do Not Require A Different Conclusion

The court of appeals' contrary conclusion was primarily based not on disagreement about Section 717f(h)'s

most natural reading, but on constitutional concerns. The court interpreted Section 717f(h) not to authorize certificate holders to condemn State-owned land based on the court's doubt that the Eleventh Amendment would permit the United States to authorize such actions. That concern was misplaced.

1. a. As this Court's precedents establish, the "States entered the federal system with their sovereignty intact," *Alden* v. *Maine*, 527 U.S. 706, 713 (1999) (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." *Ibid.* Accordingly, a State is 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).

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.'" *Blatchford*, 501 U.S. at 779. To the contrary, "[t]he right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses." *Kohl* v. *United States*, 91 U.S. 367, 372 (1876). Indeed, the power "is essential to a sovereign government." *United States* v. *Carmack*, 329 U.S. 230, 239 (1946). This Court thus recognized long ago that the federal government's eminent-domain authority "can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised." *Kohl*, 91 U.S. at 374. And "[t]he fact that land is owned by a state is no barrier to its condemnation by the United States." *Oklahoma ex rel.*

Phillips v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941). The only question, then, is whether the federal eminent-domain power inherent in the plan of the Convention includes the ability to authorize private entities to exercise it. History answers that question with a yes.

b. The power of eminent domain has been understood since before the Founding as a sovereign power that private entities may exercise 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 for the public. 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, Act IV, *reprinted in* 2 William Waller Hening, *The Statutes at Large* 260-261 (1823). Similar statutes were enacted before independence 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 Mill Acts 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 by private entities for the construction of public and private roadways. 1 *Nichols on Eminent Domain* § 1.22 (3d ed. 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,

ch. 342, § 1, *reprinted in* 4 James T. Mitchell & Henry Flanders, *The Statutes at Large of Pennsylvania* 296-297 (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.

Similar provisions continued to be enacted 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). And many States also delegated the eminent-domain power to private companies for public projects like "building wharves and basins, establishing ferries, draining marshes and swamps, and conveying water to towns." Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government*, 33 J. Econ. Hist. 232, 239 n.24 (1973); see, *e.g.*, *Scudder* v. *Trenton Delaware Falls Co.*, 1 N.J. Eq. 694 (N.J. Ch. 1832).

Congress too has long delegated the federal right of eminent domain to private actors in similar circumstances. In 1809, Congress authorized a corporation to build a turnpike through Alexandria (then part of the District of Columbia) and to condemn property as needed to construct the project. Act of Mar. 3, 1809, ch. 31, § 7, 2 Stat. 541-542; see *Chesapeake & O. Canal Co.* v. *Union Bank*, 5 F. Cas. 570, 571 (C.C.D.C. 1830) (No. 2653) (federal delegation of eminent-domain authority to build a canal in the District of Columbia). And 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. 467, 477; Act of Feb. 18, 1888, ch. 13, § 3, 25 Stat. 36-37.

For federal projects within the States, soon after the Founding, States authorized federal officials to exercise the States' own eminent-domain authority, see, *e.g.*, Act of Mar. 1794, 1794 R.I. Acts & Resolves 11, 12, or made outright grants to the federal government, see, *e.g.*, Act of Feb. 3, 1790, ch. 3, 1790 N.Y. Laws 106, 107. In the 1860s, however, Congress began delegating federal eminent-domain authority to private corporations for constructing railroads through the States. See, *e.g.*, Act of July 2, 1864, ch. 217, 13 Stat. 365; Act of July 27, 1866, ch. 278, 14 Stat. 292. And since 1876, when in *Kohl* this Court put to rest any doubts about whether the federal government's eminent-domain authority *could* be exercised within state boundaries, see 91 U.S. at 371-372, Congress has regularly delegated that authority 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 pp. 20-22, *supra* (collecting additional examples); see also *Luxton* v. *North River Bridge Co.*, 153 U.S. 525, 529-530 (1894).

c. For the nearly 150 years since *Kohl*, no one appears to have seriously questioned that the federal government's eminent-domain authority includes the authority to condemn property owned by a State. See Henry Stanberry, *Acquisition of Property for Public Use*, 12 Op. Att'y Gen. 173, 175 (1867) (suggesting that

Secretary of the Treasury seek a special act of Congress "authorizing a proceeding to condemn" property owned by the State of Ohio for a federal lighthouse); see Act of July 24, 1935, ch. 414, § 2, 49 Stat. 496-467 (authorizing Secretary of the Interior to "acquire by condemnation" certain lands "held in public, private, State, or Indian ownership" for purposes of establishing an Indian reservation); Act of Sept. 7, 1950, ch. 905, § 2, 64 Stat. 771 (authorizing Secretary of Commerce to "acquire, by purchase, lease, condemnation, or otherwise," land required to construct what is now Washington Dulles International Airport).

During that time, Congress has expressly authorized condemnation actions by private actors against States in federal district courts. See 16 U.S.C. 814 (establishing special procedures before FPA licensee may "exercise the right of eminent domain in the district court of the United States for the district" in which "lands or other property that are owned by a State or political subdivision" are located). Even when the authorization did not expressly include State-owned land, it has been understood to include such land. See, *e.g.*, *Transcontinental Gas Pipe Line Co.* v. *0.607 Acres of Land*, No. 15-cv-428 (D.N.J. Feb. 23, 2015); *Stockton* v. *Baltimore & N.Y.R. Co.*, 32 F. 9, 17 (C.C.D.N.J. 1887) (Bradley, J.), appeal dismissed, 140 U.S. 699 (1891).

This "longstanding and established" history bears "great weight" in the constitutional analysis. *Chiafalo* v. *Washington*, 140 S. Ct. 2316, 2326 (2020). The eminent-domain authority is a sovereign power delegable to private parties for public projects. It has been used in that manner consistently since before the Founding through today. In light of this long unbroken history, there is no

basis to conclude that, when the States granted the federal government that power in the plan of the Convention, they silently retained the right to veto delegations of its exercise, simply by obtaining some kind of property interest in the land at issue.

2. a. The court of appeals' contrary analysis primarily rests on its assertion that the federal government's "ability to condemn State land" is actually "the function of two separate powers: the government's eminent-domain power and its exemption from Eleventh Amendment immunity." Pet. App. 12. But this Court has never drawn such an artificial distinction between an entity's authority to exercise the right of eminent domain and its authority to file a condemnation acting against a non-consenting landowner. The Court should not do so here.

The government generally "may take property pursuant to its power of eminent domain, either by entering into physical possession of the property without a court order, or by instituting condemnation proceedings." *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 340 (1963). In *Kohl*, the Court held that a statutory grant of authority to obtain land by condemnation implied "the power to obtain [the land] by any means that were competent to adjudge a condemnation." 91 U.S. at 375. Respondent's novel assertion of Eleventh Amendment immunity from a condemnation action brought to effectuate a valid delegation of the right of eminent domain does not require a different approach.

Georgia v. *City of Chattanooga*, 264 U.S. 472 (1924), is instructive. There, the State of Georgia contested the City of Chattanooga's effort to condemn property that Georgia owned and used to operate a railroad within Tennessee. *Id.* at 478-479. Georgia argued that al-

though the City had been delegated Tennessee's general eminent-domain authority, the grant did not specifically include the right to exercise that authority against land owned by a State. *Id.* at 479. When the City filed suit in a Tennessee court to condemn a right-of-way through Georgia's property, the State asserted sovereign immunity and asked this Court to prevent the condemnation action from going forward. *Ibid.*

This Court refused. The Court explained that "[t]he power of eminent domain is an attribute of sovereignty" that "extends to all property within the jurisdiction of the State." *City of Chattanooga*, 264 U.S. at 480. It reasoned that "[l]and acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership." *Ibid.* And because Georgia held its land subject to Tennessee's power of eminent domain, Georgia could not assert sovereign immunity against a condemnation suit filed by the City as Tennessee's delegee. *Id.* at 479-480. The same is true here. Respondents' property is indisputably subject to the federal government's eminent-domain authority. And for that reason, respondents likewise cannot assert sovereign immunity against the condemnation suit filed by petitioner, the federal government's delegee.

b. The court of appeals expressed concern (Pet. App. 14) that it could not recognize petitioner's ability to file a condemnation suit here without recognizing the delegability of an exemption from Eleventh Amendment immunity for any type of suit. It cited (*id.* at 14-15) this Court's skepticism of such delegation authority in *Blatchford*, 501 U.S. at 785. And it worried (Pet. App. 20) that permitting Congress to delegate its general exemption from Eleventh Amendment immunity could "undermine the careful limits" this Court has placed on

Congress's authority to abrogate that immunity for suits by private parties to seek money damages. But the Eleventh Amendment poses no barrier to petitioner's exercise of federal eminent domain—and the concomitant right to condemn—because the sovereign power of eminent domain has always encompassed the power to authorize private parties to exercise it for the construction of infrastructure such as mills, roads, canals, and railroads to serve the public. See *Luxton*, 153 U.S. at 529-530. Acknowledging that history does not imply that other sovereign powers operate in the same way.

To the contrary, this Court has long recognized that, as a general matter, only an "Officer of the United States" can "exercis[e] significant authority pursuant to the laws of the United States," with the federal direction and supervision such status constitutionally requires. *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam); see *Department of Transp.* v. *Association of Am. R.Rs.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring) ("Congress cannot delegate away its vested powers."); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring) (noting "[d]ifficult and fundamental questions" raised by "delegation[s] of Executive power"). The validity of any delegation to a private party of such sovereign authority—and any right to sue a sovereign State under such a delegation—would have to be justified on its own terms, and would find no support in the particular history of eminent domain.

c. Finally, the court of appeals expressed (Pet. App. 17-18) concerns about political accountability for private parties' exercise of the federal eminent-domain author-

ity. 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 concerning which land, whether State-owned or otherwise, will be included in the pipeline route and thus (if necessary) subject to the exercise of eminent domain through a condemnation action. See 15 U.S.C. 717f(e). 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" for other purposes. *Alden*, 527 U.S. at 756.

Viewing the process as a whole underscores the government's role and accountability. In seeking a certificate of public convenience and necessity, pipeline operators are required to make a "good faith effort to notify all affected landowners." 18 C.F.R. 157.6(d). Property owners, including the States, may object to the route before the agency before any siting decision is made. Upon making the decision, FERC is authorized to attach any "terms and conditions" to its issuance of a certificate in the public interest. 15 U.S.C. 717f(e). And if any objections remain, a State may invoke the jurisdiction of an Article III court to challenge the *Commission's* actions, including the decision to traverse a State's land and the corresponding delegation of eminent-domain authority to acquire that land. 15 U.S.C. 717r(b).

In the end, the condemnation action merely furnishes a mechanism to provide the property owner—including, here, the State—with just compensation and

effectuates the transfer of title that completes the exercise of eminent domain. 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 private entities' exercising the right of eminent domain to construct similar infrastructure to serve the public—from relying on private entities to implement such federal determinations and satisfy the requirement of compensation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated on jurisdictional grounds or reversed on the merits.

Respectfully submitted.

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