October 18, 2019

Nathaniel J. Davis, Sr.
Deputy Secretary
Federal Energy Regulatory Commission
888 1st Street, NE
Washington, DC 20428

Re: Docket No. RP20-41-000: Comments, Protest, and Opposition Regarding
PennEast Pipeline Company, LLC; Notice of Petition for Declaratory Order

Dear Mr. Davis,

Maya K. van Rossum, the Delaware Riverkeeper, and Delaware Riverkeeper Network (collectively “DRN”) moved to intervene in Docket No. RP20-41-000 on October 13, 2019, and are now providing the following comments, protest, and opposition to be considered by the Federal Energy Regulatory Commission (“FERC” or “Commission”) with respect to the PennEast Pipeline Company, LLC (“PennEast”) Petition for Declaratory Order and Request for Expedited Action, FERC Docket No. RP20-41-000, FERC eLibrary No. 20191004-5170 (Oct. 4, 2019) (“Petition”).¹ PennEast is requesting that the Commission interpret the Natural Gas Act’s (“NGA’s”) eminent domain authority in Section 7(h) in an expedited declaratory order.

The Delaware Riverkeeper is the leader of DRN, a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats. This area includes 13,539 square miles, draining parts of New Jersey, New York, Pennsylvania and Delaware, and it is within this region that a portion of PennEast’s proposed pipeline construction activity will take place. New Jersey-owned lands that

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¹ PennEast filed its Petition on October 4, 2019. On October 10, 2019, the Commission published notice of PennEast’s request in the Federal Register. *Federal Energy Regulatory Commission, Docket No. RP20–41–000, PennEast Pipeline Company, LLC: Notice of Petition for Declaratory Order*, 84 Fed. Reg. 54,600 (Oct. 10, 2019). The Commission is requiring that all comments, protests, or opposition be filed by 5:00 pm Eastern Time on October 18, 2019. *Id.*
PennEast has tried to condemn for its proposed pipeline fall within this region.\textsuperscript{2} The interests of DRN are set out more fully in DRN’s motions to intervene filed in this docket and incorporated by reference into this comment letter. See Maya K. van Rossum, the Delaware Riverkeeper, Motion to Intervene, FERC Docket No. RP20-41-000, FERC eLibrary No. 20191015-5020 (Oct. 13, 2019); Delaware Riverkeeper Network Motion to Intervene, FERC Docket No. RP20-41-000, FERC eLibrary No. 20191015-5021 (Oct. 13, 2019).

DRN opposes PennEast’s request for a declaratory order. There is no appropriate reason for the Commission to issue a declaratory order that PennEast is legally entitled to exercise eminent domain authority over state-owned lands – and no valid reason to expedite review of PennEast’s request for a declaratory order. The Third Circuit’s decision is clear and well-supported. The Eleventh Amendment prohibits PennEast, as a private company, from filing condemnation actions against state-owned land for its proposed pipeline under the NGA. \textit{In re PennEast Pipeline Co.}, No. 19-1191, 2019 U.S. App. LEXIS 27254, at *4 (3d Cir. Sept. 10, 2019) (“\textit{In re PennEast}”).

I. The Commission Should Deny PennEast’s Petition For a Declaratory Order

The Commission should deny the Petition, which is nothing more than an attempt by PennEast to improperly use the Commission and its Rule 207 to circumvent the judicial process. PennEast’s request ignores separation of powers. It’s the role of the judiciary – not the Commission – to decide sovereign immunity issues. PennEast’s Petition is a legal brief, improperly soliciting the Commission’s interpretation for use in its petition for rehearing of the Third Circuit’s \textit{In re PennEast} opinion. However, a declaratory order from the Commission addressing these issues will not be afforded deference by the Court. Nor is it a substitute for Commission participation in the ongoing judicial proceedings. In sum, there is no reason for the Commission to grant PennEast’s request to issue a declaratory order and, therefore, the Commission should deny PennEast’s request.

A. PennEast Incorrectly Submits That A Declaratory Order “Will Be Of Substantial Assistance” To Courts Interpreting The Natural Gas Act

A declaratory order from the Commission will not assist the Third Circuit or any other federal court in deciding the issues raised in \textit{In re PennEast}. Instead, such an order would violate the separation of powers doctrine and not be entitled to deference. Although PennEast offers conclusory statements regarding how helpful and important a Commission declaratory order would be (Petition at 3, 11, 13-15, 44), PennEast notably fails to cite any authority to support its claim that the Commission’s view of the Eleventh Amendment would assist the Third Circuit, which has already ruled, or any other federal court. In short, a declaratory order from the Commission would be of no consequence to the ongoing judicial proceedings and, thus, is entirely unnecessary.

\textsuperscript{2} Since 1992, DRN has had a strong community-based monitoring program. With the onslaught of fracking and pipeline infrastructure expansion, communities have been seeking to document related impacts. DRN has assisted many communities in Pennsylvania, New Jersey, New York, and beyond with their efforts to serve as watchdogs over pipeline construction. As part of this effort, DRN professional staff and volunteer monitors have documented conditions along, \textit{inter alia}, New Jersey-owned lands.
1. Under The Separation Of Powers Doctrine, The Judiciary Has Ultimate Authority To Provide The Appropriate Interpretation And Application Of Law, Not PennEast And Not The Commission

The Commission has already correctly recognized that “[i]ssues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the NGA are matters for the applicable state or federal court.” PennEast Pipeline Co., 164 FERC ¶ 61,098, P 33 (2018) (citing Transcontinental Gas Pipe Line Co., 161 FERC ¶ 61,250, at P 35 (2017) (citing Rover Pipeline LLC, 158 FERC ¶ 61,109 at PP 68, 70 (2017) (explaining that “[t]he Commission does not oversee the acquisition of property rights through eminent domain proceedings”). Likewise, the Constitutional issues that arise under the eminent domain provisions of NGA Section 7(h) are matters for the judiciary to address, not PennEast or the Commission. PennEast’s Petition invites the Commission to violate the separation of powers doctrine. The Commission should decline to do so.

Article III, Section 1 of the United States Constitution provides that the “judicial Power of the United States” is vested exclusively in the federal courts. Central to the judicial power is the “‘the duty of interpreting [the laws] and applying them in cases properly brought before the courts.’” Patchak v. Zinke, 583 U. S. ___, ___, 138 S. Ct. 897, 904-05 (2018) (plurality opinion) (quoting Massachusetts v. Mellon, 262 U. S. 447 (1923)). “It is emphatically the province and duty of the judicial department to say what the law is.” Marbury v. Madison, 5 U.S. 137 (1803); see also Wayman v. Southard, 23 U.S. 1 (1825) (“[T]he legislature makes, the executive executes, and the judiciary construes the law”).

A declaratory order would run afoul of the separation of powers doctrine, and the judicial process is the only appropriate way for PennEast or any other party, including the Commission if it so desires, to be heard on these issues. PennEast’s petition for panel rehearing or rehearing en banc in the Third Circuit is due to be filed on or before October 22, 2019. See Order Granting Motion for Extension of Time to File Petition for Rehearing, In re: PennEast Pipeline Co., No. 19-1191, Dkt. 003113242876 (3d Cir. Oct. 8, 2019). Should PennEast so desire, it could file a petition for writ of certiorari in the Supreme Court after Third Circuit proceedings are complete. However, it is wholly inappropriate for PennEast to attempt to create an extra-judicial reinterpretation through an outside regulatory process by requesting a Commission declaratory order.3 It would be similarly inappropriate for the Commission to grant such a request.

At any prior point, PennEast’s request would have been improper, but it is particularly easy to see how improper the request is now – when a federal appellate court has already ruled against the company. PennEast’s argument that the Third Circuit got it wrong should

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3 PennEast’s suggestion that “the Commission should clarify whether it interprets NGA Section 7(h) to authorize FERC or another federal agency to bring a condemnation action” (PennEast Petition at 26 (citation omitted)), is another clear example of PennEast’s lack of understanding of separation of powers. The Commission should not expend its resources considering the authorities of the other agencies or the federal government as a whole. Such a task is well beyond the Commission’s authority.
not be considered by the Commission; it should be considered by the Third Circuit in a petition for rehearing.

An additional appropriate option available to PennEast for addressing its concerns is to request that Congress amend the NGA to carry forth the goals PennEast seeks to achieve. But it is never appropriate for a federal agency to rewrite the law and advance an illegal and unconstitutional interpretation of its own accord. A declaratory order seeking to challenge and undermine the authority of the judiciary is contrary to the constitutional separation of powers.

2. The Commission’s Declaratory Orders Are Not Entitled To Deference And, Thus, Will Not Be Helpful In Judicial Proceedings

PennEast claims that the Commission should provide its “authoritative interpretation of the NGA’s eminent domain authority.” Petition at 3. However, PennEast vastly overstates the effect of the Commission’s declaratory orders. As a Federal Appellate Court pointed out rather clearly, “[w]hile this FERC-issued document [requested by a party] is rather impressively called a Declaratory Order, it is actually akin to an informal guidance letter.” Exelon Wind 1, L.L.C. v. Nelson, 766 F.3d 380, 391 (5th Cir. 2014). Despite arguments to the contrary, a Commission Declaratory Order “would still not be entitled to Chevron deference because it is an informal guidance document.” Id. at 391-93. Declaratory Orders are advisory, non-binding, and subject to judicial review. See Indus. Cogenerators v. FERC, 47 F.3d 1231, 1235 (D.C. Cir. 1995) (“The Commission nowhere purported to make the Declaratory Order binding upon the [parties], nor can we imagine how it could do so. Unlike the declaratory order of a court, which does fix the rights of the parties, this Declaratory Order merely advised the parties of the Commission’s position.”).

Moreover, the nature of this issue means that any Commission interpretation would not be afforded deference. Federal courts “exercise plenary review over a claim of sovereign immunity.” In re PennEast at *10 (citing Karns v. Shanahan, 879 F.3d 504, 512 (3d Cir. 2018) (“We review de novo the legal grounds underpinning a claim of . . . sovereign immunity.”)). A declaratory order from the Commission would not affect the judiciary’s de novo review of sovereign immunity issues.

Lastly, the timing of any declaratory order from the Commission, after the Third Circuit has ruled, is yet another reason why the Commission’s interpretation would not be afforded deference. In the same way that a court will “give no deference to agency ‘litigating positions’ raised for the first time on judicial review” Vill. of Barrington v. Surface Transp. Bd., 636 F.3d 650, 660 (2011) (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212, (1988)), a Commission interpretation of any sort offered at this late date would not be entitled to deference.

3. A Declaratory Order Is Not An Appropriate Alternative To Participation By The Commission In Judicial Proceedings

The Commission has had ample opportunity to appropriately share its interpretation of the NGA as part of the judicial process, but it chose not to participate in In re PennEast or any other condemnation proceedings where this issue has been raised. An after the fact
declaratory order circumvents the orderly advancement of the judicial process and is an indefensible end-run power grab around the authority of the judiciary. While the litigation was proceeding before the district court and then the Third Circuit, the Commission had the opportunity to seek intervention to inform and defend any interpretation of the NGA and the eminent domain authority that a FERC Certificate confers on recipient pipeline companies considering state sovereignty and states’ rights. Alternatively, the Commission could have sought leave to submit an amicus brief.

The Commission chose not to exercise these options, likely because the Commission believes “[i]ssues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the NGA are matters for the applicable state or federal court.” *PennEast Pipeline Co.*, 164 FERC ¶ 61,098, P 33 (2018). In fact, the Commission’s decision not to weigh in despite the high profile and federal nature of *In re PennEast* suggests that the Commission did not have an opinion one way or the other and was interested in what the unbiased opinion of the judiciary was on this precedent setting question and case regarding eminent domain and sovereign immunity.

PennEast asserts that because pipeline related “condemnation actions occur in court proceedings to which the Commission is not a party, the Commission has not previously needed to articulate or defend its views on whether Section 7(h) authorizes a certificate holder to condemn state-owned land, or whether a certificate holder may exercise the right of eminent domain notwithstanding a state’s claim of sovereign immunity.” Petition at 15. PennEast fails to show what has changed – condemnation actions still occur in proceedings where the Commission is not a party. To be sure, both PennEast and the Commission were aware of the claims being advanced by the state and at issue in the district court and Third Circuit. This was not a run-of-the-mill condemnation proceeding. To the contrary, it garnered much interest. PennEast even points out that “a coalition of industry *amici* led by the Interstate Natural Gas Association of America” participated in *In re PennEast*. Petition at 9. To suggest that the Commission could not have sought to weigh in on this federal legal challenge with its own interpretation of the NGA is absurd. It is a blatant misrepresentation of the facts to suggest that because eminent domain cases are generally addressed in state court that the Commission did not have the opportunity to be heard in *In re PennEast*.

The Commission has never been shy about weighing in with the courts to make clear its interpretation of its authority and/or the authority of states, other agencies and/or the pipeline companies. Had the Commission wanted to weigh in to inform the outcome of *In re PennEast*, it had ample opportunity to do so. If the Commission and/or PennEast now regret the decision not to have the Commission participate in *In re PennEast*, they cannot now use a declaratory order to try to remedy this because states and the public would be unfairly harmed by an end-run effort around the judicial process. Weighing in at this time, after the courts have ruled on the proper interpretation of the law, is a clear effort to circumvent the authority of the judiciary to interpret our nation’s laws and determine their proper implementation and enforcement by other branches of government.

PennEast asserts that the Commission should now explicitly provide its interpretation of NGA Section 7(h) in a declaratory order, relying on the Commission’s decision in *Islander East* to support its argument. Petition at 24-25. In that matter, the issue of whether the NGA delegates the United States’ eminent domain power over state lands to private parties was
raised by Connecticut, and the Commission declined to make a determination. See Islander E. Pipeline Co. v. Algonquin Gas Transmission Co., 102 FERC ¶ 61054, P. 130 (Jan. 17, 2003). Even PennEast acknowledges that, while the Commission made the conclusory statement that it found Island East’s response to Connecticut “persuasive,” the Commission did not offer any analysis or opinion on the sovereign immunity issue. See PennEast Petition at 25, 29. There is no reason for the Commission to now alter course and explicitly provide an interpretation of this generic issue in a declaratory order. Regardless of what PennEast thinks, the ultimate arbiter of the proper interpretation of the NGA vis-à-vis state-owned lands is the courts.

B. The Broad Scope Of PennEast’s Request Cannot Be Addressed Through A Rule 207 Declaratory Order From The Commission

While Rule 207 of the Commission’s Rules of Practice and Procedure allows for petitions for a “declaratory order or rule to terminate a controversy or remove uncertainty,” 18 C.F.R. § 385.207, the Commission has been clear that “[p]etitions for declaratory order, and orders granting those petitions, ‘are based on the specific facts and circumstances presented,’” ITC Grid Dev., LLC, 154 FERC ¶ 61,206, at P 45 (2016) (quoting Puget Sound Energy Inc., 139 FERC ¶ 61,241, at P 12 (2012)) (footnote omitted). Where a petition “presents a broad issue to the Commission, not an issue arising from specific facts” the Commission has declined to issue a declaratory order for a “generic finding.” Id.

Here, PennEast is upfront about the fact that it is seeking the Commission’s opinion of a generic issue that is not based on the specific facts and circumstances concerning the proposed PennEast pipeline. See, e.g., Petition at 2-3 (The declaratory order request “is critically important to the development of pipeline projects that the Commission has already found to be in the public convenience and necessity, such as the PennEast Pipeline Project . . . , and to the development of future pipeline infrastructure to serve the Nation’s rapidly growing energy needs.”). PennEast itself describes how specific facts and circumstances may differ among various projects crossing various states and lands, but nonetheless still requests a declaratory order that applies to all present and future pipeline projects. See Petition at 9 (“Although some states confer eminent domain authority on pipeline or other utility developers or voluntarily waive sovereign immunity as a matter of state law, others do not.”). It is evident that PennEast’s broad request is not based on or limited to PennEast proposed project specific facts and circumstances. The Commission should decline PennEast’s request to broaden the scope of what the Commission addresses in declaratory orders and deny the Petition on this basis alone.

C. In Re PennEast Does Not Undermine The Commission’s Administration Of The Natural Gas Act

In re PennEast does not undermine the Commission’s administration of the NGA: it simply ensures that the law is implemented in a way that is consistent with the Constitution and the sovereign rights of states.
1. **PennEast’s Assertion That The Third Circuit Decision Will Impact The Natural Gas Industry Is Not A Reason To Misinterpret Or Unconstitutionally Interpret And Apply the Law**

PennEast’s belief that *In re PennEast* will “disrupt” plans for the proposed PennEast pipeline and the natural gas industry as a whole because it is contrary to past practice of the industry is not a legally defensible basis for the Commission to attempt to overrule the Third Circuit. In fact, the Third Circuit directly addressed this concern in its decision:

PennEast warns that our holding today will give States unconstrained veto power over interstate pipelines, causing the industry and interstate gas pipelines to grind to a halt — the precise outcome Congress sought to avoid in enacting the NGA. We are not insensitive to those concerns and recognize that our holding may disrupt how the natural gas industry, which has used the NGA to construct interstate pipelines over State-owned land for the past eighty years, operates.

*In re PennEast* at *28.

But the Third Circuit made clear that “[i]nterstate gas pipelines can still proceed.” *Id.* at *29. The Court explained that “New Jersey is in effect asking for an accountable federal official to file the necessary condemnation actions and then transfer the property to the natural gas company.” *Id.* (citation omitted).

History is filled with examples a law that was misinterpreted or misapplied for years, even decades, before the courts were asked to judicially interpret and apply the law. Using PennEast’s logic, the U.S. Supreme Court was not legally, judicially, or constitutionally right to rule as it did in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) because doing so reversed, disrupted and changed decades of illegal and unconstitutional interpretation of the law in ways that would disrupt government and business practices which denied communities of color their civil rights in our nation.

The fact that, prior to *In re PennEast*, courts had not yet been asked to decide the appropriate interpretation and application of the NGA’s eminent domain provision and the role of sovereign immunity where state ownership interests are at stake does not provide a basis for reversal of the Third Circuit decision. The pipeline industry’s longstanding violation of the sovereign rights of states to force construction of pipeline projects does not provide a legally defensible basis for continuing this illegal and unconstitutional practice.

Likewise, PennEast’s assertion that the Third Circuit decision “calls into question the efficacy of the NGA’s condemnation authority” and “uproots nearly 80 years of Commission practice” (Petition at 1) is not a defensible basis for seeking to have an agency overturn the Third Circuit decision, a decision that is about the proper legal and constitutional interpretation and application of NGA and the sovereign immunity of states.

In addition, PennEast seeks to frighten the Commission and the judiciary by asserting that if the Third Circuit decision is upheld it will mean that if a state is opposed to a pipeline project then “it’s dead” (Petition at 10, citation omitted). While it is true that in those situations when a pipeline company targets lands in which a concerned state has property
interests and denies access in order to protect state interests and the interest of its citizenry from the devastating impacts of pipelines, the remedy is for the pipeline company to either reroute their project, work collaboratively with the state to resolve their concerns, or explore condemnation by a federal entity. The remedy can never be to force an illegal and unconstitutional interpretation and application of federal law.

2. There Are Other Solutions Available To PennEast That Do Not Involve Usurping The Authority Of The Judiciary Or States, And/Or Illegally And Unconstitutionally Interpreting And Applying The Natural Gas Act

PennEast, as well as other pipelines that may be impacted by In re PennEast, have a number of other remedies available to them that do not require the illegal and unconstitutional application of NGA and the usurpation of the sovereign immunity and rights of New Jersey and other states. PennEast could reconfigure its pipeline project and route. Or the company could re-engage with the state to try to negotiate a solution that does not require the exercise of eminent domain. Alternatively, PennEast could recognize the fact that there is no demonstrable need for the proposed PennEast pipeline and that the harms inflicted by the pipeline are too great to justify is construction and operation. PennEast could then choose instead to invest in clean energy solutions that will create energy while at the same time protect state’s rights, protect our environment, and not result in climate changing emissions that will contribute to the devastation of our present and future earth. There is no true justification for the construction of the proposed PennEast pipeline beyond the private profit motives of PennEast and its fossil fuel owners, and there certainly is no justification that would warrant the illegal and unconstitutional usurpation of states’ rights and sovereign immunity.

The truth is that PennEast created its own dilemma. It is PennEast, and PennEast alone, that chose to target state-owned lands when determining the route it would follow, and it is PennEast that chose to maintain its identified route despite being told by the state of New Jersey that the state would not grant the company authority to cut through the lands in which the state had ownership interests. The state of New Jersey and its people should not be responsible for sacrificing their rights, health, safety, and environment because the PennEast company greedily decided to target state-owned lands for its unneeded pipeline.

PennEast asserts that the power of eminent domain is needed because it forces “meaningful negotiation” of an equitable deal. Petition at 28. And yet, what we see in reality is that PennEast and other pipeline companies use the power of eminent domain for exactly the opposite outcome: they use the power to either force inequitable terms favorable to their corporate interests but not the interests of landowners (state or otherwise) or to avoid having to negotiate at all. In truth, pipeline companies, including PennEast, are quick to file condemnation proceedings after they have received certification from the Commission and do so to avoid meaningful negotiation of terms. Thus, for PennEast to suggest that it must be given eminent domain authority over states to force meaningful negotiation is a farce. PennEast does not want eminent domain authority to advance meaningful negotiation, it wants it to be able to take land rights on the terms it is willing to offer, regardless of equity, fairness, or impact.
D. The Commission Should Decline To Issue A Declaratory Order Because PennEast’s Flawed Interpretation Of The Eleventh Amendment Would Have Far-Reaching Consequences Beyond Interstate Pipelines

As an independent federal agency with specific statutory authority, the Commission should decline PennEast’s invitation to weigh in on Constitutional issues well beyond its areas of expertise that could have far-reaching consequences outside the pipeline context. As one of the PennEast amici, the Niskanen Center, pointed out to the Third Circuit, finding that a private party can simply “stand in the shoes” of the federal sovereign and condemn state land would lead to unanticipated results:

Congress could seize on the principle of delegation of the eminent domain power to make politically inexpedient decisions and open State public lands for private benefit. It could, for example, neatly solve the problem of where to store nuclear waste by simply “delegating” to private companies the ability to seize State lands for the purpose. It could also solve the problem of finding land for renewable wind and solar power farms, by empowering energy companies to take State grazing lands. Because these private companies would be cloaked with the federal government’s exemption from State sovereign immunity, States would be powerless to challenge these decisions—and Congress could avoid democratic accountability.


The potential for far-reaching implications of this Constitutional issue is yet another reason why the judiciary – and not a single federal agency like the Commission – should be rendering a final decision. The Commission does not have the expertise to evaluate the potential repercussions any decision on sovereign immunity and the NGA would have in other contexts.

E. The Third Circuit Properly Interpreted The Natural Gas Act

DRN agrees with the Third Circuit’s decision in In Re PennEast, which carefully considered and rejected all the arguments PennEast is now making to the Commission in its Petition. DRN accepts and incorporates by reference the Third Circuit’s decision and rationale in In Re PennEast as well as the arguments and information presented in the following briefs attached to this comment: Appellant’s Merits Brief, In re: PennEast Pipeline Co., No. 19-1191, Dkt. 003113216701 (3d Cir. Apr. 18, 2019); Brief for Amicus Curiae Niskanen Ctr. in Supp. of Appellants and Reversal, In re: PennEast Pipeline Co., No. 19-1191, Dkt. 003113222374 (3d Cir. Apr. 25, 2019); and Appellant’s Reply Brief, In re: PennEast Pipeline Co., No. 19-1191, Dkt. 003113242876 (3d Cir. May 20, 2019).

In its Petition to the Commission as well as in the Third Circuit, PennEast focuses on the power of the United States to exercise eminent domain, but that is not the issue. See In re PennEast at *13 (“Focusing on Congress’s intent to enable gas companies to build interstate gas pipelines, PennEast fails to adequately grapple with the constitutional impediment to allowing a private business to condemn State land: namely, Eleventh Amendment
immunity.”). PennEast is asking the Commission to decide whether, in the NGA, Congress has delegated the United States’ eminent domain authority over State lands to a private party. The Third Circuit correctly held that the NGA does not delegate this authority and questioned whether Congress could Constitutionally delegate this authority. *Id.* at *4.

PennEast asserts that the Third Circuit reached the wrong conclusion and rendered a decision that undermined Congress’ intent in drafting the NGA. This is simply not accurate. The court went to great pains to ensure that it was in fact interpreting the NGA provisions at issue in a way that gave credence to the plain meaning of the law and did preserve and advance the goals of Congress as reflected by the language in the NGA. *See In re PennEast* at *27*- *28. If Congress had meant to dissolve state sovereign immunity when it came to interstate, FERC-regulated pipelines it could have done so in the drafting of the NGA. But it did not. PennEast is seeking to put words into the Congress’ mouth. If Congress wants to now change its mind aside with PennEast it can do so. PennEast could approach Congress for amendment of NGA to address this issue if it in fact agrees with PennEast that the sovereign rights of states should be made subservient to the greedy profit-making interests of a pipeline company and the fossil fuel industry.

Given the NGA’s language and our Constitution, PennEast’s assertion that Congress intended for private pipeline interests to be entitled to exercise the power of eminent domain against states is simply an opinion — an opinion that cannot be relied upon to rewrite the interpretation and application of the law.

1. **PennEast’s Arguments Regarding Congressional Intent Are Misleading**

PennEast asserts that “Congress understood when it enacted Section 7(h) that the provision authorized certificate holders to condemn state-owned lands” because during hearings on the NGA in 1947 a John M. Crimmins criticized the legislation for ‘permit[ting] the taking of state-owned lands used for State purposes by a private company.” Petition at 21 (quoting *Amendments to the Natural Gas Act: Hearings on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569, and H.R. 2956 Before the H. Comm. on Interstate and Foreign Commerce, 80th Cong. 611 (1947)* (‘*House Hearings*’)). But this is simply absurd. John Crimmins is not a member of congress nor a member of any Congressperson’s staff. He is not related to Congress nor Congressional lawmaking in any way, at least not in the context of the testimony PennEast cites in its Petition. Petition at 23. In the *House Hearings,* John Crimmins describes himself during his testimony before Congress, so juveniley and enthusiastically referred to by PennEast, as follows:

Mr. Chairman, and members of the committee, my name is John M. Crimmins. My address is Koppers Building, Pittsburgh, Pa. I am a member of the law department of Koppers Co.. Inc. I appear here to oppose H. R. 2956. My company is engaged in the manufacture of gas on the eastern seaboard which is sold for domestic, commercial, and industrial purposes in northern New Jersey.

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4 Available at [https://play.google.com/books/reader?id=jiYZIOFewz4C&hl=en&pg=GBS.PA608](https://play.google.com/books/reader?id=jiYZIOFewz4C&hl=en&pg=GBS.PA608)
Thus, the testimony of Mr. Crimmins cannot be offered as proof of Congress’ intent, as PennEast suggests. The simple act of testifying on a particular point before Congress does not bind Congress. To hold otherwise would have far-reaching results and unintended consequences.

In another argument regarding Congressional intent, PennEast asserts – without citation – that waterways serve as the boundaries for all states east of the Mississippi, states own the riverbeds under the Equal Footing Doctrine, and therefore, it is “inconceivable” that Congress would have set up a mechanism whereby states could prevent the passing of a pipeline from one state to another. Petition at 14. However, the Third Circuit recognized that the focus is properly on the NGA’s statutory language, not what PennEast imagines Congress may or may not have been thinking when legislation was passed:

If delegation were a possibility, one would think some similar clarity would be in order. But the NGA does not even mention the Eleventh Amendment or state sovereign immunity. Nor does it reference “delegating” the federal government's ability to sue the States. It does not refer to the States at all. If Congress had intended to delegate the federal government's exemption from sovereign immunity, it would certainly have spoken much more clearly.

*In re PennEast* at *26. Like PennEast’s other arguments, this argument does not hold water.

2. **PennEast’s Arguments Regarding Congressional Intent Have Been Addressed By *In re PennEast***

PennEast asserts that because Congress amended the Federal Power Act in a way that restricted the exercise of eminent domain over state-owned lands but did not similarly restrict this exercise of eminent domain under the NGA was proof that Congress intended to allow the exercise of eminent domain over state-owned lands pursuant to the NGA. Petition at 22-23. This argument, as with the other arguments in the Petition, was considered and rejected by the Third Circuit. *See In re PennEast* at *27, *28, n.20. If the Commission were to accept PennEast’s incredible overreach, there would be broad repercussions for all laws enacted, amended and/or not amended by Congress. It is simply absurd to impute congressional intent and interpretation from one law to another because Congress amended the language of one law and not the other. This would wreak havoc on our legislative process. Congressional action to amend one law could be used to seek and force re-interpretation of every law on the books that Congress chose not to revisit in that moment and time. This is an irrational request that stretches the boundaries of legislative interpretation and intent beyond the bounds of proper legal interpretation and rationality.

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5 Notably, PennEast’s scenario fails to recognize the realities of modern-day construction opportunities whereby pipeline companies could, through Horizontal Directional Drilling, cross from one state through to another without disturbing the river bottom of a boundary waterway. It is only in those situations whereby a pipeline company schemes to open cut a major river system that there is not a mechanism for them to avoid the scenario they seek to establish.
3. As The Third Circuit Correctly Held, Whether Or Not The Federal Government May Delegate Its Eminent Domain Power To A Private Party, In The Case Of The Natural Gas Act It Did Not

PennEast asserts that “the federal government may delegate its eminent domain power to private corporations.” Petition at 17. Even if one were to agree that was legally correct, a legal position we do not in fact concede, the Third Circuit was clear that in the context of the NGA Congress did not choose to make such a delegation:

We will vacate because New Jersey’s sovereign immunity has not been abrogated by the NGA, nor has there been — as PennEast argues — a delegation of the federal government’s exemption from the State’s sovereign immunity. The federal government’s power of eminent domain and its power to hale sovereign States into federal court are separate and distinct. In the NGA, Congress has delegated the former. Whether the federal government can delegate its power to override a State’s Eleventh Amendment immunity is, however, another matter entirely. While there is reason to doubt that, we need not answer that question definitively since, even if a delegation of that sort could properly be made, nothing in the text of the NGA suggests that Congress intended the statute to have such a result.

*In re PennEast* at *3-*4.

Whether Congress could (again, assuming arguendo PennEast is correct, which we do not) is irrelevant; the correct question would be whether Congress intended to and in fact did make such a delegation. According to the plain statutory language, and the Third Circuit, Congress did not seek to make such a delegation. *In re Penn East* at *4.

If Congress would like to make such a delegation, it can certainly seek to do so by revisiting and amending the NGA to attempt to make such a delegation. But it is not for the Commission, a regulatory agency, to revisit and revise the law – to do so is an unconstitutional usurpation of the authority of the Congress and the judiciary.

II. The Commission Should Deny PennEast’s Unsubstantiated Request For Expedited Review

PennEast’s timing is curious and its request for expedited review unfounded. PennEast’s assertion that expedited review is “necessary” is simply not true. There is no reason in fact or law for the Commission to grant the request that it consider and pursue this Declaratory Order on an expedited basis. PennEast does not even attempt to explain why it is seeking a declaratory order at this time, when it could have filed its Petition long ago when the Eleventh Amendment issue was first raised. PennEast’s decision to delay filing its Petition – a delay of its own making – does not warrant expedited review by the Commission. Moreover, there is no defensible reason to short-change the public by contracting the comment period on this important issue to a mere eight days.

As explained in a motion for extension of time filed in this docket, although the Commission only gave the public five business days from publication of notice in the Federal Register to comment on PennEast’s Petition, PennEast has twice requested and twice
received extensions of time to seek on rehearing from the Third Circuit – for a total of five weeks.\(^6\) PennEast explained the importance of the issues at stake in its request for more time to the Third Circuit, stating that “this case presents complex and novel questions about the intersection between NGA and state sovereign immunity,” that “will require careful research into the legislative history of at least three major acts of Congress and their amendments.” Unopposed Motion for Further Extension of Time to File Petition for Panel Rehearing or Rehearing En Banc, In re: PennEast Pipeline Co., No. 19-1191, Dkt. 003113363406, at 2 (Oct. 2, 2019 3d Cir.).

For its part, PennEast is focused on its own interests in allowing itself enough time to thoroughly analyze the relevant issues to move forward with the proposed pipeline as quickly as possible. PennEast, however, displays a complete lack of understanding about the other interests at stake here. PennEast has the audacity to argue that the Commission need not be overly concerned about potential Constitutional problems because “Section 7(h) suits do not threaten state treasuries: rather, they seek to effectuate limited rights of way necessary to construct a pipeline project . . . .” Petition at 36; see also id. at 39 (further attempting to trivialize concerns by stating “the condemnor simply seeks title to the property or, as here, limited easements . . . .”). PennEast statement stands in stark contrast to Supreme Court and D.C. Circuit precedent holding that the Commission’s decisions authorizing a pipeline company’s “physical invasion” of property constitute a “government intrusion of an unusually serious character.” Allegheny Def. Project v. FERC, 932 F.3d 940, 954 (D.C. Cir. 2019) (quoting Loretto v. Telepromter Manhattan CATV Corp., 458 U.S. 419, 426, (1982); cf. United Church of the Med. Ctr. v. Medical Ctr. Comm’n, 689 F.2d 693, 701 (7th Cir. 1982) (“It is settled beyond the need for citation . . . that a given piece of property is considered to be unique, and its loss is always an irreparable injury.

There are serious and significant rights at stake. “After all, constructing a gas pipeline is not a tidy intrusion” and “building the pipeline would cause permanent, irreparable environmental harm.” Allegheny Def. Project, 932 F.3d at 954 (internal citation and quotations omitted). “Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” Id. (quoting Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987)).

Not only is PennEast seeking to have the Commission illegally and unconstitutionally circumvent, undermine and strip the sovereign rights of the state of New Jersey, but this issue will impact all states faced with pipeline construction over lands in which a state has a property interest. In New Jersey and in states across our nation communities have approved the commitment of public tax dollars and government resources in the purchase of property and property interests in land in order to protect them for socially important reasons such as protection of drinking water supplies, preservation of natural landscapes to prevent flooding and flood damages, protection of habitats important for preserving the ecological integrity of natural systems important for environmental, economic and other community needs and

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priorities such as quality family recreational opportunities, protecting public health and safety, and protecting natural resources vital for present and future generations.

There is no imminent action on the proposed PennEast pipeline that will be affected by the Commission issuing this declaratory order with only an eight-day comment period versus allowing a more appropriate time period for the public to weigh in on this important issue. A comment period of 90, 60, 45 or even 30 days would be more appropriate.

III. Conclusion

For the reasons set forth above, DRN requests that the Commission deny PennEast’s Petition. Should the Commission decide to issue a declaratory order, it should adopt the sound reasoning of the Third Circuit’s In re PennEast opinion, not the alternative analysis offered by PennEast.

Respectfully Submitted,

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Attachments

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 19-1191 thru 19-1232

In re: PENNEAST PIPELINE COMPANY, LLC

STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; NEW JERSEY STATE AGRICULTURE DEVELOPMENT COMMITTEE; DELAWARE & RARITAN CANAL COMMISSION; NEW JERSEY WATER SUPPLY AUTHORITY; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; NEW JERSEY MOTOR VEHICLE COMMISSION,
Appellants

On Appeal from the United States District Court for the District of New Jersey
3-18-cv-01859, 3-18-cv-01863, 3-18-cv-01869,
3-18-cv-01874, 3-18-cv-01896, 3-18-cv-01905,
3-18-cv-01938, 3-18-cv-01942, 3-18-cv-01973,
3-18-cv-01974, 3-18-cv-01976, 3-18-cv-01990,
3-18-cv-01995, 3-18-cv-02001, 3-18-cv-02003 and
3-18-cv-02014)
District Judge: Hon. Brian R. Martinotti

Argued
June 10, 2019

Before: JORDAN, BIBAS, and NYGAARD, Circuit
Judges.

(Filed: September 10, 2019)

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OPINION OF THE COURT
The Natural Gas Act ("NGA"), 15 U.S.C. §§ 717–717z, allows private gas companies to exercise the federal government’s power to take property by eminent domain, provided certain jurisdictional requirements are met. This appeal calls on us to decide whether that delegation of power allows gas companies to hale unconsenting States into federal court to condemn State property interests.

PennEast Pipeline Company ("PennEast") is scheduled to build a pipeline through Pennsylvania and New Jersey. The company obtained federal approval for the project and promptly sued pursuant to the NGA to condemn and gain immediate access to properties along the pipeline route. Forty-two of those properties are owned, at least in part, by the State of New Jersey or various arms of the State. New Jersey sought dismissal of PennEast’s condemnation suits for lack of jurisdiction, citing the Eleventh Amendment to the United States Constitution, and, separately, arguing that PennEast failed to satisfy the jurisdictional requirements of the NGA. Broadly speaking, the Eleventh Amendment recognizes that States enjoy sovereign immunity from suits by private parties in federal court. New Jersey has not consented to PennEast’s condemnation suits, so those legal proceedings can go forward only if they are not barred by the State’s immunity. The District Court held that they are not barred and granted PennEast orders of condemnation and preliminary injunctive relief for immediate access to the properties. New Jersey has appealed.
We will vacate because New Jersey’s sovereign immunity has not been abrogated by the NGA, nor has there been – as PennEast argues – a delegation of the federal government’s exemption from the State’s sovereign immunity. The federal government’s power of eminent domain and its power to hale sovereign States into federal court are separate and distinct. In the NGA, Congress has delegated the former. Whether the federal government can delegate its power to override a State’s Eleventh Amendment immunity is, however, another matter entirely. While there is reason to doubt that, we need not answer that question definitively since, even if a delegation of that sort could properly be made, nothing in the text of the NGA suggests that Congress intended the statute to have such a result. PennEast’s condemnation suits are thus barred by the State’s Eleventh Amendment immunity. We will therefore vacate the District Court’s order with respect to New Jersey’s property interests and remand the matter for the dismissal of any claims against New Jersey.

I. BACKGROUND

The NGA authorizes private gas companies to acquire “necessary right[s]-of-way” for their pipelines “by the exercise of the right of eminent domain[,]” if three conditions are met. 15 U.S.C. § 717f(h). First, the gas company seeking to condemn property must have obtained a Certificate of Public Convenience and Necessity (a “Certificate”) from the Federal Energy Regulatory Commission (“FERC”). Id. Second, it must show that it was unable to “acquire [the property] by contract” or “agree with the owner of property” about the amount to be paid. Id. Third and finally, the value of the property condemned must exceed $3,000. Id.
In the fall of 2015, PennEast applied for a Certificate for its proposed 116-mile pipeline running from Luzerne County, Pennsylvania to Mercer County, New Jersey (the “project”). After a multi-year review, FERC granted PennEast’s application and issued a Certificate for the project, concluding that, so long as PennEast met certain conditions, “the public convenience and necessity require[d] approval of PennEast’s proposal[.]”

1 That review unfolded as follows: In February 2015, FERC published notice in the Federal Register and mailed it to some 4,300 interested parties. FERC received over 6,000 written comments in response and heard from 250 speakers at three public meetings. The following summer, FERC issued a draft Environmental Impact Statement (“EIS”) for the project. It also published notice in the Federal Register and mailed the draft EIS to over 4,280 interested parties. In response, FERC received more than 4,100 letters and heard from 420 (out of 670) attendees at six public meetings.

To address environmental and engineering concerns raised by the public, PennEast filed 33 route modifications. FERC then provided notice to newly affected landowners. The following spring, FERC published a final EIS in the Federal Register. That final EIS sought to address all substantive comments on the draft EIS. FERC concluded that nearly all New Jersey parcels “subject to types of conservation or open space protective easements will generally retain their conservation and open space characteristics[.]”

2 Multiple parties, including New Jersey, challenged FERC’s decision in the United States Court of Appeals for the District of Columbia. Petition for Review, Delaware Riverkeeper Network v. FERC, No. 18-1128 (D.C. Cir. filed
Certificate in hand, PennEast filed verified complaints in the United States District Court for the District of New Jersey, asking for orders of condemnation for 131 properties along the pipeline route, determinations of just compensation for those properties, and preliminary and permanent injunctive relief to gain immediate access to and possession of the properties to begin construction of its pipeline. Forty-two of the 131 property interests PennEast sought to condemn belong to New Jersey or arms of the State (collectively, the “State” or “New Jersey”). The State holds possessory interests in two of the properties and non-possessory interests – most often, May 9, 2018). That petition remains pending. Several property owners also petitioned FERC for rehearing. Those petitions were all “rejected, dismissed, or denied[.]” (App. at 31.)

3 This appeal was filed on behalf of the State of New Jersey, the New Jersey Department of Environmental Protection (“NJDEP”), the State Agriculture Development Committee (“SADC”), the Delaware & Raritan Canal Commission (“DRCC”), the New Jersey Department of the Treasury, the New Jersey Department of Transportation, the New Jersey Water Supply Authority, and the New Jersey Motor Vehicle Commission. It is undisputed that those various entities are arms of the State, and PennEast does not suggest that any of those entities should have anything less than Eleventh Amendment immunity to the same extent as the State of New Jersey.
easements requiring that the land be preserved for recreational, conservation, or agricultural use – in the rest.  

After PennEast filed its complaints, the District Court ordered the affected property owners to show cause why the Court should not grant the relief sought. New Jersey filed a

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4 New Jersey owns those property interests as part its attempt to preserve farmland and open space in the State. *Cf.* N.J. Const. art. VIII, § 2 ¶¶ 6-7 (setting aside tax dollars for open space and farmland preservation). For decades now, the State has operated preservation programs aimed at preserving such land. For example, NJDEP’s “Green Acres” program authorizes the State to purchase, and help local governments purchase, land for recreation and conservation. N.J. Stat. Ann. §§ 13:8A-1 to -56. New Jersey’s Agriculture Retention and Development Act also empowers the SADC to preserve farmland by buying such land in fee simple or by buying development easements to preserve the land for agricultural uses. *Id.* §§ 4:1C-11 to -48. The State also owns and maintains easements along the Delaware Canal through DRCC to protect the State’s water quality and vegetation. *Id.* §§ 13:13A-1 to -15; N.J. Admin. Code § 7:45-9.3.

The State has spent over a billion dollars on its preservation efforts. As of 2017, New Jersey had “helped to preserve over 650,000 acres of land[,]” and the “SADC and its partners had preserved over 2,500 farms and over 200,000 acres of farmland.” (Opening Br. at 6 (citing App. at 94, 108)).

5 The defendants include the State, as well as various townships, property trusts, utility companies, and individual property owners.
brief invoking its Eleventh Amendment immunity and arguing for dismissal of the complaints against it. It also argued that PennEast had failed to satisfy the jurisdictional requirements of the NGA by not attempting to contract with the State for its property interests.

After hearings on the show-cause order, the District Court granted PennEast’s application for orders of condemnation and for preliminary injunctive relief. At the outset, the Court rejected New Jersey’s assertion of Eleventh Amendment immunity. It found that “PennEast ha[d] been vested with the federal government’s eminent domain powers and stands in the shoes of the sovereign[,]” making Eleventh Amendment immunity inapplicable. (App. at 33.) The Court reasoned that, because “the NGA expressly allows ‘any holder of a certificate of public convenience and necessity’” to condemn property, PennEast could do so here – even for property owned by the State. (App. at 33 (quoting 15 U.S.C. § 717f(h))).

Next, the Court held that PennEast met the three requirements of the NGA, entitling it to exercise the federal government’s eminent domain power. First, it found that PennEast holds a valid Certificate for the project. Next, it

6 The Court held three hearings to accommodate the large number of defendants involved. Each hearing “generally proceeded the same way: First, PennEast was permitted to address the Court, followed by [property owners] represented by counsel. Next, any property owner in attendance was permitted to address the Court, giving first priority to any party who had filed an opposition. PennEast was permitted to respond.” (App. at 29.)
concluded that PennEast had been unable to “acquire by contract, or [was] unable to agree with the owner of property to the compensation to be paid for” the affected properties. (App. at 48 (alteration in original) (quoting 15 U.S.C. § 717f(h)).) On that point, the Court rejected the State’s contention that PennEast had to negotiate with the holders of all property interests, including easement holders. In the District Court’s view, § 717f(h) refers only to the “owner of [the] property[,]” meaning the owner of the possessory interest. (App. at 48 n.49.) Finally, the Court found that the statute’s property value requirement was satisfied because PennEast had extended offers exceeding $3,000 for each property. The Court thus granted PennEast’s request for orders of commendation.

The District Court went on to hold that PennEast had satisfied the familiar four-factor test for preliminary injunctive relief. To obtain a preliminary injunction, the movant must show “1) that there is reasonable probability of success on the merits, 2) that there will be irreparable harm to the movant in the absence of relief, 3) that granting the injunction will not result in greater harm to the nonmoving party, and 4) that the public interest favors granting the injunction.” Transcon. Gas Pipe Line Co. v. Conestoga Twp., 907 F.3d 725, 732 (3d Cir. 2018). As to the first factor, the Court said that PennEast had already effectively succeeded on the merits, given that “the Court ha[d] found PennEast satisfied the elements of § 717f(h) and is therefore entitled to condemnation orders.” (App. at 50.) As to the second factor, the Court found that, without an injunction, PennEast would suffer irreparable harm in the form of non-recoupable financial losses and construction delays. For the third factor, the Court noted that, while it had “carefully considered a wide range of arguments from Defendants regarding the harm PennEast’s possession will cause,” the
property owners would not be harmed “by the Court granting immediate possession” because they would receive just compensation. (App. at 53, 55.) Lastly, the Court was persuaded, especially in light of FERC’s conclusion about public necessity, that the project is in the public interest. Having found all four factors weighed in favor of granting a preliminary injunction, the Court ordered that relief.\(^7\) It then appointed five individuals to serve as special masters and condemnation commissioners to determine just compensation awards.

New Jersey moved for reconsideration of the District Court’s denial of sovereign immunity and sought a stay of the District Court’s order to prevent PennEast from taking immediate possession of the State’s properties. As described more fully herein, see infra Part III–B.1., it argued that, based on the Supreme Court’s decision in Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991), the United States lacks the constitutional authority to delegate to private entities like PennEast the capacity to sue a State. The District Court denied that motion, concluding that Blatchford does not apply to condemnation actions brought pursuant to the NGA.

The State timely appealed. It also moved to stay the District Court’s order pending resolution of this appeal and to expedite our consideration of the dispute. We granted that

\(^7\) In addition to allowing PennEast to take immediate possession of the properties, the Court ordered that the U.S. Marshals could investigate, arrest, imprison, or bring to Court any property owner who violated the Court’s order.
motion in part, preventing construction of the pipeline and expediting the appeal.

II. JURISDICTION AND STANDARD OF REVIEW

New Jersey contests jurisdiction in these condemnation actions, asserting here, as it did in the District Court, its sovereign immunity. For the reasons that follow, we agree with it that the District Court lacked subject matter jurisdiction over the suits insofar as they implicated the State’s property interests. We, however, have jurisdiction under 28 U.S.C. § 1291 to review the denial of New Jersey’s claim of Eleventh Amendment immunity. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993); *see Cooper v. Se. Pa. Transp. Auth.*, 548 F.3d 296, 298 (3d Cir. 2008) (“An order denying Eleventh Amendment immunity is immediately appealable as a final order under the collateral order doctrine.”). And, pursuant to 28 U.S.C. § 1292(a)(1), we have jurisdiction to review the grant of an injunction.

We exercise plenary review over a claim of sovereign immunity. *Karns v. Shanahan*, 879 F.3d 504, 512 (3d Cir. 2018). We review the grant of a preliminary injunction for abuse of discretion but review de novo the legal conclusions underlying the grant. *McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 357 (3d Cir. 2007).

III. DISCUSSION

The Eleventh Amendment declares that:

The Judicial power of the United States shall not be construed to extend to any suit in law or
equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The States’ immunity from suit in federal court, however, “neither derives from, nor is limited by, the terms of the Eleventh Amendment.” *Alden v. Maine*, 527 U.S. 706, 713 (1999). Rather, that immunity is “a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today[.]” *Id.* The Eleventh Amendment thus embodies a “recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity.” *Puerto Rico Aqueduct*, 506 U.S. at 146.

Because of that immunity, States are not “subject to suit in federal court unless” they have consented to suit, “either expressly or in the ‘plan of the convention.’” *Id.* *Blatchford*, 501 U.S. at 779 (quoting *Port Auth. Trans–Hudson Corp. v. Feeney*, 495 U.S. 299, 310 (1990)). As part of “the ‘plan of the

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8 State sovereign immunity “includes both immunity from suit in federal court and immunity from liability[.]” *Lombardo v. Pa., Dep’t of Pub. Welfare*, 540 F.3d 190, 193 (3d Cir. 2008). Immunity from suit in federal court is known by the shorthand “Eleventh Amendment immunity.” *Id.* That is the only type of State sovereign immunity at issue here.

[Constitutional] convention[,]” the States consented to suit by the federal government in federal court. *Blatchford*, 501 U.S. at 779-82; see *United States v. Texas*, 143 U.S. 621, 641-46 (1892); *City of Newark v. United States*, 254 F.2d 93, 96 (3d Cir. 1958) (“The consent of states to suits by the United States is implied as inherent in the federal plan.”). The federal government thus enjoys an exemption from the power of the States to fend off suit by virtue of their sovereign immunity, an exemption that private parties do not generally have.\(^{10}\) *Alden*, 527 U.S. at 755.

New Jersey asserts that it is entitled to sovereign immunity from these condemnation suits. It argues that the federal government cannot delegate its exemption from state sovereign immunity to private parties like PennEast and that, even if it could, the NGA is not a clear and unequivocal delegation of that exemption. PennEast disagrees. The company argues that a delegation of the federal government’s eminent domain power under the NGA necessarily includes the ability to sue the States and that concluding otherwise would frustrate the fundamental purpose of the NGA to facilitate interstate pipelines.

\(^{10}\) Citizens can, however, file suit against a State’s officers where the litigation seeks only prospective injunctive relief based on an ongoing constitutional violation. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 70-71 (1989); *Ex parte Young*, 209 U.S. 123 (1908). No one suggests that that doctrine of *Ex parte Young* is applicable here.
In view of PennEast’s argument, it is essential at the outset to distinguish between the two powers at issue here: the federal government’s eminent domain power and its exemption from Eleventh Amendment immunity. Eminent domain is the power of a sovereign to condemn property for its own use. *Kohl v. United States*, 91 U.S. 367, 371, 373-74 (1875). The federal government can exercise that power to condemn State land in federal court. *United States v. Carmack*, 329 U.S. 230, 240 (1946). But its ability to do so is not due simply to “the supreme sovereign’s right to condemn state land. Rather, it is because the federal government enjoys a special exemption from the Eleventh Amendment.” *Sabine Pipe Line, LLC v. Orange Cty., Tex.*, 327 F.R.D. 131, 140 (E.D. Tex. 2017). Thus, the federal government’s ability to condemn State land – what PennEast contends it is entitled to do by being vested with the federal government’s eminent domain power – is, in fact, the function of two separate powers: the government’s eminent domain power and its exemption from Eleventh Amendment immunity. A delegation of the former must not be confused for, or conflated with, a delegation of the latter. A private party is not endowed with all the rights of the United States by virtue of a delegation of the government’s power of eminent domain.

PennEast tries to ignore that distinction, arguing that Congress intended for private gas companies to which the federal government’s eminent domain power has been delegated under the NGA to be able to condemn State property. Focusing on Congress’s intent to enable gas companies to build interstate gas pipelines, PennEast fails to adequately grapple with the constitutional impediment to allowing a private business to condemn State land: namely, Eleventh Amendment immunity.
That failure is a consequence of the easier road PennEast chooses, namely citing the NGA and asserting, in effect, that Congress must have meant for pipeline construction to go forward, regardless of the Eleventh Amendment. That approach has the advantage of avoiding the difficulty of facing up to what the law requires to overcome Eleventh Amendment immunity. As discussed below, see infra Part III–B.3., Congress cannot abrogate state sovereign immunity under the Commerce Clause, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59, 72-73 (1996), and because Congress enacted the NGA pursuant to that Clause, the statute cannot be a valid congressional abrogation of sovereign immunity. To maintain these suits, then, PennEast had to offer a different answer for why its suits do not offend New Jersey’s sovereign immunity. But, as just noted, the only reason it gives – an argument of implied delegation of the federal government’s Eleventh Amendment exemption under the NGA – ignores rather than confronts the distinction between the federal government’s eminent domain power and its exemption from Eleventh Amendment immunity. Unfortunately for PennEast, that distinction is essential, and there are powerful reasons to doubt the delegability of the federal government’s exemption from Eleventh Amendment immunity.

B

Three reasons prompt our doubt that the United States can delegate that exemption to private parties. First, there is simply no support in the caselaw for PennEast’s “delegation” theory of sovereign immunity. Second, fundamental differences between suits brought by accountable federal agents and those brought by private parties militate against
concluding that the federal government can delegate to private parties its ability to sue the States. Finally, endorsing the delegation theory would undermine the careful limits established by the Supreme Court on the abrogation of State sovereign immunity.

1

Looking in more detail at the caselaw, it lends no credence to the notion that the United States can delegate the federal government’s exemption from state sovereign immunity. In *Blatchford*, the Supreme Court dealt with this issue. In that case, Native American tribes sued an Alaskan official for money allegedly owed to them under a state revenue-sharing statute. *Blatchford*, 501 U.S. at 777-78. Relevant here, the tribes argued that their suit did not offend state sovereign immunity because Congress had delegated to the tribes the federal government’s ability to sue the States. *See id.* at 783 (explaining the tribes’ assertion that, in passing 28 U.S.C. § 1362, which grants district courts jurisdiction over suits brought by Indian tribes arising under federal law, Congress had “delegate[d]” the federal government’s authority to sue on behalf of Indian tribes “back to [the] tribes themselves”).

The Court rejected that argument, expressing its “doubt … that sovereign exemption can be delegated—even if one limits the permissibility of delegation … to persons on whose behalf the United States itself might sue.” *Id.* at 785. The Court explained why: “[t]he consent, ‘inherent in the convention,’ to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might
select[.]” *Id.* The delegation theory, the Court explained, was nothing more than “a creature of [the tribes’] own invention.” *Id.* at 786.

PennEast would have us dismiss *Blatchford* as “so distinguishable” as to be “useless by analogy.” (Answering Br. at 41.) As PennEast sees it, the statute at issue in *Blatchford* was a jurisdictional statute that did not confer any substantive rights on the tribes, while the NGA confers the substantive power of eminent domain on private parties. But the Supreme Court’s statements in *Blatchford* had nothing to do with the jurisdictional nature of the statute at issue and everything to do with the Court’s deep doubt about the “delegation” theory itself.

Courts of Appeals have been similarly skeptical that the federal government can delegate to private parties its exemption from state sovereign immunity – even when the private party seeks to assert the interests of the United States, rather than the party’s own. The D.C. Circuit’s decision in *U.S. ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870 (D.C. Cir. 1999), is a case in point. There, the court stated that “permitting a *qui tam* relator to sue a state in federal court based on the government’s exemption from the Eleventh Amendment bar involves just the kind of delegation that *Blatchford* so plainly questioned.” *Id.* at 882. That conclusion accords with others from our sister circuits. See *United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999) (holding, in the *qui tam* context, that “the United States cannot delegate to non-designated, private individuals its sovereign ability to evade the prohibitions of the Eleventh Amendment”); see also *Jachetta v. United States*, 653 F.3d 898, 912 (9th Cir. 2011) (rejecting argument that the federal
government could authorize a private plaintiff to sue on its behalf as “unpersuasive” based on Blatchford. But cf. United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr., 961 F.2d 46, 50 (4th Cir. 1992) (concluding that “the United States is the real party in interest” in qui tam suits and therefore such suits are not barred by the States’ Eleventh Amendment immunity).

While the Supreme Court and federal Courts of Appeal have not addressed the precise issue that we have here – whether condemnation actions under the NGA are barred by Eleventh Amendment immunity – the one reported district court decision to do so held that Eleventh Amendment immunity is indeed a bar. In Sabine Pipe Line, LLC v. Orange, County, Texas, the pipeline company plaintiff argued that, because the federal government could exercise its eminent domain power to condemn State property, there was “no reason to treat a delegation of the same authority any differently.” 327 F.R.D. at 139. The court disagreed. It explained that, like PennEast’s arguments, the plaintiff’s “theory of the case erroneously assumes that by delegating one power [, that of eminent domain], the government necessarily also delegated the other [, the ability to sue the States].” Id. at 140. The court was careful not to conflate the two powers and, based on Blatchford, concluded that “a private party does not become the sovereign such that it enjoys all the rights held by the United States by virtue of Congress’s delegation of eminent domain powers.” Id. at 141.”

11 PennEast is, of course, at pains to distinguish Sabine. It notes that the property at issue in Sabine had been privately owned at the time of the project’s approval and only later transferred to the State of Texas. Thus, it argues, FERC’s
We are in full agreement. Quite simply, there is no authority for PennEast’s delegation theory of sovereign immunity. Indeed, the caselaw strongly suggests that New Jersey is correct that the federal government cannot delegate to private parties its exemption from state sovereign immunity.

2

Non-delegability makes sense, since there are meaningful differences between suits brought by the United States, an accountable sovereign, and suits by private citizens. Blatchford, 501 U.S. at 785. Suits brought by the United States are “commenced and prosecuted … by those who are entrusted with the constitutional duty to ‘take Care that the Laws be faithfully executed[.]’” Alden, 527 U.S. at 755 (quoting U.S. Const., art. II, § 3). Private parties face no similar obligation. Nor are they accountable in the way federal officials are. See id. at 756 (“Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.”).

Those considerations are clearly in play in the eminent domain context. There, the condemning party controls the predecessor was not aware that it was approving a project that implicated State-owned land and that the State opposed. Moreover, it asserts, the Sabine court did not consider the arguments pressed here. But those arguments are unresponsive to the fundamental concern: whether the federal government can delegate its immunity exemption at all.
timing of the condemnation actions, decides whether to seek immediate access to the land, and maintains control over the action through the just compensation phase, determining whether to settle and at what price. The incentives for the United States, a sovereign that acts under a duty to take care that the laws be faithfully executed and is accountable to the populace, may be very different than those faced by a private, for-profit entity like PennEast, especially in dealing with a sovereign State. In other words, the identity of the party filing the condemnation action is not insignificant.

3

There is, however, a way that Congress can subject the States to suits by private parties. It can abrogate the sovereign immunity of the States. The Supreme Court “ha[s] stressed, however, that abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States, placing a considerable strain on the principles of federalism that inform Eleventh Amendment doctrine[.]” *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (alterations, internal quotation marks, and citations omitted). Accordingly, the Court has held that Congress can abrogate the sovereign immunity of the States “only by making its intention [to do so] unmistakably clear in the language of the statute” in question. 12 *Id.* at 228 (quoting *Atascadero State Hosp. v.*

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12 The same kind of clarity is demanded for waivers of sovereign immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (“[W]e require an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment. As we said in *Edelman v. Jordan*, ‘[c]onstructive
“Unmistakable” clarity is a high bar, and one that must be cleared without resort to nontextual arguments. See Atascadero, 473 U.S. at 246 (“A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.”); see also Dellmuth, 491 U.S. at 230 (“If Congress’ intention is ‘unmistakably clear in the language of the statute,’ recourse to legislative history will be unnecessary; if Congress’ intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of Atascadero will not be met.”).

Moreover, Congress may abrogate state sovereign immunity only pursuant to a valid exercise of federal power. Seminole Tribe, 517 U.S. at 59. Particularly relevant here, Congress cannot abrogate sovereign immunity under its Commerce Clause powers. Id. at 59, 72-73. Instead, the Supreme Court has recognized that Congress can abrogate sovereign immunity only when it acts pursuant to § 5 of the Fourteenth Amendment. See Fitzpatrick v. Bitzer, 427 U.S.

consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here.”” (second alteration in original) (citation omitted)), superseded in other respects by Rehabilitation Act Amendments, 42 U.S.C. § 2000d-7.

13 For a relatively short period of time, the Supreme Court held that Congress could abrogate state sovereign immunity pursuant to the Commerce Clause. Pennsylvania v. Union Gas Co. 491 U.S. 1, 13-15 (1989). But that decision

What we take from those rules is that state sovereign immunity goes to the core of our national government’s constitutional design and therefore must be carefully guarded. Yet accepting PennEast’s delegation theory would dramatically undermine the careful limits the Supreme Court has placed on abrogation. Indeed, “[t]o assume that the United States possesses plenary power to do what it will with its Eleventh Amendment exemption [by delegation] is to acknowledge that Congress can make an end-run around the limits that that Amendment imposes on its legislative choices.” SCS Bus., 173 F.3d at 883. We are loath to endorse a never-before-recognized doctrine that would produce such a result.

4

None of PennEast’s arguments for the delegability of the Eleventh Amendment exception are persuasive. PennEast contends that “[t]here simply is no interference with state sovereignty when the United States itself has found that an interstate infrastructure project is both necessary and in the public’s interest”14 and that New Jersey “faces no real ‘harm’ was overruled. Seminole Tribe, 517 U.S. at 66; see also infra note 20.

14 In support of that proposition, PennEast relies on Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508
… given FERC’s plenary oversight over pipeline projects and their respective routes.” (Answering Br. at 18-19.) And, the company says, if the State is aggrieved, it “has recourse against the federal government” by way of challenging FERC’s decision to grant the Certificate. (Answering Br. at 22.) Those arguments miss the point. This case is not about whether the States have a chance to register their dissent or concerns about pipeline plans. It is about whether the federal government can delegate its ability to hale fellow sovereigns into federal court and force the States to respond. It is the “indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties” that New

(1941). There, according to PennEast, the Supreme Court held there was no Eleventh Amendment bar to a private party condemning State land because the dam project at issue had been authorized by Congress and so “there was ‘no interference with the sovereignty of the state.’” The same reasoning applies here, it asserts, because the NGA authorizes PennEast to condemn property that FERC has found necessary to complete a project that is in the public interest.

That misreads Guy. In Guy, the State of Oklahoma sued to enjoin the construction of a congressionally authorized dam, as well as related condemnations. Id. at 511. While the respondents were private entities, federal government attorneys had instituted the condemnation actions. Id. at 511 n.2. And the United States, not the dam company, was going to “acquire title to the inundated land.” Id. at 511. So while it is true that Oklahoma argued the dam would be a “‘direct invasion and destruction’ of the sovereign and proprietary rights of Oklahoma[,]” id. at 512, that was not because the State was being sued by private parties.
Jersey seeks to avoid. *Puerto Rico Aqueduct*, 506 U.S. at 146 (citation omitted). FERC’s blessing of the project does not speak to that problem in any way.¹⁵

In the same vein, PennEast cites *qui tam* suits under the False Claims Act (“FCA”), 31 U.S.C. §§ 3729–3733,¹⁶ as proof “that the federal government can delegate its authority to sue” the States, provided the parties act on the government’s behalf and under its control, as PennEast says is the case here.

¹⁵ Again, adopting PennEast’s position that federal agency involvement is enough to conclude that the United States has delegated its ability to sue the States to a private entity would fundamentally erode the Eleventh Amendment and the rules regarding abrogation. If PennEast were correct, Congress could simply amend a statute pursuant to its Commerce Clause powers, give an agency some review responsibility, and thereby skirt any limit on Congress’s ability to abrogate state sovereign immunity.

¹⁶ The FCA authorizes private plaintiffs to sue “for the person and for the United States Government” against the alleged false claimant, “in the name of the Government.” 31 U.S.C. § 3730(b)(1). The FCA places several conditions on those suits. Before suing, the private plaintiff must first notify the federal government and allow it to intervene. *Id.* §§ 3730(b)(2), (4). The government can then decide whether to pursue the claim itself or leave it to the individual to pursue on behalf of and in the name of the government. *Id.* § 3730(b)(4). At that point, the government can intervene in the suit only for “good cause.” *Id.* § 3730(c)(3). But the private plaintiff also cannot dismiss the suit without the consent of the government. *Id.* § 3730(b)(1).
(Answering Br. at 36.) We disagree. To begin with, there is a split of authority on whether *qui tam* suits against States are barred by the Eleventh Amendment. *Compare, e.g., United States ex rel. Milam, 961 F.2d at 50* (allowing *qui tam* suits to proceed based on that court’s view that the United States was the “real party in interest”), *with United States ex rel. Foulds, 171 F.3d at 289, 292-94* (concluding that *qui tam* suits are barred by the Eleventh Amendment, based on *Blatchford*). While we take no position on that question now, even the cases upholding *qui tam* suits are of little help to PennEast. As New Jersey highlights, courts upheld suits under the FCA because the suits are brought “in the name of the Government” based on “false claims submitted to the government”; the federal government receives most of any amount recovered; it can intervene in the suit after it has begun; and the case cannot be settled or voluntarily dismissed without the government’s consent. *United States ex rel. Milam, 961 F.2d at 48-49* (citations omitted). None of that is true here: PennEast filed suit in its own name; PennEast will gain title to the land; there is no special statutory mechanism for the federal government to intervene in NGA condemnation actions; and PennEast maintains sole control over the suits. Most importantly, while the Supreme Court has “express[ed] no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment,” it has noted “there is ‘a serious doubt’ on that score.” *Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 787* (2000) (quoting *Ashwander v. TVA, 297 U.S. 288, 348* (1936) (Brandeis, J., concurring)). Accordingly, the attempted analogy to *qui tam* suits falls far short of supporting PennEast’s broad delegation theory.
PennEast is also incorrect that New Jersey’s sovereign immunity simply “does not apply” in condemnation actions because they are in rem proceedings. (Answering Br. at 48.) The cases PennEast cites are confined – by their terms – to the specialized areas of bankruptcy and admiralty law. See Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 445, 450 (2004) (concluding “a bankruptcy court’s discharge of a student loan debt does not implicate a State’s Eleventh Amendment immunity” because “the bankruptcy court’s jurisdiction is premised on the res, not on the persona”); California v. Deep Sea Res., 523 U.S. 491, 506 (1998) (“Although the Eleventh Amendment bars federal jurisdiction over general title disputes relating to state property interests, it does not necessarily follow that it applies to in rem admiralty actions, or that in such actions, federal courts may not exercise jurisdiction over property that the State does not actually possess.”) (emphases added)). In contrast, the Supreme Court has made clear that the general rule is “[a] federal court cannot summon a State before it in a private action seeking to divest

Moreover, States can assert their sovereign immunity in in rem admiralty proceedings, when the State possesses the res. See Aqua Log, Inc. v. Georgia, 594 F.3d 1330, 1334 (11th Cir. 2010) (“In Deep Sea Research, the Supreme Court reaffirmed the vitality of a series of cases dating back to the nineteenth century that hold a government can assert sovereign immunity in an in rem admiralty proceeding only when it is in possession of the res.”). Here, of course, New Jersey possesses the property interests PennEast is seeking to condemn, so PennEast’s argument is wholly unsupported.

18 PennEast argues that *Coeur d’Alene*, in which the Supreme Court held that a tribe’s suit was barred by Eleventh Amendment immunity, does not show New Jersey is entitled to sovereign immunity because, in *Coeur d’Alene*, a state forum was available, the tribe was effectively seeking a “determination that the lands in question are not even within the regulatory jurisdiction of the State[,]” and submerged lands were at issue, a “unique” type of property under the law. (Answering Br. at 39 (quoting *Coeur d’Alene*, 521 U.S. at 282-83.).) But those facts were only important for determining whether the tribe could bring suit pursuant to *Ex parte Young*, 209 U.S. at 155-56, which allows suits against state officials for injunctive relief. *Coeur d’Alene*, 521 U.S. at 281-83. The facts PennEast relies on had nothing to do with the general rule that the Eleventh Amendment applies when a State’s property is at issue. *See Coeur d’Alene*, 521 U.S. at 281-82 (“It is common ground between the parties … that the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State’s consent. The Eleventh Amendment would bar it.); *id.* at 289 (“The Tribe could not maintain a quiet title action in federal court without the State’s consent, and for good reason: A federal court cannot summon a State before it in a private action seeking to divest the State of a property interest.” (O’Connor, J., concurring)).
(plurality). New Jersey’s sovereign immunity remains very much a concern in these in rem proceedings.¹⁹

¹⁹ The only support for PennEast’s position is Islander East Pipeline Co. v. Algonquin Gas Transmission Co., 102 FERC ¶ 61054 (Jan. 17, 2003). In that final order, FERC concluded that the Eleventh Amendment “has no significance” for condemnation actions under the NGA because those suits are not “suit[s] in law or equity” against a State. Id. ¶ 61132. FERC’s conclusion is an outlier and one that was reached with little, if any, analysis. More importantly, it is flatly wrong. FERC did not deign to explain what type of suit a condemnation action under the NGA is, if not a suit at law or equity. And the drafters of the Eleventh Amendment evidently meant that term to be all-encompassing. See Alden, 527 U.S. at 721 (“Each House spent but a single day discussing the [Eleventh] Amendment, and the vote in each House was close to unanimous. All attempts to weaken the Amendment were defeated.” (citations omitted)); see also id. at 722 (“The text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design. Although earlier drafts of the Amendment had been phrased as express limits on the judicial power granted in Article III, the adopted text addressed the proper interpretation of that provision of the original Constitution[.]” (citations omitted)). In any event, condemnation suits have historically been understood as suits in law. See City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710 (1999) (“Just compensation [for a taking] ... differs from equitable restitution.... As its name suggests, ... just compensation is, like ordinary money damages, a compensatory remedy.”); Kohl, 91 U.S. at 376 (“The right of eminent domain always was a right at common
Like the Supreme Court, our sister circuits, and the district court in Sabine, we are thus left in deep doubt that the United States can delegate its exemption from state sovereign immunity to private parties. But we need not definitively resolve that question today because, even accepting the “strange notion” that the federal government can delegate its exemption from Eleventh Amendment immunity, Blatchford, 501 U.S. at 786, nothing in the NGA indicates that Congress intended to do so. “As a first inquiry, we must avoid deciding a constitutional question if the case may be disposed of on some other basis.” Doe v. Pa. Bd. of Prob. & Parole, 513 F.3d 95, 102 (3d Cir. 2008).

Recall that congressional intent to abrogate state sovereign immunity must be “unmistakably clear in the language of the statute.” Blatchford, 501 U.S. at 786 (citation omitted); see also United States v. Carmack, 329 U.S. 230, 243 n.13 (1946) (explaining that statutes granting eminent domain power to non-governmental actors “do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers” and that “[i]n such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority”). If delegation were a possibility, one would think some similar clarity would be in order. But the NGA does not even mention the Eleventh Amendment or state sovereign immunity. Nor does it reference “delegating” the federal government’s ability to sue the States. It does not
refer to the States at all. If Congress had intended to delegate the federal government’s exemption from sovereign immunity, it would certainly have spoken much more clearly. Cf. Dellmuth, 491 U.S. at 232 (rejecting the argument that a statute’s frequent references to the States were clear enough to abrogate sovereign immunity); Guerrero-Sanchez v. Warden York Cty. Prison, 905 F.3d 208, 223 (3d Cir. 2018) (explaining courts must “assume that Congress does not intend to pass unconstitutional laws” given the “cardinal principle of statutory interpretation that when an Act of Congress raises a serious doubt as to its constitutionality, courts will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided” (citation and alterations omitted)). And while the NGA confers jurisdiction where the amount in controversy exceeds $3,000, “it would be quite a leap” to infer from that “grant of jurisdiction the delegation of the federal government’s exemption from the Eleventh Amendment.” Sabine, 327 F.R.D. at 141. In short, nothing in the text of the statute even “remotely impl[ies] delegation[.]” Blatchford, 501 U.S. at 786.

Despite that, PennEast contends that, because the NGA does not differentiate between privately held and State-owned property, Congress intended to make all property subject to a Certificate-holder’s right of eminent domain. The company also argues that the NGA is best understood in light of its legislative history and purpose, as well as by comparing the NGA to two other condemnation statues, both of which include explicit carve-outs for property owned by States. Whatever the force of those arguments – and it is slight, at best20 – it does not

20 As for the legislative history, it demonstrates that Congress intended to give gas companies the federal eminent
domain power. See S. Rep. No. 80-429, at 2-3 (1947) (discussing need to grant natural gas companies the right of eminent domain to ensure the construction of interstate pipelines). But it says nothing about Congress’s intent to allow suits against the States.

And, as one of the amici, the Niskanen Center, argues, the history of Eleventh Amendment jurisprudence explains the difference in language between the NGA and the two statutes PennEast cites, the Federal Power Act ("FPA"), 16 U.S.C. § 791a et seq., and the statute authorizing Amtrak to exercise eminent domain over property necessary to build rail lines, 49 U.S.C. § 24311(a) (the "Amtrak Act"). When Congress passed the NGA and 15 U.S.C. § 717f(h), in 1938 and 1947, respectively, Congress “was legislating under the consensus that it could not abrogate states’ Eleventh Amendment immunity pursuant to the Commerce Clause[.]” (Niskanen Br. at 14.) Because of that, there was no reason to include a carve-out for State-owned property. See Union Gas, 491 U.S. at 35 (Scalia, J., concurring in part and dissenting in part) ("It is impossible to say how many extant statutes would have included an explicit preclusion of suits against States if it had not been thought that such suits were automatically barred.").

Then came Union Gas, which permitted Congress to abrogate state sovereign immunity pursuant to its Commerce powers. Id. at 23 (plurality opinion). Seven years later, however, in Seminole Tribe, the Supreme Court overruled Union Gas and affirmed that Congress can only abrogate state sovereign immunity pursuant to the Fourteenth Amendment. Seminole Tribe, 517 U.S. at 65-66.

The FPA and Amtrak Act, however, “were enacted or amended during [the] eight-year period” between Union Gas.
change the text of the statute. In the absence of any indication in the text of the statute that Congress intended to delegate the federal government’s exemption from state sovereign immunity to private gas companies, we will not assume or infer such an intent. That is to say, we will not assume that Congress intended – by its silence – to upend a fundamental aspect of our constitutional design. Cf. King v. Burwell, 135 S. Ct. 2480, 2494 (2018) (rejecting a proposed interpretation of a statutory scheme because “[i]t is implausible that Congress meant the Act to operate in this manner”); Guerrero-Sanchez, 905 F.3d at 223 (explaining doctrine of constitutional avoidance). Accordingly, we hold that the NGA does not constitute a delegation to private parties of the federal government’s exemption from Eleventh Amendment immunity.21

D

PennEast warns that our holding today will give States unconstrained veto power over interstate pipelines, causing the industry and interstate gas pipelines to grind to a halt – the precise outcome Congress sought to avoid in enacting the NGA. We are not insensitive to those concerns and recognize that our holding may disrupt how the natural gas industry, and Seminole Tribe, a time during which Congress was careful to address state sovereign immunity when drafting legislation. (Reply Br. at 12.) Given that context, the lack of similar language in the NGA is not as persuasive of PennEast’s point as the company would like.

21 Because we hold that New Jersey is entitled to Eleventh Amendment immunity from these suits, we need not address the State’s alternative arguments.
which has used the NGA to construct interstate pipelines over State-owned land for the past eighty years, operates.

But our holding should not be misunderstood. Interstate gas pipelines can still proceed. New Jersey is in effect asking for an accountable federal official to file the necessary condemnation actions and then transfer the property to the natural gas company. *Cf. Kelo v. City of New London*, 545 U.S. 469, 480 (2005) (discussing how broadly the Supreme Court has defined “public purpose” under the Takings Clause). Whether, from a policy standpoint, that is or is not the best solution to the practical problem PennEast points to is not our call to make. We simply note that there is a work-around.

PennEast protests that, because the NGA does not provide for FERC or the federal government to condemn the necessary properties, the federal government cannot do so. But one has to *have* a power to be able to delegate it, so it seems odd to say that the federal government lacks the power to condemn state property for the construction and operation of interstate gas pipelines under the NGA. In any event, even if the federal government needs a different statutory authorization to condemn property for pipelines, that is an issue for Congress, not a reason to disregard sovereign immunity. To be sure, such a change would alter how the natural gas industry has operated for some time. But that is what the Eleventh Amendment demands.

IV. CONCLUSION

Accordingly, we will vacate the District Court’s order insofar as it condemns New Jersey’s property interests and grants preliminary injunctive relief with respect to those
interests, and we will remand for dismissal of claims against the State.
Case No. 19-1191 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: PENNEAST PIPELINE COMPANY, LLC

On Appeal from an Order of the
United States District Court for the District of New Jersey

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INTRODUCTION

The issue in this case strikes at the heart of New Jersey’s sovereign interests: whether a private party can hale the State into federal court in an effort to condemn the State’s property interests. Here, a private entity—PennEast Pipeline Company—obtained federal court orders enabling it to condemn the State’s property interests in 42 parcels of land as part of its effort to build a 116-mile pipeline. The condemnation orders involve a range of New Jersey entities and most affect lands New Jersey that has preserved specifically for recreational, conservation, and agricultural uses. They even involve some property interests that New Jersey paid over one million dollars to obtain. And here is the problem: New Jersey never consented to these lawsuits. Instead, the State opposed the litigation—and asserted its sovereign immunity—at every step of the way. That should have been enough to bar this litigation.

But the federal district court chose to exercise jurisdiction and allow PennEast to proceed with its condemnation actions anyway. The district court held (and the parties agree) that all States enjoy sovereign immunity from suits by private citizens. See Alden v. Maine, 527 U.S. 706 (1999). The district court also held (and the parties agree) that sovereign immunity does not preclude suits against states by the federal government. See Monaco v. Mississippi, 292 U.S. 313 (1934). But the district court then concluded that the federal government could delegate its exemption from state sovereign immunity to a private entity like PennEast. And the district court held that
the Federal Energy Regulatory Commission (FERC) had done so when it issued an order entitling PennEast to build its pipeline. Because the federal government could sue New Jersey to condemn the 42 property interests at issue, the court reasoned, so too could a private citizen to whom the United States has delegated its power.

That decision was wrong. As part of adopting the constitutional plan, States consented to lawsuits by the United States and their sister States. But as the Supreme Court has found, consent “to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select.” Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 785 (1991). Lawsuits by the United States are controlled by “responsible federal officials” who are bound by constitutional obligations and can be held accountable. Lawsuits by private entities are governed by private interests and by unaccountable private individuals. That is why other lower courts have consistently rejected (or cast doubt on) the notion that the federal government can “delegate” its exemption from state sovereign immunity to a private party. This decision is an outlier, and one that undermines New Jersey’s longstanding sovereign rights.

There are multiple reasons to vacate the erroneous ruling below, and there are multiple ways of doing so. This Court could address the constitutional issue head-on and hold that the federal government cannot “delegate” its exemption from state sovereign immunity to a private entity. Alternatively, this Court could hold that the
Natural Gas Act (NGA)—which authorizes private parties to file eminent domain actions, but says nothing about state property interests, state sovereign immunity, or the Eleventh Amendment—does not embody the sort of unequivocal congressional intent needed to delegate this exemption, thus leaving the constitutional question for another day. Finally, there is a third problem: PennEast never attempted to negotiate with New Jersey over most of these 42 property interests before filing condemnation actions, but such negotiations are a jurisdictional prerequisite to suit under the NGA. The district court’s decision should be reversed for any or all of these reasons.

**STATEMENT OF JURISDICTION**

Because New Jersey maintains its immunity from suit, and because PennEast failed to comply with the NGA’s jurisdictional requirements before filing its actions, the district court lacked jurisdiction over this condemnation action. See infra. Other than those two defects, however, the district court maintained jurisdiction over this suit under 15 U.S.C. § 717f(h), which allows the holder of a Certificate of Public Convenience and Necessity to acquire the necessary right of way for a pipeline “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.”

This Court has appellate jurisdiction to review the State’s claim that the lower court impermissibly stripped it of sovereign immunity. See *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (holding that states “may

STATEMENT OF ISSUES

I. Whether this case must be dismissed because New Jersey’s sovereign immunity bars this action by a private party. (JA23.)

II. Whether this case must be dismissed because PennEast failed to comply with the Natural Gas Act’s jurisdictional requirement to negotiate with all property owners before filing condemnation actions. (JA24.)

STATEMENT OF RELATED CASES

Before PennEast can condemn any property interests to build its pipeline, the NGA requires it to obtain a Certificate of Public Convenience and Necessity from FERC. Multiple parties—including New Jersey—challenged FERC’s decision to grant PennEast a Certificate in the D.C. Circuit. See Delaware Riverkeeper Network v. FERC, No. 18-1128. Briefing in that case remains ongoing. Moreover, on January 25, 2019, pursuant to the same Certificate, PennEast filed additional condemnation actions in the District of New Jersey for seven state-park properties owned by the
New Jersey Department of Environmental Protection. (Dkts. 19-01097; 19-01104; 19-01107; 19-01110; 19-01114; 19-01117.) PennEast seeks orders of condemnation and preliminary injunctions for immediate access to each property. The district court (Martinotti, J.) will hold a hearing on May 13, 2019.

Appellants are not aware of any other related case or proceeding that is either completed, pending, or about to be presented before this court or any other court or agency, state or federal.

**STATEMENT OF THE CASE**

I. **FACTUAL BACKGROUND.**

A. **New Jersey’s Preservation Programs.**

New Jersey is the most densely populated state in the United States. Given the constant development pressure, open space and farmland have become increasingly scarce. In response, and for over fifty years, New Jersey has spent billions of dollars to preserve open space and farmland. Under New Jersey’s Constitution, tax dollars are set aside annually for open space and farmland preservation. See N.J. Const. art. VIII, § 2, ¶¶ 6, 7. And multiple New Jersey statutes reflect the State’s view that “the acquisition and preservation of open space, farmland, and historic properties in New Jersey protects and enhances the character and beauty of the State and provides its citizens with greater opportunities for recreation, relaxation, and education.” N.J. Stat. Ann. § 13:8C-2; see also id. (“determin[ing] that it is in the public interest to
preserve as much open space and farmland, and as many historic properties, as possible” and that “as much [open space] as possible shall protect water resources and preserve adequate habitat and other environmentally sensitive areas”.

To further these policies, New Jersey has maintained open space and farmland preservation programs under the State’s Department of Environmental Protection (NJDEP) and its State Agriculture Development Committee (SADC), respectively. NJDEP’s Green Acres program was created in 1961 to authorize the State to acquire (and assist local governments to acquire) land for recreation and conservation. See N.J. Stat. Ann. §§ 13:8A-1 to -56. As of 2017, New Jersey has helped to preserve over 650,000 acres of land. JA94. Similarly, New Jersey enacted the Agriculture Retention and Development Act in 1981 to empower SADC to preserve farmland in the State either by purchasing farmland in fee simple or by purchasing development easements, N.J. Stat. Ann. § 4:1C-11 to -48, thus permanently preserving them for agricultural uses, see N.J. Stat. Ann. § 4:1C-32. As of 2017, SADC and its partners had preserved over 2,500 farms and over 200,000 acres of farmland. JA108. The State has spent over one billion dollars to preserve these farmlands. Id.

The State has also preserved environmentally valuable properties through the Delaware and Raritan Canal Commission (DRCC). In 1974, the Legislature passed the Delaware and Raritan Canal State Park Law, N.J. Stat. Ann. § 13:13A-1 to -15, which created the Canal Park and made the DRCC responsible for its conservation.
§ 13:13A-2. DRCC maintains easements along the stream to protect the water quality, as well as to prohibit addition of new structures and/or to prevent any actions that would harm native vegetation. N.J. Admin. Code § 7:45-9.3.

B. The PennEast Pipeline and Underlying FERC Proceedings.

On September 24, 2015, PennEast Pipeline Company filed an application with FERC to construct an interstate natural gas pipeline. JA211. The main line of its proposed project runs about 116 miles, from Luzerne County, Pennsylvania, to Mercer County, New Jersey, using 36-inch diameter pipes. Id. It would also include a new compressor station and three proposed lateral pipes. Id.

Before PennEast can complete the proposed construction, the NGA requires it to obtain a Certificate of Public Convenience and Necessity (Certificate) from FERC. 15 U.S.C. §§ 717f(c)(1)(A), 717f(h). In evaluating PennEast’s application, FERC recognized the project would disturb approximately 1,588 acres of pristine land, and that its operation would permanently harm 788 acres. JA226. The project would permanently impact 8 acres and temporarily impact 16 acres of wetlands in New Jersey, JA259, and would affect 220 acres of interior forest, JA260. FERC also recognized that it had limited information about the overall environmental impacts

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1 PennEast is a private, corporate conglomerate owned by Red Oak Enterprise Holdings, Inc, a subsidiary of AGL Resources, Inc., NJR Pipeline Company, a subsidiary of New Jersey Resources, SJI Midstream, LLC, a subsidiary of South Jersey Industries, UGI PennEast, LLC, a subsidiary of UGI Energy Services, LLC, and Spectra Energy Partners, LP. JA212.
of the project because PennEast failed to survey a majority of the land along the New Jersey portion of the route. JA247.


II. PROCEDURAL HISTORY.

Upon receipt of its Certificate, PennEast promptly filed condemnation actions in the U.S. District Court for the District of New Jersey for 131 affected properties. JA10. As relevant here, PennEast sought to condemn 42 property interests that were possessed by NJDEP, SADC, DRCC, Department of the Treasury, the Department of Transportation, the Water Supply Authority, and the Motor Vehicle Commission (collectively, “the State” or “Appellants”). JA1-4. The State held two of these 42 properties in fee. JA137; JA155. For the other 40, the State held particular property interests—typically, easements requiring that the land be preserved for recreational, conservation, and/or agricultural uses—that PennEast needed to condemn before it could begin the construction of its proposed pipeline. JA1-4.

In each action, PennEast’s Complaint sought to obtain “[a] permanent right of way and easement … for the purpose of constructing, operating, maintaining, altering, repairing, changing the size of, replacing and removing a 36-inch diameter
pipeline and all related equipment and appurtenances … for the transportation of natural gas, or its byproducts, and other substances.” JA190-91.² PennEast sought “all rights and benefits necessary for the full enjoyment and use of the right of way and easement,” and a “right from time to time … to cut and remove all trees … and any other obstructions that may injure, endanger or interfere with the construction and use of said pipeline and all related equipment and appurtenances thereto.” Id. PennEast sought temporary easements (in all but eight actions) “for use during the pipeline construction and restoration period only for the purpose of ingress, egress and regress and to enter upon, clear off and use for construction,” and the company demanded “[p]ermanent rights of ingress to and egress from the permanent Right-of-Way.” Id. The rights that PennEast was seeking thus directly conflicted with State easements limiting development on the affected parcels.

Finally, PennEast sought to restrict New Jersey’s own rights at the preserved properties. PennEast’s Complaint demanded that the condemnation orders include language to ensure that New Jersey cannot, *inter alia*, “excavate, change the grade of or place any water impoundments or structures on the right of way and easement

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² For the purposes of this brief, and unless otherwise specifically noted, references to the “Complaint” shall refer to PennEast’s Verified Complaint in Appellate Docket No. 19-1191 (District Court Docket No. 18-01597), a copy of which is included at JA187. Appellants take this approach for administrative convenience; PennEast’s Verified Complaints are largely uniform. Any slight differences between the various complaints are immaterial to the issues raised in this appeal.
without the written consent of [PennEast]… plant any trees … on the permanent right of way and easement; or use said permanent right of way … in such a way as to interfere with [PennEast’s] immediate and unimpeded access to said permanent right of way, or otherwise interfere with [PennEast’s] lawful exercise of any of the rights herein granted” without obtaining PennEast’s written approval. *Id.*

Notably, PennEast made little effort to resolve this issue by negotiation before resorting to these condemnation actions. Before filing suit, PennEast had submitted an offer of compensation to the State for just one of the 42 properties it would later seek to condemn—a property that the State partially owned in fee. JA138-39. The company made no offers for the remaining property interests—including easements requiring that certain parcels remain preserved for recreational, conservation, and/or agricultural uses—even though PennEast needed to condemn those very interests before it could begin construction. JA97; JA101; JA110; JA116; JA156.

Simultaneous with the filing of its condemnations actions, PennEast moved for a preliminary injunction for immediate access to the properties. JA202-06. As relevant to this appeal, the State opposed the motion and filed a motion to dismiss the case. First, the State explained, the court did not have jurisdiction to adjudicate the condemnation actions involving New Jersey’s own property interests. JA23. As a matter of constitutional law, a private party cannot hale a State into federal court absent that State’s consent—something New Jersey had not provided. New Jersey’s
sovereign immunity extended to cases adjudicating state property rights, including
\textit{in rem} proceedings. While sovereign immunity would not preclude condemnation
actions filed by the federal government, it would preclude ones filed by PennEast.
Second, the State explained that PennEast failed to comply with its statutory duty to
try obtaining the State’s property interests through contract negotiations before filing

On December 14, 2018, the district court denied the motion to dismiss and
granted PennEast’s application for 117 orders of condemnation and for preliminary
injunctive relief to take immediate possession of the properties. JA5-9. First, the
district court held that New Jersey’s sovereign immunity could not apply because
PennEast “has been vested with the federal government’s eminent domain powers
and stands in the shoes of the sovereign.” JA33. In other words, the United States
had delegated to PennEast its right to sue New Jersey when FERC granted PennEast
its Certificate. Second, the district court held that because the NGA only required
PennEast to negotiate with the “owner of property” before filing these condemnation
actions, PennEast did not have to initiate negotiations with any owners of \textit{interests}
in an affected property. JA48. So even where New Jersey held an property interest—
including an easement—that PennEast would need to condemn to build its pipeline,
PennEast had no duty to try negotiating first.
On December 28, 2018, the State moved for reconsideration on the denial of sovereign immunity. Relying on the Supreme Court’s prior decision in *Blatchford v. Native Villages of Noatak*, 501 U.S. 775 (1991), the State explained that the United States lacked the constitutional authority to delegate its unique exemption from state sovereign immunity. After all, the States’ consent “to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select.” *Id.* at 785. Appellants also sought a stay of the December 14, 2018 order on the same basis. The court denied both motions on January 23, 2019. JA61-64. The district court held that *Blatchford* did not apply to suits brought under the NGA. JA64.

On January 11, 2019, Appellants timely appealed the court’s December 14, 2018 decision. JA1-4. On March 5, 2019, Appellants filed a motion with this Court to stay the district court’s December 14 order pending appeal, and to expedite the appeal. JA510-11. On March 19, 2019, this Court granted a stay in part, preventing construction of PennEast’s pipeline pending appeal, and expedited the appeal. *Id.*

**SUMMARY OF ARGUMENT**

I. New Jersey’s sovereign immunity bars this private party lawsuit. It is black letter law that States enjoy sovereign immunity in suits by private citizens, but not in suits by the United States. The questions in this case are whether the federal government could (as a matter of constitutional law) delegate its exemption from
state sovereign immunity to a private party, and whether the federal government did so (as a matter of statutory interpretation) when it enacted the NGA.

First, the United States cannot delegate this exemption. At the Founding, the States gave an exemption from sovereign immunity only to the United States and to other States. As the Supreme Court has held, consent “to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select.” *Blatchford*, 501 U.S. at 785.

That result is sensible: while federal officers are responsible to the Constitution and accountable to state officials, private parties are bound only by their own incentives. Moreover, permitting the federal government to delegate its exemption from state sovereign immunity would allow Congress to easily evade the limits on its ability to abrogate that immunity. That is why lower courts have repeatedly rejected this same delegation theory. The district court erred in concluding otherwise.

Second, even assuming this “strange notion” were possible, *Blatchford*, 501 U.S. at 786, Congress did not delegate its exemption from state sovereign immunity when it adopted the NGA. Just as Congress must speak with unmistakable clarity when seeking to abrogate state immunity, so too would Congress have to speak with unmistakable clarity to delegate its way around that same immunity. The NGA does not satisfy that test. While the NGA authorizes certain private entities to file eminent domain actions generally, that is insufficient to establish unmistakable congressional

II. Under the NGA, a pipeline company must try to obtain each necessary property interest through negotiations with the relevant “owner of property” before it can condemn those interests. 15 U.S.C. § 717f(h). But PennEast did not attempt to negotiate for 41 of the state-owned property interests it seeks to condemn. *See JA97; JA101; JA110; JA116; JA156*. PennEast contended that because New Jersey only owned *interests* at the affected parcels (i.e., it did not own them in fee simple), it did not qualify as an owner. JA192; JA200. But property is simply an aggregation of distinct interests, and an owner of a property interest is an owner of property. Indeed, in the Takings Clause context, “property” includes non-fee interests, including the same sorts of easements New Jersey maintains here. *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945). It follows that “[t]he term ‘owner’ in statutes relating to the exercise of eminent domain includes any person having a legal or equitable interest in the property condemned.” *Swanson v. United States*, 156 F.2d 442, 445 (9th Cir. 1946). That interpretation yields a simple and workable rule: if a company needs to condemn a particular property interest, it must attempt to negotiate with the
owner of that particular interest before it can file suit. PennEast’s failure to do so is an independently sufficient reason to reverse.

**STANDARD OF REVIEW**

I. This Court “review[s] de novo the legal grounds underpinning a claim of … sovereign immunity.” *Karns v. Shanahan*, 879 F.3d 504, 512 (3d Cir. 2018).

II. While this Court reviews the grant of a preliminary injunction for abuse of discretion, this Court reviews the underlying legal conclusions de novo. *McNeil Nutritionals LLC, v. Heartland Sweeteners LLC*, 511 F.3d 350, 357 (3d Cir. 2007).

**ARGUMENT**

I. **NEW JERSEY’S SOVEREIGN IMMUNITY BARS THIS ACTION BY A PRIVATE PARTY.**

Federal courts lack jurisdiction over suits by a private citizen against a state. Indeed, the Constitution’s structure and history—as well as longstanding doctrine—establish that “States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.” *Alden*, 527 U.S. at 712-13. As the Court has held, that immunity is confirmed by, but is not limited to, the Eleventh Amendment. *See, e.g., id.*; U.S. Const. amend. XI (“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). State agencies, as well as state officials acting in their official capacities,
enjoy full immunity from suit, except where they consent to the suit or where the litigation seeks only prospective injunctive relief based on an ongoing constitutional violation. See Will v. Mich. Dep’t of State Police, 491 U.S. 58, 70-71 (1989); Ex parte Young, 209 U.S. 123 (1908).

Typically, that would be the end of the story. Sovereign immunity, after all, is not merely a defense against liability; it is an immunity from suit altogether. Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 766 (2002); see also Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 58 (1996) (“The Eleventh Amendment does not exist solely in order to preven[t] federal-court judgments that must be paid out of a State’s treasury [and instead] also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.”). There is no question that New Jersey is a sovereign and that PennEast is a private party. There is no claim that New Jersey consented to this action; it has consistently asserted its immunity. And there is no suggestion that Ex parte Young applies.

But the district court allowed PennEast to hale New Jersey into federal court anyway. The court noted that, at the Founding, the States granted permission to the federal government and to their sister States to sue them. The court then concluded that the United States can delegate that power to any private party it selects, and that the NGA embodies just such a delegation. That is wrong. And that is the only basis
on which the district court relied to deny New Jersey its immunity, because no other justification exists here. PennEast’s condemnation actions should be dismissed.

A. The federal government cannot delegate its exemption from state sovereign immunity to a private party, and it did not do so here.

To find that PennEast can hale the State into court against its will, this Court would have to reach two conclusions. First, this Court must conclude that the United States could (as a matter of constitutional law) delegate its special exemption from state sovereign immunity to this private company. Second, this Court must conclude that the United States did (as a matter of statutory interpretation) delegate that special exemption to this company. Both conclusions fail as a matter of law.

i. The federal government cannot delegate its exemption from state sovereign immunity to a private party.

Begin with the Court’s decision in Blatchford, which addressed this issue. In Blatchford, a group of Native villages filed suit against an Alaska state official to recover money allegedly owed under a state revenue-sharing statute. See 501 U.S. at 778. To avoid sovereign immunity, the villages claimed that the U.S. government had delegated its authority to sue the State to the tribes under 28 U.S.C. § 1362, a jurisdictional statute. Id. at 783. The villages argued that if the federal government has an exemption from Eleventh Amendment restrictions, then its delegates do as well. The Court disagreed, expressing clear “doubt” that the federal government’s “sovereign exemption can be delegated—even if one limits the permissibility of
delegation … to persons on whose behalf the United States itself might sue.” *Id.* at 785 (emphasis in original). After all, States “entered the federal system with their sovereignty intact,” and their limited surrender of immunity encompassed “only two contexts: suits by sister States … and suits by the United States.” *Id.* at 782; *see also,* e.g., *Alden,* 527 U.S. at 755 (“In ratifying the Constitution, the States consented to suits brought by other States or by the federal government.”). Importantly, “[t]he consent, ‘inherent in the convention,’ to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person’s benefit is not consent to suit by that person himself.” *Blatchford,* 501 U.S. at 785 (emphases added).3

First principles confirm what precedent makes plain. There are meaningful—and significant—differences between lawsuits brought by a government and suits by a private citizen, even one with delegated authority. And those differences were key at the Founding. Indeed, as the Court has explained, “the fear of private suits against nonconsenting States was the central reason given by the Founders who chose to preserve the States’ sovereign immunity.” *Alden,* 527 U.S. at 756. By contrast, States

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3 After expressing doubt that the federal government can ever delegate its exemption, the Court refuted the claim that Congress had done so in adopting 28 U.S.C. § 1362. *See id.* at 785-86 (noting that, even “assuming that delegation of exemption from state sovereign immunity is theoretically possible, there is no reason to believe that Congress ever contemplated such a strange notion” in passing § 1362).
could consent to suits by the United States as they are “commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to ‘take Care that the Laws be faithfully executed,’” id., at 755 (quoting U.S. Const., Art. II, § 3)—a duty private parties do not have. So “responsible federal officers” decide whether to sue, what claims to bring, and when to settle. Blatchford, 501 U.S. at 782. And not only could States trust federal officers, but they could also be sure of their accountability: “Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.” Alden, 527 U.S. at 756. If State officials, residents, or elected senators and representatives oppose a lawsuit against a State, they know which officials to hold accountable, and they have tools for doing so. Cf. Printz v. United States, 521 U.S. 898, 928-30 (1997) (describing the need for clear lines of political accountability between the States and the United States). That is simply not true for a private entity—even one the federal government selects.

There is another reason the federal government cannot delegate its exemption: such an approach would eviscerate the careful limits the Court has placed upon the abrogation of sovereign immunity. As discussed in Section I(B)(i), infra, Congress typically “lacks power … to abrogate the States’ sovereign immunity.” Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000). Delegation would present a simple end run
around that rule. Take, for example, the Indian Gaming Regulatory Act, in which Congress sought to authorize tribes to file certain suits against the States. In *Seminole Tribe*, the Court held that Congress did not have power to abrogate state sovereign immunity through passage of IGRA. 517 U.S. at 47. But under the delegation theory, Congress could achieve the same result by delegating to tribes the U.S. government’s exemption from state sovereign immunity. So too here: the NGA does not abrogate immunity, see Section I(B)(i), infra, yet the district court authorized this delegation anyway. But abrogation rules safeguard the “proper balance between the supremacy of federal law and the separate sovereignty of the States,” *Alden*, 527 U.S. at 757, and Congress should not so easily be able to evade these limits on its power.4

Multiple circuits—relying on *Blatchford*, *Alden*, and these core principles—have thus rejected (or at least cast doubt on) the notion that the federal government can delegate its exemption to a private party. *See, e.g.*, *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 617 F.3d 114, 134-35 (2d Cir. 2010); *Tenn. Dep’t of Human Servs. v. U.S. Dep’t of Educ.*, 979 F.2d 1162, 1166 (6th Cir. 1992) (*TDHS*); *Jachetta*

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4 The practical implications for sister States are just as troubling. If the United States could “delegate” the exemption from state sovereign immunity that it received at the Founding, it would appear States can do so as well. That could have implications for inter-state disputes, like those over water rights. *See, e.g.*, *Florida v. Georgia*, 138 S. Ct. 2502 (2018). Imagine that a State chooses to sell particular water rights to a private company. Could the State, at the same time, delegate to that private company the right to sue its sister State for damages because the latter had taken more than its “equitable share of the basin’s waters”? *Id.* at 2508. That appears to flow from the logic of PennEast’s position but would be an unfathomable result.
v. United States, 653 F.3d 898, 912 (9th Cir. 2011) (dicta); Chao v. Va. Dep’t of Transp., 291 F.3d 276, 282 (4th Cir. 2002) (dicta). TDHS is particularly instructive. There, a U.S. Department of Education arbitration panel issued an award ordering a state agency to pay a blind vendor damages under the applicable federal statute. 979 F.2d at 1165. The Sixth Circuit had to resolve whether the vendor could enforce the award in federal court. Ruling that the Eleventh Amendment bars such enforcement, the Sixth Circuit—in a decision issued just after Blatchford—distinguished between the Department of Education seeking to enforce the award and the vendor doing so. While the former is permitted “because a state implicitly surrenders its immunity to such suits when it joins the Union,” the latter was not justified because consent “to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select.” Id. at 1167 (quoting Blatchford, 501 U.S. at 785). Even though the federal government could bring the enforcement action to support the blind vendor, “it does not follow that [the private beneficiary] may collect the award himself.” Id.

The only decision Appellants have identified to address this issue in a Natural Gas Act case (aside from the decision below) is in accord. See Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange Cnty., 327 F.R.D. 116 (E.D. Tex. Sept. 6, 2017). There, as here, a pipeline company argued that it had power to abrogate the State’s immunity, asserting that “because the federal
government can exercise its right of eminent domain against state land in federal court, so can a delegee of the federal government’s power of eminent domain.” Id. at 139. Not so. The company, the court held, was “conflat[ing] two separate rights held by the federal government: the right to exercise eminent domain and the right to sue states in federal court.” Id. The company was right to claim that “the federal government’s power of eminent domain is supreme above the states’ power.” Id. at 140. But while the U.S. government “may [also] exercise its right to condemn state lands in federal court,” that distinct authority “is not due to the supreme sovereign’s right to condemn state land. Rather, it is because the federal government enjoys a special exemption from the Eleventh Amendment.” Id. That special exemption “is not an inherent attribute of its sovereignty, but, rather, a permission granted to it by the states.” Id. And for that reason, “a private party does not become the sovereign such that it enjoys all the rights held by the United States by virtue of Congress’s delegation of eminent domain powers.” Id. at 141. The United States can delegate its inherent eminent domain power. But it cannot delegate the exemption from state sovereign immunity that the States permitted it to have.

The court below thus erred in concluding that PennEast could sue New Jersey despite the State’s immunity. The court accepted that PennEast was a private citizen and that New Jersey had not consented to this suit. But the court held that PennEast could still hale New Jersey into court. The court noted (as Appellants do here) that
“Eleventh Amendment immunity applies only to suits by private citizens” and that it does not apply if the United States “pursu[es] eminent domain rights.” JA33. But the court held that this distinction somehow supported PennEast—because PennEast “ha[d] been vested with the federal government’s eminent domain powers and stands in the shoes of the sovereign.” Id. The district court thus made the same fundamental mistake as the company in Sabine in “conflat[ing] two separate rights held by the federal government: the right to exercise eminent domain,” which FERC could grant to PennEast, “and the right to sue states in federal court,” which FERC could not. 327 F.R.D. at 139. That error led the court to reach a conclusion that is inconsistent with Blatchford and its progeny and the ideas of responsibility and accountability on which those decisions consistently rely.

Against all this, the lower court offered only one answer: that “Blatchford is limited in application to 28 U.S.C. § 1362,” that Blatchford “did not discuss what Congress could have contemplated when they enacted the Natural Gas Act,” and that “[t]he NGA is unique and distinguishable.” JA64. But while Blatchford did, in fact, arise under §1362—a statute quite different from the NGA—that was not the only basis for its decision. Blatchford offered two justifications: first, the Court expressed “doubt, to begin with, that that sovereign exemption can be delegated,” and second, the Court explained that “in any event, assuming that delegation of exemption from state sovereign immunity is theoretically possible, there is no reason to believe that
Congress ever contemplated such a strange notion” in passing § 1362. 501 U.S. at 785-86 (emphasis added). While the second assertion turns on statutory language, the first—whether the exemption can be delegated—goes well beyond it. Still more, Blatchford and Alden’s views on responsibility and accountability make just as much sense under the NGA as under § 1362. That is why circuits have applied Blatchford to other statutory contexts, and why Sabine applied it to the NGA.5

That is not to say PennEast is out of luck, or that the substantive claims this company raises can never be evaluated. All that results from the proper application of sovereign immunity is a determination that PennEast lacks the power to maintain this condemnation action against New Jersey’s interests. Still, sovereign immunity does not prevent the United States from condemning these same property interests, paying New Jersey just compensation, and transferring the interests to PennEast. See Blatchford, 501 U.S. at 785 (noting that the States did “consent to suit by the United States for a particular person’s benefit”); TDHS, 979 F.2d at 1167 (confirming that

5 As it did when opposing Appellants’ stay motion before this Court, PennEast likely will argue that TDHS and the other lower court decisions listed above also involved distinct statutory schemes and/or distinct facts. But Appellants agree that most of the cases involved other laws or facts (except, of course, Sabine). Those differences are irrelevant, however, since they speak only to whether the Government attempted to delegate its exemption. The statutory differences do not bear on whether, as a matter of constitutional law, the federal government can delegate that power. Said another way, the “obstacle to suit [was] a creation not of Congress but of the Constitution,” which is why Blatchford doubted that the Government could delegate its exemption to private actors via any type of statute. 501 U.S. at 785.
sovereign immunity “does not bar such an action even if the money collected by the federal government ultimately will pass to a private person”).

That is what happened in Chao. There, courts had previously dismissed two labor lawsuits by private parties against the Virginia Department of Transportation based on state sovereign immunity. 291 F.3d at 278. So the U.S. Secretary of Labor filed suit, seeking an injunction and back wages on behalf of those same parties. Id. at 279. Virginia argued “that this suit for back wages is essentially a private suit” and is thus barred by sovereign immunity—adding that the United States was not a “real party in interest” and was just “asserting a ‘private interest’” for others. Id., at 280. The Fourth Circuit disagreed, concluding that the United States maintained its exemption from state sovereign immunity because the U.S. government had “taken ‘political responsibility’ for this suit.” Id. at 282; see also id. (noting the “presence vel non of political responsibility” explains the “expression of doubt, in Blatchford, that the Federal Government’s exemption from state sovereign immunity can be delegated to private individuals”).

That is as it should be. If the United States wants to sue to condemn these state interests, it can do so—but it must take ownership. Responsible government officials

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6 The federal government can also use other tools at its disposal to encourage States to waive their sovereign immunity. See, e.g., Alden, 527 U.S. at 755 (“Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States’ voluntary consent to private suits.”) (citing South Dakota v. Dole, 483 U.S. 203 (1987)). It did not use them here.
must decide whether to hale New Jersey into court, whether to engage in good-faith negotiations over the property interests (which PennEast did not do), and when to settle, and they must be accountable for their choices. They may not simply allow a private company to file suit based on its own private interests.

   ii. The federal government did not delegate its exemption from state sovereign immunity.

Even assuming for a moment that Congress can in fact delegate its exemption from state sovereign immunity, there is a high bar for finding that Congress intended to do so—PennEast must provide unequivocal evidence of such intent. Because the Court has suggested that Congress can never delegate this exemption, it has not yet articulated a test to determine whether Congress intended to work such a delegation. See Blatchford, 501 U.S. at 785-86 (finding the law at issue did not “remotely imply delegation,” without establishing a test for determining whether Congress intended “such a strange notion”). But the Court has previously required such unmistakable evidence of Congressional intent to find any abrogation of state sovereign immunity. The same test would logically apply to purported delegations.

   In the rare cases when Congress enjoys the power to abrogate state sovereign immunity, Congress can do so “only by making its intention unmistakably clear in the language of the statute.” Atascadero State Hosp., 473 U.S. at 242; see also id. (explaining that Congress must “unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court”); Dellmuth, 491
U.S. at 230 (reaffirming “that in this area of the law, evidence of congressional intent must be both unequivocal and textual.”). The same is true for waivers of immunity, which the Court will not recognize unless “the State’s consent [is] unequivocally expressed.” *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

The Court has justified those twin protections for sovereign immunity on the basis that loss of immunity “upsets the fundamental constitutional balance between the Federal Government and the States” and thus “plac[es] a considerable strain on the principles of federalism that inform Eleventh Amendment doctrine.” *Dellmuth*, 491 U.S. at 227. That reasoning applies any time the federal government “mak[es] one sovereign appear against its will in the courts of the other” by “negat[ing]” a State’s sovereign immunity—whether via waiver, abrogation, or delegation. *Pennhurst*, 465 U.S. at 99-100. It follows that the standard for finding a Congressional intent to delegate would be equally stringent.

The NGA does not remotely satisfy the unmistakable clarity requirement. The NGA includes only a general authorization for private parties to file eminent domain actions; it states that a company that obtains a Certificate from FERC could sue to “acquire [necessary rights-of-way] by the exercise of the right of eminent domain.” 15 U.S.C. § 717f(h). But that general authorization to file suit is the sort of statutory language the Court has held to be insufficient for establishing an intent to eliminate state sovereign immunity. *See Atascadero State Hosp.*, 473 U.S. at 246 (holding “[a]
general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment”). “While the statute does, in fact, confer federal jurisdiction where the amount in controversy exceeds $3,000, it would be quite a leap to imply into this grant of jurisdiction the delegation of the federal government’s exemption from the Eleventh Amendment.” Sabine, 327 F.R.D. at 141. And the law “makes no reference whatsoever to either the Eleventh Amendment or the States’ sovereign immunity”—two things that the Court has held to be crucial when searching for unequivocal intent. Dellmuth, 491 U.S. at 231; see also Sabine, 327 F.R.D. at 141 (“Nowhere in this provision, or in other sections of the NGA, is Eleventh Amendment immunity mentioned. Consequently, the court is without the authority to read this exemption into the statute.”). The NGA therefore establishes a general authorization to file condemnation actions—which Appellants do not contest—but not to file actions to adjudicate state property interests.

The canon of constitutional avoidance further supports finding that Congress did not intend to delegate its exemption from state sovereign immunity in the NGA context. Courts must “assume that Congress does not intend to pass unconstitutional laws” in light of the “cardinal principle of statutory interpretation that when an Act of Congress raises a serious doubt as to its constitutionality, courts will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” Guerrero-Sanchez v. Warden York Cnty. Prison, 905 F.3d 208, 223 (3d
Cir. 2018) (citation and modifications omitted). So this Court “must avoid deciding a constitutional question if the case may be disposed of on some other basis.” *Id.* (quoting *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 102 (3d Cir. 2008)). That doctrine fits this case perfectly: if this Court holds that Congress intended to delegate the exemption from state sovereign immunity when it adopted the NGA, it must also decide whether the delegation is constitutionally proper; if it finds Congress did not so intend, it need not reach that question at all. So long as the NGA is “susceptible” to an interpretation that does not delegate the federal government’s exemption from state sovereign immunity—and it clearly is—this Court must adopt it. *Id.*

B. Absent a delegation from the federal government, PennEast cannot overcome New Jersey’s sovereign immunity.

Because the district court’s only basis for denying immunity was its mistaken belief that the United States could and did delegate its exemption to PennEast, the foregoing provides sufficient reason to reverse. But should any doubt remain, there is no other justification for negating New Jersey’s sovereign immunity here.

i. The Natural Gas Act does not abrogate state sovereign immunity.

In determining whether a statute abrogates sovereign immunity, courts first ask if Congress “acted pursuant to a valid grant of constitutional authority” for doing so. *Kimel*, 528 U.S. at 73; *see also Seminole Tribe*, 517 U.S. at 72 (“Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private
parties against unconsenting States.”). To date, the Supreme Court “has recognized only one valid source of Congressional power that would allow the abrogation of a state’s immunity from suit by its citizens—Section 5 of the Fourteenth Amendment.” Sabine, 327 F.R.D. at 143 (citing Coleman v. Ct. of App. of Md., 566 U.S. 30, 35 (2012)). And the Court has repeatedly “held that Congress lacks power under Article I to abrogate the States’ sovereign immunity.” Kimel, 528 U.S. at 78 (citing Seminole Tribe, 517 U.S. at 72; Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank, 527 U.S. 627, 636 (1999); Alden, 527 U.S. at 712). That includes the commerce power; if a statute “rests solely on Congress’ Article I commerce power,” private parties “cannot maintain their suits against the[] state.” Id. at 79.

That describes this situation perfectly. No one disputes that Congress enacted the NGA pursuant to its Commerce Clause powers. See, e.g., Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm’n, 341 U.S. 329, 334 (1951). It follows that the NGA could not have abrogated New Jersey’s sovereign immunity.7

ii. Absent delegation or abrogation, New Jersey enjoys sovereign immunity in this dispute over its property rights.

As the Supreme Court has explained, the Eleventh Amendment generally bars adjudication of state property interests without that state’s consent. See California v.
Deep Sea Research, Inc., 523 U.S. 491, 506 (1998) (confirming that “the Eleventh Amendment bars federal jurisdiction over general title disputes relating to state property interests”). Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997), is illustrative. In that case, the Court found that state sovereign immunity barred an Indian Tribe’s suit, in which the Tribe sought a declaration that it was entitled to exclusive use of certain Idaho lands. Id. at 264-65. While state sovereign immunity does not prohibit claims “where prospective relief is sought against individual state officers in a federal forum based on a federal right” (known as the “Ex Parte Young fiction”), id. at 276-77, the State’s immunity still barred this property rights lawsuit, “which implicates special sovereignty interests,” id. at 281. That made sense, Justice Kennedy’s opinion and Justice O’Connor’s controlling concurrence explained: just as the “Eleventh Amendment would bar” a “quiet title suit against [a State] without the State’s consent,” so too did it bar any functionally equivalent claims.8 Id. at 281-82; accord id. at 289 (O’Connor, J., concurring) (agreeing that the “Tribe could not maintain a quiet title action in federal court without the State’s consent”). No matter how the claim is styled, Justice O’Connor wrote, “[a] federal court cannot summon a State before it in a private action seeking to divest the State of a property interest.” Id. at 289. Justice Kennedy agreed, adding that states had immunity against claims

8 A “quiet title” action is one in which a party seeks to establish its title to either real or personal property against anyone else who may have such a claim to the property, thereby “quieting” any future challenges or claims to that title.
that sought to “shift … substantially all benefits of ownership and control” from state properties and weaken the State’s “sovereign interest” in land—a result “as intrusive as almost any conceivable retroactive levy upon funds in its Treasury.” *Id.* at 282.

This sovereign immunity extends to any suits against the sovereign’s property (*i.e.*, *in rem* proceedings). *See United States v. Alabama*, 313 U.S. 274, 282 (1941) (“A proceeding against property in which the United States has an interest is a suit against the United States.”); *Minnesota v. United States*, 305 U.S. 382 (1939) (same); *Belknap v. Schild*, 161 U.S. 10, 16 (1896) (agreeing that the United States, “like all sovereigns, cannot be impleaded in judicial tribunal, except so far as they have consented” and that the “same exemption from judicial process extends to [its] property”); *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869) (finding “no distinction between suits against the government directly, and suits against its property.”). That means “an action—otherwise barred as an *in personam* action against the State—cannot be maintained through seizure of property owned by the State.” *Fla. Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699 (1982) (plurality); *see also, e.g.*, *Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 761 F.3d 218, 221 (2d Cir. 2014) (in tribal sovereign immunity case, “declin[ing] to draw … a distinction between *in rem* and *in personam* proceedings”). Any other rule would risk allowing state sovereign immunity to “easily be circumvented; an action for damages could be brought simply
by first attaching property that belonged to the State and then proceeding in rem.”

_Treasure Salvors_, 458 U.S. at 699.⁹

Sovereign immunity thus bars this claim. PennEast’s complaint seeks federal court orders to condemn state property interests in 42 parcels of land. New Jersey spent millions of taxpayer dollars to permanently preserve most of these lands for recreation, conservation, and farmland uses at the affected properties. See JA97-JA98; JA101-02; JA110-12; JA116-19. New Jersey owns in fee two of them, and it maintains enforceable property rights that run with the land—and that allow State agencies to exclude certain uses, including the development PennEast proposes—at almost all of the remainder. _Id._; JA137; JA155. In choosing to exercise jurisdiction here, the district court thus subjected New Jersey to “general title disputes relating to state property interests.” _Deep Sea Research_, 523 U.S. at 506. Said another way, the court “summon[ed] a State before it in a private action seeking to divest the State of a property interest.” _Coeur d’Alene_, 521 U.S. at 289 (O’Connor, J., concurring).

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⁹ The rare times that the Supreme Court permitted _in rem_ proceedings against state property interests are the exceptions that prove the rule: an admiralty action where a state’s possession of maritime artifacts was unauthorized even under state law, see _Treasure Salvors_, 458 U.S. at 689; an admiralty action where the state did not even possess the property, _Deep Sea Research_, 523 U.S. at 506; and an undue hardship determination by a bankruptcy court, see _Tenn. Student Assistance Corp. v. Hood_, 541 U.S. 440, 443 (2004). None of those unique facts, of course, apply in this action: this is not an admiralty or bankruptcy case, the property interests are authorized by state law, and the property interests are (but for this suit) in the State’s control. Most importantly, these cases repeatedly confirmed the general rule that States maintain immunity in adjudications over their property rights.
And by ultimately siding with PennEast, the court agreed to “shift … substantially all benefits of ownership and control” in these property interests away from the State. *Id.* at 282 (Kennedy, J.). That was in error: this condemnation should never have been allowed to proceed absent New Jersey’s consent.

**II. PENNEAST FAILED TO COMPLY WITH THE REQUIREMENT TO NEGOTIATE WITH ALL PROPERTY OWNERS BEFORE FILING CONDEMNATION ACTIONS.**

The NGA sets out three jurisdictional prerequisites for any pipeline company before it can file condemnation actions in federal court. As relevant here, a company like PennEast can only file suit if it “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” its pipeline. 15 U.S.C. § 717f(h). But despite the statutory language, PennEast did not even attempt to contract with New Jersey for 41 of the 42 state property interests it sued to condemn. *See JA97; JA101; JA110; JA116; JA156.* Neither the parties nor the district court dispute this. Yet at PennEast’s urging, the court allowed the condemnations to proceed anyway.

The court exclusively relied on the fact that New Jersey did not hold those parcels in fee; rather, New Jersey held specific property interests at each one (largely, easements to prevent development). To the district court, that distinction makes all

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10 The NGA also requires the company to obtain a Certificate and to establish that the value of the property as claimed by the owner is more than $3,000. *See id.*
the difference: “[t]o satisfy its burden under § 717f(h), PennEast need only show it ‘cannot acquire by contract, or is unable to agree with the owner of property.’ … There is no obligation to make a showing as to all interest holders.” JA48 (quoting 15 U.S.C. § 717f(h)). According to the lower court, if the State owns a parcel of land in fee, PennEast has to make it an offer. But if the State instead owns interests in that parcel, then PennEast can simply ignore the State—even if PennEast will eventually have to condemn those very interests in court.

The approach taken below misunderstands the NGA’s text and structure, as well as principles of property law. The NGA says that before PennEast can condemn a property, it must attempt to negotiate with that “owner of property.” 15 U.S.C. § 717f(h). It is hornbook law that “property” is not limited to tangible real property; rather, a “common idiom” accurately “describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property.” United States v. Craft, 535 U.S. 274, 278 (2002); see also, e.g., Dickman v. Comm’r, 465 U.S. 330, 336 (1984) (‘‘Property’ is more than just the physical thing—the land, the bricks, the mortar—it is also the sum of all the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible.’’). Traditionally, that includes easements—i.e., “non-possessory acquired interest in land of another.” Nichols on Eminent Domain, §5.07[2][a] (Matthew Bender 3d ed., last updated May 2019). Property is simply a collection of interests—of which easements are one.
The interpretation of the Takings Clause—which permits the eminent domain of “property,” see U.S. Const. amend. V—is in accord. In that context, “[a] private easement in real estate is property in the constitutional sense,” such that it could be condemned and compensation will be owed for its loss. Nichols, supra, §5.07[2][b] (emphasis added). That was true in the years before passage of §717f(h) of the NGA in 1947, during which time the Court held that the term “property … is addressed to every sort of interest the citizen may possess,” including any of “the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.” United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945); see also Panhandle E. Pipe Line Co. v. State Highway Comm’n of Kan., 294 U.S. 613, 618 (1935) (finding a “private right of way is an easement and is land” requiring compensation); United States v. Welch, 217 U.S. 333, 339 (1910) (same). And it was true in the years after, when the Court confirmed that easements and similar interests qualify. See United States v. Va. Elec. & Pwr. Co., 365 U.S. 624, 627 (1961) (calling it “indisputable” that “a flowage easement is ‘property’ within the meaning of the Fifth Amendment,” and “destruction of that easement would ordinarily constitute a taking of property”); Nichols, supra, § 5.01[5][d][ii] (“Real property is subject to the power of eminent domain, as are all rights or interests in the property. All of these interests must be paid for when the property is acquired.…”)
It follows inexorably that “easement holders have been held to be ‘owners’ as that term is used in condemnation statutes.” United States v. Certain Parcels of Land in Fairfax Cnty., 345 U.S. 344, 349 (1953); see also Swanson v. United States, 156 F.2d 442, 445 (9th Cir. 1946) (holding—the year before enactment of § 717f(h)—that use of “[t]he term ‘owner’ in statutes relating to the exercise of eminent domain includes any person having a legal or equitable interest in the property condemned”). Section 717f(h) plainly fits that bill.

To be sure, that general rule does not apply to every statute. If the “scheme of the Act” indicates that Congress would not have wanted the statutory language to sweep in easement owners, Fairfax Cnty., 345 U.S. at 349, then the Court has held as much. Fairfax County involved the meaning of the Lanham Act of 1940, which permitted the Federal Works Administrator to condemn any properties only after it obtained the consent of all the owners. Id. at 347-48. In that context, the Court held, Congress could not have meant to cover every interest holder. Id. Requiring consent from “the holder of every servitude to which the property might be subject,” after all, may “make preliminary negotiations so cumbersome as to virtually nullify the power” Congress had granted the agency to condemn public works. Id., at 349.\(^{11}\)

\(^{11}\) While Fairfax County has rarely been cited, let alone for any relevant propositions, the Fifth Circuit has understood Fairfax County in the same way. See United States v. 194.08 Acres of Land, More or Less, Situated in St. Martin Parish, 135 F.3d 1025, 1032 (5th Cir. 1998) (explaining that Fairfax County applies to statutes that require pre-condemnation consent because “requiring the government to obtain the consent
But here, the structure of the statute actually supports interpreting “owner of property” in the traditional way, *i.e.*, to include easement owners. For one, the central idea of § 717f(h) is clear: if a private company wishes to condemn a property interest, it must try negotiating for the interest first, so that eminent domain could be avoided. Unlike the Lanham Act, the NGA does not require PennEast to obtain consent before suit; PennEast just needs to try. See 15 U.S.C. § 717f(h) (permitting condemnation if company cannot obtain contract). That renders *Fairfax County* inapposite, because reading “owner of property” in the NGA to include easement owners will not make negotiations “cumbersome” or undermine the grant of eminent domain authority. If an interest owner “wants to hold out and extract windfall profits,” *St. Martin Parish*, 135 F.3d at 1032, it is out of luck, since the company can file a condemnation action instead. (Indeed, after multiple fee owners resisted PennEast’s offers, PennEast filed suit.) For another, the NGA empowers a private entity to exercise eminent domain—another reason why Congress would have required at least trying to resolve all of the affected property interests through negotiation before resorting to court.

The contrary approach the district court endorsed—in which PennEast does not have to make offers to interest holders—undermines the statutory scheme. Take every servitude holder … would greatly impede the ability of the government to acquire land because the owner of any servitude could hold out and extract windfall profits for his or her consent, no matter how much the owners of other interests in the property desired to sell their interests”).
the real-world example of a 100-acre farm in Hopewell. In 2009, the SADC paid the farm owner $1,028,825 in exchange for a Deed of Easement, which gave New Jersey development rights over that farm and prohibited development for nonagricultural purposes. JA111. According to the district court, PennEast need only try negotiating with the farmer (as fee owner) and not SADC (as interest holder). But the results are untenable. If the farmer accepted PennEast’s offer, nothing would happen, because that farmer cannot grant PennEast its desired right-of-way; all the farmer can give is a property interest bound by SADC’s restrictions. See, e.g., State v. Quaker Valley Farms, LLC, 235 N.J. 37, 58 (2018) (confirming SADC can enforce deed restrictions against a farmer to prevent development). No matter whether its offer is accepted, PennEast would still have to file this suit. Such limited efforts at negotiation achieve nothing and would transform §717f(h)—which seeks to prevent contentious eminent domain suits and preserve judicial economy—into empty formalism. Only one rule gives full effect to §717f(h): if PennEast will need to condemn a particular interest in order to build its pipeline, PennEast must make a pre-filing offer to the owner of that interest.\footnote{12} The traditional understanding of a property owner—which covers the owner of a property interest—thus fits the structure of the NGA perfectly.

\footnote{12} Appellants concede that PennEast does not need to defeat the judgment interests held by Treasury (Dist. Dkt. No. 18-2014) and the Motor Vehicle Commission (Dist. Dkt. No. 18-1806) to build its pipeline, meaning neither would be considered owners under the NGA. However, Appellants maintain that jurisdiction over these interests remains improper due to the State’s sovereign immunity. See Part I, supra.
The court below should have dismissed the complaints for this independent reason. PennEast’s complaint, which often distinguishes between “landowners” and “interest holders,” proves as much. JA192. While the complaint alleges PennEast “contacted the Landowners several times in an effort to negotiate in good faith” and was “unable to acquire the Rights of Way by contract or to obtain an agreement with the Landowners on the amount of compensation to be paid,” the company makes no such allegations as to “interest holders.” JA199-200. That is no mere pleading error: PennEast did not make offers to the State for its non-fee interests. See JA97; JA101; JA110; JA116; JA156. In this appeal, New Jersey has roughly 40 affected interests designed to preserve lands for recreational, conservation, or agricultural uses. The NJDEP’s Green Acres Program maintains interests to restrict lands to recreation and conservation purposes, N.J. Stat. Ann. §§ 13:8C-31 to -32, while SADC possesses easements that prohibit non-agricultural development, N.J. Admin. Code § 2:76-6.15. New Jersey spent millions to secure these interests, and at the very least, the NGA required PennEast to try to negotiate with New Jersey over the interests before

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13 To take one illustrative example, in 2003, NJDEP’s Green Acres Program paid $229,372.50 to acquire a Conservation Easement on 108 acres in West Amwell to, inter alia, protect the water supply. JA101-02. That easement prohibits “grading, mining excavation, dredging or removal or disturbance of top soil, gravel, sand, loam, rock or other materials or minerals from, in, on, over or beneath the Property.” JA496. Notably, the Green Acres Program separately paid $1,792,326 to acquire in fee over 318 acres of surrounding land to preserve these areas in their natural state for those same water quality purposes. JA101-02. Those are the sorts of “interests” for which PennEast has failed to attempt negotiations.
seeking to condemn them all in court. PennEast’s failure to do so warrants reversal and, ultimately, dismissal.

CONCLUSION

For the foregoing reasons, the district court’s decision should be reversed.

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By: s/ Mark Collier
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Deputy Attorney General

Dated: April 18, 2019
CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: April 18, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), as well as L.A.R. 31.1(c), I certify that:


2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 word-processing system in Times New Roman, 14 point font.

3. Pursuant to Local Appellate Rule 31.1(c), I certify that the text of the electronic brief is identical to the text of the paper copies.

4. The electronic brief has been scanned for viruses with a virus protection program, McAfee VirusScan Enterprise + Antispyware Enterprise, version 8.8.0, and no virus was detected.

Dated: April 18, 2019

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CERTIFICATE OF SERVICE

I certify that on April 18, 2019, the foregoing Appellants’ Merits Brief was electronically filed with the clerk of the court with the United States Court of Appeals for the Third Circuit through the Court’s CM/ECF system, which filing effected service upon counsel of record through the CM/ECF system. I further certify that I caused the same Appellants’ Merits Brief to be served via U.S. Mail upon Pro Se Appellee Michael Voorhees.

Dated: April 18, 2019

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United States Court of Appeals
for the
Third Circuit

Case No. 19-1191
(and Consolidated Cases)

In re: PENNEAST PIPELINE COMPANY, LLC

STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; NEW JERSEY STATE AGRICULTURE DEVELOPMENT COMMITTEE; DELAWARE & RARITAN CANAL COMMISSION; NEW JERSEY WATER SUPPLY AUTHORITY; NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY DEPARTMENT OF THE TREASURY; NEW JERSEY MOTOR VEHICLE COMMISSION,
Appellants.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, IN NO. 3-18-CV-01597, HONORABLE BRIAN R. MARTINOTTI, U.S. DISTRICT JUDGE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Niskanen Center states that it does not have a parent corporation and that no publicly held companies hold 10% or more of its stock.
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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Niskanen Center ("Niskanen") is a 501(c)(3) libertarian think tank and advocacy organization. Niskanen believes that the Constitutional balance between dual sovereigns, State and federal, ensures not only that the States remain laboratories of democracy—but also that they are bulwarks against unchecked expansion of federal power.

Niskanen submits this brief in support of Defendants-Appellants State of New Jersey, New Jersey Department of Environmental Protection, State Agriculture Development Committee, Delaware and Raritan Canal Commission, New Jersey Water Supply Authority, Department of Transportation, Department of Treasury and New Jersey Motor Vehicle Commission. The district court concluded that PennEast Pipeline Company, LLC, a private company, has the power to sue the State of New Jersey in federal court without New Jersey’s consent, and to seize New Jersey’s property for its own use. The district court’s decision not only expands the jurisdiction of the federal courts beyond the parameters of Article III, but it would permit private citizens to override the elected government of a State, on matters fundamental to
sovereignty, including land management and resource conservation. The decision is counter to the most basic principles of State sovereign immunity. It must be reversed.

Niskanen files this brief with the consent of the parties. No party authored this brief in whole or part, nor did any party fund the preparation or submission of this brief.
SUMMARY OF ARGUMENT AND INTRODUCTION

The district court’s decision is a frontal attack on a fundamental element of our nation’s Constitutional plan—a State’s sovereignty over its territory.

When PennEast sought to seize State lands through condemnation actions in federal court, New Jersey refused to give its consent, as is its sovereign prerogative. To get around the roadblock of State sovereignty and build its pipeline, PennEast claims to have found a detour hiding in plain sight. According to PennEast, Congress can avoid the Constitutional bar against private citizen suits against the States by simply “delegating” to a private citizen or corporation the federal government’s exemption from State sovereign immunity. It troubles PennEast not at all that generations of judges and legislators, dating back to the Framers, never considered such delegation to be within Congress’s power, or that delegation to private parties of federal power to sue the States would render the Eleventh Amendment a mere formality.

The district court endorsed PennEast’s radical theory, eviscerating State sovereignty. Based on the most cursory analysis, the district court
concluded that because PennEast has received a limited grant of the federal government’s eminent domain authority, the “Eleventh Amendment is inapplicable” to this suit. JA 33.

The district court need not have reached this constitutional question. Consistent with the doctrine of constitutional avoidance, the court should have started, and ended, with the statutory question: whether the Natural Gas Act authorizes condemnation actions against States. Because the statute is not “unmistakably clear” that it purports to permit suits against States, the district court should have decided this question in the negative, and dismissed New Jersey from the case on that basis alone.

Furthermore, the district court’s determination that “the Eleventh Amendment is inapplicable” to this case is reversible error. The text and history of the Eleventh Amendment make clear that Congress cannot delegate the federal exemption to State sovereign immunity.

States were sovereign before ratification of the Constitution, and preservation of State sovereignty was of paramount concern during the Constitutional Convention. To assuage the fears of those who worried that the Constitution would end States’ sovereign status and leave them
open to suit by private citizens, Alexander Hamilton reported in the Federalist Papers that it was the “plan of the convention” to preserve States’ “pre-existing” immunity from suit, because “inherent in the nature of [State] sovereignty” is the freedom of a State “not to be amenable to the suit of an individual without its consent.” The Federalist No. 81, p. 496-97 (A. Hamilton) (Bantam 2003). When in *Chisholm v. Georgia* the Supreme Court nonetheless permitted a citizen of South Carolina to sue the State of Georgia, the reaction was swift: within two years, Congress passed, and the States ratified, the Eleventh Amendment, confirming that States were immune to suits by citizens of another State. Only the federal government or a sister State can sue a State without consent—a necessary condition of the constitutional compact.

Approximately a century after ratification of the Eleventh Amendment, in *Hans v. Louisiana*, the Supreme Court confirmed that Eleventh Amendment immunity applied equally to prevent States from being sued by their own citizens, as the alternative would be “almost an absurdity on its face.” 134 U.S. 1, 15 (1890). Since *Hans*, the Supreme Court has confirmed that the only exceptions to the Eleventh

Even limited to the Natural Gas Act, the district court’s opinion is harmful enough, permitting a private company to seize State land by bringing suit against a State in federal court without Constitutionally-mandated State consent. But the decision is also dangerous because it endorses the idea that Congress can simply “delegate” the federal government’s exemption from State sovereign immunity to private individuals—thereby doing away with Constitutional limitations on suits against States and dismantling the “plan of the Convention.” This court should swiftly reverse the judgment of the district court.
ARGUMENT

Although “[q]uestions of jurisdiction” are normally given priority, the Supreme Court “routinely addresses before the question whether the Eleventh Amendment forbids a particular statutory cause of action to be asserted against States, the question whether the statute itself permits the cause of action it creates to be asserted against States.” Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 778-79 (2000). Because a new cause of action against a State represents not only an encroachment on State sovereignty but also a corresponding expansion of the jurisdiction of the federal courts, this “logical priority” serves two purposes: it permits the court to construe the statute to “avoid difficult constitutional questions,” and it ensures that the Court will not inadvertently “expand the Court’s power beyond the limits” of the jurisdictional bar created by the Eleventh Amendment. Id. at 779, 787. It is therefore “appropriate[] to decide the statutory issue first.” Id. at 780.

The district court here skipped this “appropriate” starting point, ignoring entirely the statutory question. This Court, however, should start with the text of the Natural Gas Act, and hold that because the
The Natural Gas Act is not “unmistakably clear” in permitting suits against States, PennEast cannot condemn New Jersey State lands. See Stevens, 529 U.S. at 787 (“[i]f Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intentions to do so unmistakably clear in the language of the statute.”). If this Court nevertheless reaches the constitutional issue—the question whether the Eleventh Amendment permits Congress to “delegate” federal authority to sue States—two centuries of clear precedent compel reversal on that basis as well.

I. The Natural Gas Act Does Not Permit Condemnation Actions Against a State

A. The “Unmistakably Clear” Standard Applies Even When Plaintiffs “Stand in the Shoes” of the Federal Government

The district court concluded that because “PennEast stands in the shoes of the sovereign” it could seize State lands “by the exercise of the right of eminent domain.” JA 33 (quoting 15 U.S.C. § 717f(h)). The State correctly argues on appeal that just as Congress must make its intent to abrogate State sovereign immunity “unmistakably clear,” the same standard should apply in determining whether a statute “delegates” to private parties the right to bring a condemnation action against a State.

The State is also correct that Congress must be “unmistakably clear” that it intended to permit companies to bring condemnation actions against States, *even if* those companies “stand in the shoes of the [United States]” for purposes of the statute. As the Supreme Court explained in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, when addressing the threshold statutory question “whether [a] statute provides for suits against the States,” the court must apply “the ordinary rule of statutory construction” that “if Congress intends to alter the usual constitutional balance between States and the Federal Government, *it must make its intentions to do so unmistakably clear in the language of the statute.*” 529 U.S. at 779, 787 (emphasis added); see also id. (stating that Congress must “clearly express” its intent to subject states to suit, and citing the line of “abrogation” cases, including, *inter alia*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)); see also *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989) (rule that “Congress should make its intention ‘clear and manifest’ if it intends to pre-empt the historic powers of the States” applies in contexts other than “Eleventh
Amendment case[s],” in particular those that affect the “federal balance” (citations omitted)).

*Stevens* demonstrates that the “unmistakably clear” standard applies even to statutes that place a private plaintiff “in the shoes of” the United States. In *Stevens*, a *qui tam* relator attempted to sue Vermont under the False Claims Act. The relator, Stevens, was “in effect[] suing as a partial assignee of the United States,” to vindicate the interests of the United States. *Stevens*, 529 U.S. at 771, 773 n.4. The Court concluded that even though Stevens stood *in the shoes of the United States*,¹ a suit by a private person against a State would “alter the usual constitutional balance between States and the Federal Government,” and the Court could not simply infer that Congress intended that result. Instead, Congress had to make its intention to permit a suit against a State “unmistakably clear.”² *Id.* at 787.

¹ Assignees are frequently described as “standing in the shoes of” the assignor. *See, e.g.*, *UMLIC VP LLC v. Matthias*, 364 F.3d 125, 133 (3d Cir. 2004) (describing a “rule that the assignee of the United States stands in the shoes of the United States” and observing that “[d]octrinally, an assignee stood in the shoes of the assignor”).

² Because the Court concluded that it was not “unmistakably clear” that the False Claims Act could be applied to States, it did not reach the question of whether the Eleventh Amendment would permit suit by a *qui*
The rule of *Stevens* directly controls this case. *Stevens* concerned payment of damages from the state treasury, and as this court has stated, “a state’s title, control, possession, and ownership of water and land . . . is equivalent to its control over funds of the state treasury.” *See MCI Telecomm. Corp. v. Bell Atl. Penn.*, 271 F.3d 491, 508 (3d Cir. 2001). Yet, unlike money in the State treasury, State land may be irreplaceable—particularly when it is a necessary part of a broader land-use or resource-management scheme related to the State’s unique interest in its territory. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 518-19 (2007) (“[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”) (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)). Thus, permitting condemnation suits pursuant to the Natural Gas Act would more fundamentally alter the

*tam* relator against a State—but it noted a “serious doubt’ on that score.” *Id.* at 348 (citing *Ashwander v. TVA*, 297 U.S. 288, 348 (1936)) (Brandeis, J., concurring) (When “a serious doubt of constitutionality [of a statute] is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”).
usual constitutional balance between States and the Federal Government than the damages claims at issue in the False Claims Act. The district court therefore should have applied the “unmistakably clear” standard to the “question whether [the Natural Gas Act] provides for suits against the States.”

B. The History of Eleventh Amendment Jurisprudence Demonstrates That Congress Did Not Intend To Subject States to Suit Pursuant to the Natural Gas Act

The Natural Gas Act is not “unmistakably clear” on whether it subjects State lands to suit—it does not mention State lands at all. As the authorities marshalled in the State’s brief make clear, this silence is enough to doom PennEast’s case. State Br. 26-29.

3 For this reason, Transcontinental Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres & Temporary Easements for 3.59 Acres in Conestoga Township, 907 F.3d 725, 728-29 (3d Cir. 2018), cited by the district court for the proposition that the Natural Gas Act is not “silent as to the rights of a private gas company,” JA 33, is inapposite. Transcontinental merely stands for the proposition that the Natural Gas Act allows private parties to use the federal power of eminent domain. That issue is not contested in this appeal. The issue in this appeal is whether that power encompasses the federal government’s exemption to State sovereign immunity—which Transcontinental simply does not address.
PennEast has tried to deflect this Court’s attention from the lack of statutory support for its claim against New Jersey by pointing to two other statutes, the Amtrak statute, 49 U.S.C. § 24311(a) and the Federal Power Act, 16 U.S.C § 814. Response of Appellee PennEast Pipeline Co. LLC to Appellant’s Motion for a Stay Pending Appeal and to Expedite the Appeal at 10-11, No. 19-1191 (3d Cir. Mar. 12, 2019). The Amtrak statute expressly precludes the taking of various types of property, including but not limited to State property. 49 U.S.C. § 24311(a)(1)(A). The Federal Power Act’s delegation of the eminent domain power purports to include State lands. 16 U.S.C. § 814. PennEast argues that because Congress saw fit to specifically discuss the statutory application to State lands in these other statutes, its decision not to do so in the Natural Gas Act must mean that Congress intended to make State lands available for condemnation.

Courts cannot infer that Congress intended to subject States to suit based on texts of other unrelated statutes. In addition, PennEast ignores how the history of Eleventh Amendment jurisprudence explains the purported discrepancies between the Federal Power Act, Amtrak statute, and Natural Gas Act.
The Natural Gas Act was enacted in 1938, and Section 717f(h), granting the right of eminent domain, was added in 1947. Pub. L. No. 80-245, 61 Stat. 459 (1947). At the time, Congress was legislating under the consensus that it could not abrogate states’ Eleventh Amendment immunity pursuant to the Commerce Clause—a consensus that was only briefly called into question, decades later, by the Supreme Court’s 1989 decision in Union Gas, which permitted Congress to create a right of action against states pursuant to the Commerce Clause. Pennsylvania v. Union Gas Co., 491 U.S. 1, 35 (1989) (Scalia, J., dissenting), overruled by Seminole Tribe of Fla., 517 U.S. at 44.

In his dissenting opinion in Union Gas, Justice Scalia explained that in the preceding century, “Forty-nine Congresses . . . have legislated under [the] assurance” that the Commerce Clause cannot give rise to damages suits against States and that as a result “[i]t is impossible to say how many extant statutes would have included an explicit preclusion of suits against States if it had not been thought that such suits were automatically barred.” Id. (emphasis added).

The 1947 Congress that implemented the eminent domain provisions of the Natural Gas Act was one of the “Forty-nine Congresses”
Justice Scalia referenced. And the Natural Gas Act would surely have “included an explicit preclusion of suits against States” had Congress had any reason to believe that any court would permit a condemnation action to proceed against a State. See id. The fact that the Natural Gas Act does not specifically preclude condemnation actions against States is therefore entirely consistent with the unremarkable proposition, understood both in 1947 and today, that statutory provisions precluding suits already barred by the Constitution are superfluous.

Justice Scalia’s dissent in Union Gas was prescient. Just as he suggested, in the eight years before Union Gas was overruled by Seminole Tribe (in a decision written by Justice Scalia), Congress was careful to address States’ rights when crafting legislation—including in the two statutory provisions identified by PennEast, Section 814 of the Federal Power Act, revised in 1992, see Energy Policy Act of 1992, Pub. L. No. 102-486, Title XVII, § 1701(d), 106 Stat. 3009, and Section 24311 of the Amtrak statute, enacted in 1994, see Pub. L. No. 103-272, Title V, § 24311, 108 Stat. 745 (1994).

As discussed supra, Congress must be “unmistakably clear” when it intends to subject States to suit. It did not do so in the Natural Gas
Act. Its decision to address the scope of the eminent domain power in different, unrelated statutes, drafted decades later during the interregnum between *Union Gas* and *Seminole Tribe*, says nothing about whether Congress intended in 1947 to extend the eminent domain power in the Natural Gas Act to include State lands. To the extent Section 814 of the Federal Power Act purports to give private parties the eminent domain power over State lands, the statute’s validity is open to question as an artifact of the now-overruled holding in *Union Gas*—a statutory question this Court need not resolve here.

Considered in context, the examples identified by PennEast compel the conclusion that State sovereign immunity is reserved to the States, and except during the period that *Union Gas* created uncertainty as to the extent of that immunity, Congress had no need to address whether States would be liable to suit by private parties.

The court need not examine the comparative legislative development of the Natural Gas Act, Federal Power Act, and Amtrak statute—but if it does, that comparison confirms that Congress never contemplated permitting private parties to bring condemnation suits against State lands pursuant to the Natural Gas Act.
C. The States’ Consent To In Rem Bankruptcy Jurisdiction Is Irrelevant

Because the Natural Gas Act is not “unmistakably clear” that it permits suits against States, PennEast’s fallback position that condemnation actions fall into the narrow exception to sovereign immunity for in rem bankruptcy proceedings is unavailing. The States’ consent to be subject to federal courts’ bankruptcy jurisdiction is irrelevant here, because Congress enacted the Natural Gas Act pursuant to the Commerce Clause. See 15 U.S.C. § 717(a).

In Central Virginia Community College v. Katz the Supreme Court acknowledged a long-standing exception to state sovereign immunity for suits brought under Congress’ authority to create bankruptcy powers. 546 U.S. 356, 378 (2006) (“[T]he States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the in rem jurisdiction of the bankruptcy courts.”).

In Katz, the Court reached its conclusion only after careful consideration of the “history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the
Constitution.” *Id.* at 362-63. This long history of State consent to bankruptcy jurisdiction, and in particular the States’ consent for the federal government to reconcile the colonies’ “patchwork of insolvency and bankruptcy laws” after the Revolution, persuaded the Court that the power to permit suits against States pursuant to the Bankruptcy Clause “is one effected in the plan of the Convention, not by statute.” *Id.* at 366, 379. States had to surrender their sovereignty to federal bankruptcy courts because without State consent to suit, bankruptcy courts would not be able to exercise their control over the entire bankruptcy res. *Id.* at 378. *Katz* was unequivocal, however, that it described a “limited subordination of State sovereign immunity in the bankruptcy arena.” *Id.* at 363 (emphases added).

Like the bankruptcy proceedings at issue in *Katz*, condemnation actions are technically *in rem* proceedings. *See United States v. Petty Motor Co.*, 327 U.S. 372, 376 (1946). However, the States’ consent to suit under the bankruptcy clause does not permit PennEast to extend that consent to all *in rem* proceedings. *Katz* was clear that “[t]he scope of this consent was limited; the jurisdiction exercised in bankruptcy proceedings [is] chiefly *in rem*—a narrow jurisdiction that does not implicate state
sovereignty to nearly the same degree as other kinds of jurisdiction.”4 546 U.S. at 378.

This is not a bankruptcy case. And this action acutely implicates State sovereignty by seeking to strip New Jersey of title or other interests in land within its borders. Both the Supreme Court and this Court have made it clear that an “essential” and “fundamental” attribute of sovereignty, preserved by the Eleventh Amendment, is “a state’s title, control, possession, and ownership of water and land.” MCI Telecomm. Corp. v. Bell Atl. Penn., 271 F.3d 491, 508 (3d Cir. 2001) (citing Idaho v. Coeur d’Alene Tribe of Idaho, 521 U.S. 261 (1997) (If a suit against a State were permitted for submerged lands, its “sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury.”)); see Massachusetts v. E.P.A., 549 U.S. 497, 519 (2007) (recognizing that a

4 The “longstanding precedent respecting the federal courts’ assumption of in rem [admiralty] jurisdiction over vessels that are not in possession of a sovereign” is also clearly inapplicable here. See California v. Deep Sea Research, Inc., 523 U.S. 491, 507-08 (1998); see also Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 450 (2004) (recognizing the propriety of submitting States to federal courts’ in rem bankruptcy jurisdiction but noting that “both bankruptcy and admiralty are specialized areas of the law”).
State’s unique interest in “the earth and air within its domain” supports its “well-founded desire to preserve its sovereign territory”). *Katz’s* rationale, that the “unique” and “singular nature of bankruptcy courts’ jurisdiction” allows Congress to “treat States in the same manner as other creditors” is therefore inapplicable to this case. *Katz*, 546 U.S. at 369 n.9, 379.

Although this Court has not been presented with the question, other Courts have consistently agreed that *Katz’s* holding is strictly limited to the context of bankruptcy and is not applicable to other in rem suits or cases brought under the Commerce Clause. *See, e.g.*, *Allen v. Cooper*, 895 F.3d 337, 348 (4th Cir. 2018) (“The *Katz* holding, however . . . was unique to the Bankruptcy Clause, and the Court limited its holding to that Clause.”); *Mojsilovic v. Oklahoma ex rel. Bd. of Regents for Univ. of Okla.*, 841 F.3d 1129, 1134 (10th Cir. 2016) (“Analogizing to *Katz*, the [plaintiffs] contend the States ceded sovereign immunity . . . But as we have already discussed, the [statute at issue] was enacted under the Commerce Clause, which provides no congressional authority for abrogation.”); *Nat’l Ass’n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1314 (11th Cir.)
2011) (“The holding in Katz is carefully circumscribed to the bankruptcy context; its analysis is based upon the history of bankruptcy jurisdiction.”). Accordingly, Katz cannot be read as anything more than a narrow exception—inapplicable here—to the long-established understanding that the States have not consented to suits based on causes of action created pursuant to Article I.

II. The Eleventh Amendment Precludes Delegation of the Federal Exemption to Sovereign Immunity

If the Court concludes that Congress did purport to delegate its power to seize State lands, that delegation would violate the Eleventh Amendment.

By consenting to join the Union, the States consented “to suit by the United States—at the instance and under the control of responsible federal officers.” Blatchford v. Native Vill. of Noatak and Circle Vill., 501 U.S. 775, 785 (1991). This consent is “inherent in the convention” itself. Id. A State’s consent does not extend, however, to “suit by anyone whom the United States might select.” Id. As New Jersey properly asserts, State Br. at 25, 27, the principle espoused in Blatchford is in direct conflict with the district court’s decision, which concluded that the United
States may *delegate* the consent to sue given only to it in the Constitution to any private party the federal government chooses. At best, the district court’s novel delegation theory permits an end-run around decades of jurisprudence aimed at weighing “the fundamental constitutional balance between the Federal Government and the States.” *Atascadero*, 473 U.S. at 238. At worst, it eviscerates state sovereignty by impermissibly extending the consent to suit given to the federal sovereign—and only to the federal sovereign—to private parties.

**A. The Constitution Preserves State Sovereignty**

States enjoyed sovereign status before the Constitutional Convention and they retain that sovereignty today, subject only to the terms of the Constitution. *See Alden v. Maine*, 527 U.S. 706, 713 (1999) (explaining that State sovereign immunity “neither derives from, nor is limited by, the terms of the Eleventh Amendment” and instead predates the Constitution as a “fundamental aspect” of preexisting State sovereignty). The Constitution expressly preserves that sovereignty: It “specifically recognizes the States as sovereign entities.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996); *see also Alden*, 527 U.S. at 714 (describing Constitution’s preservation of State sovereignty by
reserving to States “a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status”); *Blatchford*, 501 U.S. at 779 (“T]he States entered the federal system with their sovereignty intact.”); *accord* The Federalist No. 39 at 233 (J. Madison) (“federal” aspect of hybrid national-federal government means that federal government’s “jurisdiction extends to certain enumerated objects only,” leaving “to the several States a residuary and inviolable sovereignty over all other objects”).

A key component of State sovereignty is immunity from private suit. *Alden*, 527 U.S. at 715 (“The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity.”); *id.* (citing 1 W. Blackstone, Commentaries on the Laws of England 234-35 (1765) (“[T]he law ascribes to the king the attribute of sovereignty . . . . Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies sovereignty of power.”)).

This “absolute right” of sovereign immunity can be waived only by the sovereign itself. Thus, “[o]nly the sovereign’s own consent [can]
qualify the absolute character of that immunity.” *Nevada v. Hall*, 440 U.S. 410, 414 (1979) (reaffirming principle that sovereign immunity shields States from suit by private actors in States’ own courts but finding that sovereign immunity does not extend to suits brought by citizens of sister States in courts of sister States); see also, *Alden*, 527 U.S. at 715-16 (“[T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.” (citing *Chisholm v. Georgia*, 2 U.S. 419, 434-35 (1793) (Iredell, J., dissenting); *Hans v. Louisiana*, 134 U.S. 1, 16 (1890) (“The suability of a State, without its consent, was a thing unknown to the law.”))).

The Eleventh Amendment to the Constitution enshrines these principles, but it is not the source of State sovereign immunity—rather, “the text and history of the Eleventh Amendment [] suggest that Congress acted not to change but to restore the original constitutional design,” which envisioned the States’ retention of the cloak of sovereign immunity. *Alden*, 527 U.S. at 722.5

5 The Eleventh Amendment passed almost immediately after the Court in *Chisholm* permitted the citizen of a sister State to bring a private suit against the State of Georgia. *See id.* at 719-21 (recounting history of
A State may nonetheless consent to private suit in one of two ways: First, by “express” consent to suit; and second, by consent in “the plan of the convention.” *Blatchford*, 501 U.S. at 779. The first category encompasses a State’s “waiver” of sovereign immunity. The second category requires similarly unequivocal consent, reflected in the Constitution itself—a clear “surrender of [sovereign immunity] in the plan of the convention.” *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) (finding no express waiver of sovereign immunity as to suits brought by foreign states in Article III of the Constitution).

PennEast does not claim that New Jersey has waived its sovereign immunity—and New Jersey consistently has asserted that immunity. *See, e.g.*, State Br. at 25. Instead, the district court summarily concludes that because PennEast “stands in the shoes of the sovereign,” PennEast enjoys the same exemption to sovereign immunity principles as the

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*Chisholm* and subsequent passage of Eleventh Amendment, to which “Congress turned . . . with great dispatch”); *see also generally Chisholm*, 2 U.S. at 450-53.

6 The Court has enumerated the limited ways in which a State may “waive” its sovereign immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (“A State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program.”).
federal government—or, to cast the decision in the language of the Court’s sovereign immunity jurisprudence, the district court found that States consented “in the plan of the convention” to suit by any entity the federal government selects. This is plainly wrong. To permit such a holding to stand would require casting aside numerous Supreme Court cases addressing the “fundamental Constitutional balance between the Federal Government and the States.” See Dellmuth v. Muth, 491 U.S. 223, 227 (1989).

**B. Consent To Suit by the Federal Sovereign Is Not Consent To Suit by a Private Party “Standing in the Shoes” of the Federal Sovereign**

This Court should be guided by the Supreme Court’s consideration of this delegation issue in Blatchford. There, the Court expressed “doubt . . . that the sovereign exemption can be delegated—even if one limits the permissibility of delegation . . . to persons on whose behalf the United States itself might sue.” 501 U.S. at 785 (emphasis in original). Blatchford required the Court to construe 28 U.S.C. § 1362, which granted the federal courts original jurisdiction to hear any civil actions brought by duly-recognized Native American tribes. In a prior case construing § 1362, the Court had found that the statute’s jurisdictional
grant implicated the breadth of a tribe’s right of access to the federal courts, which “would be at least in some respects as broad as that of the United States suing as the tribe’s trustee.” *Id.* at 784 (quoting *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 473 (1976)) (internal quotations and emphasis omitted). The tribes in *Blatchford* argued that this language supported a reading of § 1362 whereby the section would represent a “*delegation* to tribes of the Federal Government’s exemption from state sovereign immunity.” *Id.* at 785 (emphasis in original). In rejecting this contention, the Court opined that the States’ “consent . . . to suit by the United States . . . is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person’s benefit is not consent to suit by that person itself.” *Id.* In *Stevens*, the Court similarly expressed its “serious doubt” as to whether a *qui tam* relator would be permitted to bring suit in federal court against a State given the prohibition enshrined in the Eleventh Amendment. 529 U.S. at 787; see also *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 544 (2002) (discussing *Stevens* and describing the issue of whether “an action in
federal court by a *qui tam* relator against a State” as one “raising a serious constitutional doubt”.

As the history of the Eleventh Amendment makes plain, the principle set forth in *Blatchford*’s dicta is correct: the States jealously guarded their sovereign immunity, consenting in the Constitution only to suit by the federal sovereign and not by any entity vested with other rights enjoyed by the federal government. *Accord Alden*, 527 U.S. at 716 (“The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity”); *The Federalist* No. 81 at 497 (“Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . .”).

As the State of New Jersey rightly argues here, suits by the federal sovereign are not the same as suits brought by private actors. State Br. at 27-28. A State can take assurance from the fact that federal actions are brought to vindicate a national interest and that the individuals charged with bringing such suits are similarly charged with upholding the Constitution. *Id.* This assurance does not hold for suits brought by private actors, even ones purporting to “stand in the shoes of” the federal
sovereign. The *Alden* Court understood this nuance and reflected that “[a] general federal power to *authorize* private suits for money damages would place unwarranted strain on the States’ ability to govern in accordance with the will of their citizens.” 527 U.S. at 750-51 (emphasis added).

Delegation of the federal sovereign’s power to condemn State lands raises particularly acute concerns. A State’s ownership of its “sovereign lands” “has been ‘considered an essential attribute of sovereignty.’” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) (quoting *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987)). To permit a private party to hale a State into court and require it to defend ownership of its sovereign property would require the most unmistakable exemplar of State consent. Such consent to private suit is nowhere found in the text of the Constitution, let alone impliedly supported by the history of the convention. And the federal sovereign is not entitled to “delegate” its power to sue the States when such power is derived solely from the consent of the States to suit by the United States—and no other party—upon their ratification of the Constitution. To find otherwise
would be to find that the States made a broad and implicit waiver of their inherent sovereignty.

C. The District Court’s Decision Leads to Unanticipated—and Unconstitutional—Consequences

Finding that a private party can simply “stand in the shoes” of the federal sovereign would upset “the proper balance between the supremacy of federal law and the separate sovereignty of the States” struck by the Constitution and reflected in Supreme Court jurisprudence, see *Alden*, 527 U.S. at 757, and would lead to results never anticipated by the Framers.

*First*, Congress could seize on the principle of delegation of the eminent domain power to make politically inexpedient decisions and open State public lands for private benefit. It could, for example, neatly solve the problem of where to store nuclear waste by simply “delegating” to private companies the ability to seize State lands for the purpose. It could also solve the problem of finding land for renewable wind and solar power farms, by empowering energy companies to take State grazing lands. Because these private companies would be cloaked with the federal government’s exemption from State sovereign immunity, States
would be powerless to challenge these decisions—and Congress could avoid democratic accountability.

Second, because the delegation theory adopted by the district court has no limiting principle, it would render the Eleventh Amendment a mere formality even outside of the eminent domain context. For example, notwithstanding the Supreme Court’s holding in *Seminole Tribe* that Congress cannot abrogate the Eleventh Amendment pursuant to the Indian Commerce Clause, Congress could simply delegate the federal government’s authority to tribes, and thereby empower “a tribe to bring suit in federal court against a State in order to compel performance of [a] duty.” *Cf. Seminole Tribe*, 517 U.S. at 47. Congress could similarly avoid the holding in *Will v. Michigan Dep’t of State*, that Section 1983 of the Civil Rights Act of 1871 does not permit suits for money damages against State officials—it would merely have to add a provision delegating federal authority to sue States to any aggrieved party. *Cf. 491 U.S. 58, 65 (1989).* These are only two of the seminal decisions that would be squarely impacted by a holding that Congress can delegate its authority to sue States in federal court.
The Eleventh Amendment—which formalized an understanding that was part of the “plan of the Convention”—cannot be so easily evaded. State consent to federal suit “is not consent to suit by anyone whom the United States might select.” Blatchford, 501 U.S. at 785.

CONCLUSION

For the foregoing reasons, the Court should find that Section 717f(h) of the Natural Gas Act does not permit private condemnation actions against States. In the alternative, the Court should conclude that such condemnation actions are precluded by the Eleventh Amendment.
Respectfully submitted this 25th day of April, 2019.

Dated: April 25, 2019
New York, NY

Respectfully submitted,

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CERTIFICATION OF ADMISSION TO BAR

I, Jennifer M. Selendy, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 31.1

Pursuant to Fed. R. App. P. 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5), 32(a)(7)(B) because this brief contains 6,241 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

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This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: April 25, 2019

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CERTIFICATE OF SERVICE

I certify that on April 25, 2019, I caused a copy of the foregoing Brief of Amicus Curiae Niskanen Center to be served on counsel for all parties via the Court’s CM/ECF filing system.

/s/ Jennifer M. Selendy
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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

IN RE: PENNEAST PIPELINE COMPANY, LLC

On Appeal from an Order of the United States District Court for the District of New Jersey

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INTRODUCTION

PennEast and its amici misunderstand what this case is about. This case has nothing to do with federal supremacy; federal law is supreme. This case has nothing to do whether the federal government can regulate interstate natural gas pipelines; it can. And this case has nothing to do with whether states can “veto” interstate natural gas pipelines simply because they require condemnation of state property interests; states do not have that veto power. Instead, this is a sovereign immunity case. And because this is a sovereign immunity case, this appeal hinges on a single question: which entities can hale New Jersey into court to condemn its property interests.

When it comes to PennEast, the answer is clear—a private entity may not file this condemnation action. First, the federal government cannot and did not delegate its exemption from state sovereign immunity. At the Founding, the States agreed to suits by the United States, because such litigation would be handled by responsible and accountable actors. They did not agree to suits by private entities. Even if they had, the NGA’s plain text says nothing about sovereign immunity or state lands—which means the statute cannot supply the clear statement required for a delegation. Second, no generalized in rem exception to state sovereign immunity exists. At the Founding, the States did not consent to private party suits adjudicating state property rights, which offend sovereignty as much as suits seeking money damages. That is
why multiple cases have rejected this exception, and why the only cases PennEast
cites all arose in the specialized bankruptcy and admiralty contexts.

Still, one entity could file this condemnation action: the United States. Federal
government attorneys could file the same actions PennEast filed and condemn the
same interests. That is why nothing about New Jersey’s position gives it a veto over
construction, and why PennEast and its amici err in suggesting that a dismissal here
would prevent pipelines from being built. Dismissal simply means the wrong entity
filed these actions—a difference that will work real harms to New Jersey. If FERC
believes these property interests must be condemned, then the federal government
must file the condemnation actions. That is what sovereign immunity demands.

ARGUMENT

I. NEW JERSEY’S SOVEREIGN IMMUNITY BARS THIS ACTION BY
A PRIVATE PARTY.

A. The federal government cannot and did not delegate its exemption from
state sovereign immunity.

i. The federal government cannot delegate its exemption from state
sovereign immunity.

In its Opening Brief, New Jersey explained that while the federal government
is free to hale New Jersey into court, it cannot “delegate” that unique entitlement to
private parties. Indeed, Blatchford v. Native Village of Noatak, casts “doubt” on the
idea that the federal government’s right to sue the states “can be delegated” to a
private party. 501 U.S. 775, 785 (1991). In subsequent years, multiple circuits have
reached this holding explicitly, Opening Br. 20-21, and one district court has done so in an NGA case, see Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange Cnty., 327 F.R.D. 116 (E.D. Tex. Sept. 6, 2017). That aligns with constitutional principles, which confirm that the States’ “consent, ‘inherent in the convention,’ to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by [private parties] the United States might select.” Blatchford, 501 U.S. at 785.

PennEast’s responses are unconvincing. PennEast repeatedly argues that New Jersey’s fears about the lack of responsibility and political accountability “are not relevant here.” Br. 46-48. But PennEast cannot deny that federal officials are more constitutionally responsible, focused on national interests, and accountable to states. PennEast instead believes this delegation does not implicate these concerns because FERC was “involved in every step of the process leading to [PennEast] being vested with the federal power of eminent domain.” Br. 1; see also Br. 16 (noting that this is “a years-long extensive review process” that requires the agency to find the project

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1 PennEast also says that New Jersey “actually faces no real harm” from this action. Br. 46. That is incorrect. Because sovereign immunity seeks “to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,” the loss of immunity is itself a significant harm. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (citation omitted); see also, e.g., Franchise Tax Bd. of Cal. v. Hyatt, No. 17-1299, 2019 WL 2078084, at *5 (U.S. May 13, 2019) (describing those individuals at the Founding who “found it ‘humiliating and degrading’ that a State might have to answer ‘the suit of an individual’”) (quoting Brutus No. 13 (Feb. 21, 1788)).
is in “the public interest”

It follows that FERC—an accountable and responsible actor—can delegate to PennEast the ability to sue New Jersey.

But PennEast’s factual arguments miss the point as a matter of law. Like the trial court, PennEast “conflates two separate rights held by the federal government: the right to exercise eminent domain and the right to sue states in federal court.” *Sabine*, 327 F.R.D. at 139-40. While FERC is involved in the process of approving PennEast’s right to use eminent domain, it is nowhere to be found in this suit. And while PennEast portrays condemnation suits as mere formalities once a pipeline is approved, critical decisions remain—and so the states have reason to care about who can file them. The plaintiff must decide whether to file these actions before PennEast has obtained the necessary state permits to begin construction; whether to engage in good faith negotiations before filing these actions; whether to seek preliminary relief for immediate access to these lands; and how to value the property interests at the just compensation stage—including whether to settle and for how much. (A federal official, for example, might be more willing to settle for what New Jersey believes its land is worth than a private entity with private incentives.) That FERC approved the underlying pipeline is thus nonresponsive to the demands for responsibility and accountability in litigation against the states.

PennEast’s logic also has no stopping point and would allow Congress to too easily evade limits on its power to *abrogate* sovereign immunity. Under this theory,
Congress could amend the Indian Gaming Regulatory Act to establish a commission to review tribal claims against states and issue certificates entitling them to file suit— notwithstanding *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The same is true for nearly any law adopted under the Commerce Clause. That commission would be “intimately involved in every step of the process” before the lawsuit. The review could be a “years-long” process that asks if the suit is in the “public interest.” But the private party would still be the one to decide whether to file, how to litigate it, and when to settle (and for how much). That is an even greater concern when one considers that states could delegate their ability to sue each other. *See* Opening Br. 20 n.4. PennEast offers no response to this problem.

PennEast’s reading of the case law fares no better. The State’s Opening Brief described the decisions that rejected or doubted the idea that the United States could delegate its exception from sovereign immunity. Br. 17-18, 20-22. As the Opening Brief forewarned, *see* Br. 24 n.5, PennEast responds that these cases arose in distinct statutory or factual circumstances. While the premise is correct—except for *Sabine*, none of these cases involved the NGA—PennEast’s conclusion does not follow. The issue here is whether the Constitution allows the federal government to delegate this exemption. That question, of course, does not turn on a specific statute’s text, and so the distinctions PennEast highlights are immaterial.
That is especially true when it comes to Sabine. While the decision admittedly does not bind this Court, it provides a clear explanation for why sovereign immunity bars any private party’s action to condemn state property interests under the NGA. PennEast says Sabine must be distinguished. First, it states, “FERC issued PennEast a Certificate Order authorizing a new pipeline route knowing full well that the pipeline route would traverse state-interested parcels,” whereas it did not have that knowledge in Sabine. Br. 45. But that difference, even if true, does not matter; the question is whether FERC could have delegated its exemption, not what its order purported to do. Second, PennEast adds that Sabine overlooks the fact that Congress has “passed similar statutes vesting private entities with condemnation authority, but specifically limited actions against States, while Congress chose not to do so in the NGA.” Br. 45. But whether Congress exempted state lands from other laws at most bears on Congress’s intent (but see Part I.B, infra), not on its underlying authority.

PennEast can also identify no cases that endorse its view. To support its view that “states cannot raise Eleventh Amendment immunity claims against the federal government’s authorized agent when [that agent] is condemning land pursuant to condemnation authority specifically granted to the private entity for a specific project,” Br. 34, PennEast cites just one case, Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941). That case has no bearing on sovereign immunity: PennEast fails to note that the “attorneys for the government” were the ones “alleged to have instituted
numerous condemnation suits for the purposes of the proposed reservoir.” *Id.* at 511 n.2. (Oklahoma also filed that suit, a constitutionally material difference.) *Atkinson* thus shows only that the United States can condemn state property interests, a point New Jersey embraces. It does not address whether that power can be delegated.

While PennEast then turns to case law under the False Claims Act (“FCA”), these cases actually support New Jersey’s position. To be sure, the circuits had split over whether a *qui tam* relator can sue states without their consent. But neither side helps PennEast. The approach that state sovereign immunity applies to *qui tam* suits obviously supports New Jersey. *See United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 291-92 (5th Cir. 1999) (“Congress cannot delegate to private citizens the United States’ sovereign exemption from Eleventh Amendment restrictions.”). But so do the cases allowing *qui tam* actions to proceed. These cases did not endorse PennEast’s broad delegation theory; instead, they held the “real party in interest” in a *qui tam* action is the United States and that such cases can proceed on that basis. *See, e.g., United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 48 (4th Cir. 1992). And they were also clear about why: the FCA only permits suits “in the name of the Government” based on “false claims submitted to the government”; the federal government wins “the lion’s share of any amount recovered”; “the government may choose to intervene and pursue the action itself”; such a “case may not be settled or voluntarily dismissed without the government’s
consent”; and the government “may change its mind and intervene at any point in
the litigation” if it has a reason to do so. Id. at 48-49. None of that is true here. A
private citizen filed this action in its own name; that citizen will receive the property
interests; the United States has never had the chance to intervene and will not have
the chance to do so in the future; and a private citizen controls whether to settle this
case (and for how much). This case has all the hallmarks of private litigation, from
which New Jersey maintains immunity.

And most importantly, the Supreme Court later addressed the FCA issue and
undermined PennEast’s position. See Vt. Agency of Nat. Res. v. United States ex rel.
an action in federal court by a qui tam relator against a State would run afoul of the
Eleventh Amendment,” but as the Court had done in Blatchford, added “that there is
‘a serious doubt’ on that score.” Id. at 787; see also Raygor v. Regents of Univ. of
Minn., 534 U.S. 533, 544 (2002) (same). That doubt, along with the longstanding
“doctrine that statutes should be construed so as to avoid difficult constitutional
questions,” Stevens, 529 U.S. at 787, in part led the Court to hold that a state did not
qualify as a “person” under the FCA—meaning, as a matter of statutory construction,
that relators could not sue them, id. FCA case law thus shows that this court should
hold either that Congress cannot delegate its exemption from sovereign immunity,
or at the very least, that it did not do so clearly enough. See Part I.B, infra.
ii. The federal government did not delegate its exemption from state sovereign immunity.

As the discussion of *Stevens* makes clear, this Court need not address whether Congress can delegate its ability to sue states because Congress did not do so here. While PennEast relies on the NGA’s text, the language of other laws, and legislative history to find such a delegation, its arguments cannot withstand scrutiny.

There is little dispute about the plain text itself: the parties agree that the NGA grants to FERC certificate holders a general authorization to acquire “the necessary right-of-way to construct, operate, and maintain a pipe line … by the exercise of the right of eminent domain.” PennEast Br. 23; Opening Br. 27. Nor does PennEast deny that the NGA is silent regarding the Eleventh Amendment, sovereign immunity, and state lands. PennEast says that is enough, that the NGA allows private parties to file suits to condemn state property interests because it “speaks in unambiguously broad terms and contains no limit on the types of properties subject to the statutory grant of condemnation authority.” Br. 17. To PennEast, a law undermines state sovereign immunity where its text does not explicitly exclude states from its reach.

PennEast has it backwards. The question is not whether Congress wanted to exclude states as proper defendants, but whether Congress spoke with unmistakable clarity to include the states as defendants. *See, e.g.*, *Stevens*, 529 U.S. at 779 (holding that Congress can “only” permit a “cause of action it creates to be asserted against States … by clearly expressing such an intent”); *id.* at 787 (“If Congress intends to
alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”); *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989) (“A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.”) (citation omitted). The need for clarity is especially acute here, because PennEast’s reading raises constitutional questions. See Part I.A, supra. Just as FCA language allowing suits against “persons” was not clear enough to sweep in states, *Stevens*, 529 U.S. at 787, and a statute allowing actions against “any recipient of Federal assistance” was not enough to permit suits against state recipients of such assistance, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985), a law permitting private parties to file condemnation actions for rights-of-way more generally cannot be enough to delegate to a private party the government’s ability to file actions condemning state property interests.

PennEast’s reliance on the language of other statutes and on legislative history also fails. For one, this Court cannot turn to extra-textual tools in divining whether a clear statement exists regarding state sovereign immunity. See *Dellmuth*, 491 U.S. at 230 (“[W]e will conclude Congress intended to abrogate sovereign immunity only if its intention is ‘unmistakably clear in the language of the statute.’ Lest [that] be thought to contain any ambiguity, we reaffirm today that in this area of the law, evidence of congressional intent must be both unequivocal and textual.”) (emphases
added); see also id. (noting “[l]egislative history generally will be irrelevant” to this question). That is as it should be: the only way that Congress can show its intent to overcome sovereign immunity is through the statute Congress wrote. Because the NGA’s text does not do so, this Court need go no further. ²

But even if this Court were to consider these other sources, they do not yield a different result. First, PennEast argues that two other statutes—in other sections of the U.S. Code—disclaim or limit a private party’s ability to file actions to condemn state property interests. PennEast therefore concludes that the lack of such language in the NGA reflects the intent to delegate the exemption from sovereign immunity. But if Congress had ever “contemplated such a strange notion” of delegating this exemption, Blatchford, 501 U.S. at 785-86, it would not have done so by means of a negative inference derived from two other laws. Further, while one of the laws on which PennEast relies (the Amtrak statute, 49 U.S.C. § 24311(a)) precludes taking of state property, the other law (the Federal Power Act (“FPA”), 16 U.S.C § 814) purports to permit it in certain circumstances. Congress thus knew how to be clearer in either direction. The NGA’s silence does not prove PennEast’s point.

² The only case PennEast cites to go beyond the statutory text undermines its view. See Br. 28 n.9 (quoting FAA v. Cooper, 566 U.S. 284, 291 (2012)). Cooper agreed that “a waiver of sovereign immunity must be ‘unequivocally expressed’ in statutory text” and that “[l]egislative history cannot supply a waiver that is not clearly evident from the language of the statute.” Id. at 290.
Finally, as amicus Niskanen Center explains, relevant constitutional history accounts for the different language Congress used in the FPA and the Amtrak statute. See Niskanen Br. 13-16. When Congress enacted the NGA and 15 U.S.C. § 717f(h) (in 1938 and 1947, respectively), Congress knew it lacked the authority to abrogate state sovereign immunity, so there was no reason for Congress to adopt any statutory carve outs for the states. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 35 (1989) (Scalia, J., dissenting) (noting that, during this time, constitutional law established that “private damages actions created by federal law do not extend against the States” and that “[i]t is impossible to say how many extant statutes would have included an explicit preclusion of suits against States if it had not been thought that such suits were automatically barred”). On the other hand, the FPA and Amtrak statute were enacted or amended during an eight-year period when the Court allowed Congress to abrogate state sovereign immunity—and so a number of statutes during this time exempted states from their reach. See Niskanen Br. 15. Understood in that light, the lack of similar language in the NGA makes sense.3

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3 PennEast responds that if Congress thought it was important during this eight-year period to include “as a necessary clarification” language limiting actions against the states, “it surely also would have amended the NGA condemnation statute” at this time. Br. 17-18 n.7. But Congress’s inclusion of language in some laws that were passed or amended during these eight years does not suggest it would have searched the U.S. Code to find all the language that needed updating. Further, while PennEast also claims New Jersey’s approach renders the language in the FPA or the Amtrak statute superfluous, that is wrong. The language was not superfluous when Congress had the power to abrogate sovereign immunity. And even now, PennEast overlooks
Similarly, the legislative history on which PennEast relies does not support its position. *See, e.g., United States v. Nordic Vill. Inc.*, 503 U.S. 30, 37 (1992) (“[T]he unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report.”). The first item is a committee report about another law, and one drafted during the same eight-year period during which Congress had the power to abrogate state sovereign immunity under the Commerce Clause. Br. 26. The other report on which PennEast relies, Br. 30-31, evinces the intent to provide natural gas companies with eminent domain powers generally, but says nothing about allowing companies to hale states into court. PennEast thus offers no evidence that Congress intended to delegate its exemption from state sovereign immunity.

B. There is no generalized *in rem* exception to sovereign immunity.

Because the federal government cannot or did not delegate its unique ability to file suits against the states, the district court’s decision cannot stand. On appeal, PennEast offers an alternative argument for affirmance (on which the district court did not rely)—a generalized *in rem* exception to state sovereign immunity. That is no small request: it requires finding that the states consented at the Founding to let anyone, including private parties, file lawsuits “against” their property interests. *See* the fact that states maintain discretion to waive their immunity. The language in the FPA and Amtrak statute make clear that eminent domain of state lands would still be inappropriate in those circumstances.
Blatchford, 501 U.S. at 779 (“[A state is not] subject to suit in federal court unless it has consented to suit, either expressly or in the plan of the convention.”).

PennEast offers no evidence that the states did so. Just the opposite: “the fear of private suits against nonconsenting States was the central reason given by the Founders who chose to preserve the States’ sovereign immunity.” Alden v. Maine, 527 U.S. 706, 756 (1999). States had every reason to fear private lawsuits seeking a right to their property as much as they feared lawsuits seeking their money. After all, one “special, essential, or fundamental” element of any state’s sovereignty is its “title, control, possession, and ownership of water and land, which is equivalent to its control over funds of the state treasury.” MCI Telecomm. Corp. v. Bell Atl.-Penn., 271 F.3d 491, 508 (3d Cir. 2001); see also Idaho v. Coeur d’Alene Tribe of Idaho, 521 U.S. 261, 287 (1997) (in a case involving property interests, refusing to strip the state of its immunity because its “sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury”). No wonder, then, that the Court has held the states did not consent to quiet-title suits or to their functional equivalents. See Coeur d’Alene, 521 U.S. at 291-92; Block v. North Dakota ex rel. Bd. Of Univ. and School Lands, 461 U.S. 273, 286 (1983).

Still more, there is no basis to think that sovereign immunity turns on whether a suit happens to be styled as in rem or as in personam. For one, the Supreme Court
has explained that calling a suit *in rem*—i.e., “judicial jurisdiction over a thing”—is “a customary elliptical way of referring to jurisdiction over the interests of persons in a thing.” *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977). “This recognition leads to the conclusion that in order to justify an exercise of jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interests of persons in a thing.” *Id.* This case offers a good example: under Federal Rule of Civil Procedure 71.1, PennEast had to name the property and “at least one owner of some part of or interest in the property.” In practice as in name, this case is as much a suit against New Jersey—which stands to lose property interests, and has to litigate what it is owed—as against the parcels. For another, it would make no sense for federal immunity to turn on state-law naming conventions. Even if this action is *in rem*, “the classification of an action as in rem or in personam” is one “for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state.” *Shaffer*, 433 U.S. at 206. If this Court recognized an *in rem* immunity exception, it would be tying sovereign immunity to these standards. So for the same reasons that the Supreme Court concluded personal jurisdiction cannot turn on whether a case is *in rem or in personam*, see *id.* at 206-07, this Court should reject that dichotomy here.

It is thus unsurprising that the cases to consider the question have rejected this generalized *in rem* exception. *See* Opening Br. 32-33. These cases could hardly have
been blunter, finding “no distinction between suits against the government directly, and suits against its property.” *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869). While PennEast claims these cases “are inapposite” because they do not address the federal government’s ability to delegate its exemption from state sovereign immunity, Br. 49 n.17, it is mistaken. The issue in this section is whether a general in rem exception to state sovereign immunity exists—and these cases bear directly on that issue.

PennEast’s only other rebuttal is that three of the cases “deal with a fee interest in real property or actual ownership of personal property.” Br. 49 n.17. That links to a point PennEast makes repeatedly, namely that “for the vast majority of parcels … the State asserts only limited, non-possessory interests.” Br. 40. But even if that were true—and to be clear, the State owns two of the affected properties in fee—it does not matter. The character of a state’s specific property interests has no bearing on whether a generalized in rem exception to sovereign immunity exists, and there is no evidence that states consented at the Founding to a specific in rem exception for their non-fee interests either. Indeed, these non-fee interests are property rights that New Jersey bargained for, that run with the land, and that PennEast would have to condemn to start construction. See, e.g., Nichols on Eminent Domain, §5.07[2][b] (Matthew Bender 3d ed., last updated May 2019) (noting that “[a] private easement in real estate is property in the constitutional sense,” such that it can be condemned and compensation will be owed). It follows that a “proceeding against property in
which the United States has an interest is a suit against the United States.” *United States v. Alabama*, 313 U.S. 274, 282 (1941) (emphasis added).

Nor can PennEast identify any cases going the other way. While federal courts have recognized that States consented to *specific* types of *in rem* actions—namely, bankruptcy and certain admiralty matters—the States never consented to *in rem* suits writ large. The cases PennEast cites fit those confines. *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006)—a case PennEast cites for the proposition that state sovereign immunity is “not implicated” for *in rem* actions that “involve[] only adjudicating the interest in a res,” Br. 51—actually held that “States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.” *Katz*, 546 U.S. at 378 (emphasis added). So although the Court did include language about reduced sovereignty interests in *in rem* proceedings, it did not base its decision on a general *in rem* exception; instead, it concluded that the States had consented to certain suits “[i]n ratifying the Bankruptcy Clause.” *Id.* And the Court would have had no reason to spend tens of pages going through “the history of the Bankruptcy Clause” and bankruptcy laws “enacted in the immediate wake of the Constitution’s ratification” if a generalized *in rem* exemption existed anyway. *Id.* at 373; *see also Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004) (similarly addressing *in rem* jurisdiction in the bankruptcy context).
Nor do the remaining cases—which arose under the federal courts’ admiralty jurisdiction—govern state immunity in any non-admiralty proceedings. These cases also focused on the unique character of a distinct provision, the Admiralty Clause, and held that the states had accepted some (but not all) exercises of *in rem* admiralty jurisdiction. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998); *Aqua Log, Inc. v. Georgia*, 594 F.3d 1330 (11th Cir 2010). Their reasoning, too, relied on federal courts’ “unique role in admiralty cases since the birth of this Nation,” rather than on a general *in rem* exception. *Deep Sea Research*, 523 U.S. at 501. And the courts even suggested a different rule applies for non-admiralty cases involving state property interests. *See id.* at 506; *Aqua Log*, 594 F.3d at 1333 (confirming that, as a general matter, state immunity “bars federal jurisdiction over general title disputes relating to state property interests”). Courts of appeals have thus had little trouble distinguishing the specialized bankruptcy and admiralty cases on such grounds. *See Great Lakes Exploration Grp., LLC v. Unidentified Wrecked & Abandoned Sailing Vessel*, 522 F.3d 682, 688 (6th Cir. 2008); *Allen v. Cooper*, 895 F.3d 337, 348 (4th Cir. 2018); *Nat’l Ass’n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1314 (11th Cir. 2011). This Court should do the same.4

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4 The only outlier is *Islander E. Pipeline Co. v. Algonquin Gas Transmission Co.*, 102 FERC ¶61054 (Jan. 17, 2003). This FERC order asserts that “the NGA does not address any ‘suit in law or equity’ against a state.” *Id.* at ¶61132. But FERC does not grapple with most of the arguments discussed above, and its interpretation of the Constitution and sovereign immunity law receives no deference.
C. Recognizing New Jersey’s sovereign immunity will not produce the harmful consequences PennEast and its amici describe.

Throughout their briefs, PennEast and its amici contend that the consequences of allowing states to maintain immunity in this context would be too great. Primarily, PennEast and its amici claim that recognizing New Jersey’s immunity would unduly interfere with the construction of interstate natural gas pipelines. See, e.g., PennEast Br. 3, 16, 47-48; Amici Br. 4, 22-23. That cannot be, they argue, because the United States oversees the regulation of interstate natural gas pipelines and precludes states from exercising veto power over construction. See PennEast Br. 1; Amici Br. 7. If New Jersey cannot “veto” pipelines, their reasoning goes, then it cannot maintain its sovereign immunity where pipelines are involved.

That argument cannot carry the day. As a threshold matter, the Supreme Court has previously refused to undermine state sovereign immunity in the face of similar arguments about Congress’s interstate commerce authority. See Seminole Tribe, 517 U.S. at 55-73. And as importantly, PennEast and its amici entirely misunderstand New Jersey’s position and the consequences that flow from it. New Jersey agrees that the United States oversees interstate natural gas pipelines and that federal law reigns supreme. New Jersey also agrees that it has no veto power over a natural gas pipeline just by dint of owning affected property interests. New Jersey’s theory is that while recipients of a FERC Certificate of Public Convenience and Necessity can condemn necessary property interests, they cannot condemn state interests absent
consent. But another actor can step in: the United States. The federal government could condemn these interests, pay just compensation, and transfer the properties to PennEast. See Opening Br. 24; Blatchford, 501 U.S. at 785 (confirming that states consented to suits by the United States at the Founding, even ones “for a particular person’s benefit”). Indeed, the United States has previously filed suits to enforce an individual’s rights after that individual’s suit was dismissed. See Opening Br. 25-26 (discussing Chao v. Va. Dep’t of Transp., 291 F.3d 276, 282 (4th Cir. 2002)).

Rather than a veto, then, the result of New Jersey’s theory would be a minor change. FERC would still grant companies a Certificate, and those companies would still condemn most necessary property interests. But where a pipeline would require condemning state interests, government lawyers would file the actions instead. That way, each party’s interests would be respected: the United States would maintain its role over natural gas pipelines, while the states would maintain their constitutional right to be subject to litigation only by responsible and accountable federal officials. The federal government gets to decide whether the pipeline moves forward, but it also has to decide the critical questions in the ensuing condemnation suit, including whether to negotiate with the state and what to offer as compensation.

PennEast disagrees that the U.S. government could, under current federal law, file actions condemning these property interests directly. See Br. 48 (arguing that the NGA only grants condemnation “authority to the qualified natural gas companies”).
That “absence of [such] statutory authority,” PennEast fears, “could easily result in the interstate natural gas pipeline infrastructure grinding to a halt.” Id.\textsuperscript{5} As explained above, what federal agencies can do as a matter of federal statutes does not control whether the states can assert their immunity. But in any event, PennEast is mistaken. Because “[t]he power of the Federal Government to acquire land within a State by purchase or by condemnation without the consent of the State is well established,” \textit{Paul v. United States}, 371 U.S. 245, 264 (1963), nothing in this Nation’s constitutional structure stops it from stepping in. And federal laws already state that “[a]n officer of the Federal Government authorized to acquire real estate” for “public uses” can do so through “condemnation, under judicial process, when the officer believes that it is necessary or advantageous to the Government to do so.” 40 U.S.C. § 3113 (the Condemnation Act of 1888). This includes the condemnation of state properties. \textit{See United States v. Carmack}, 329 U.S. 230, 236-48 (1946).

Here, the NGA—as PennEast and amici take pains to emphasize—empowers FERC to oversee the approval and creation of all interstate natural gas pipelines, and thus supplies that necessary authorization. Indeed, it would be an odd reading of the NGA that allows FERC to delegate eminent domain powers to private entities, but

\textsuperscript{5} For their part, amici do not necessarily dispute that the United States \textit{can} condemn lands for pipelines; they focus instead on the fact that it \textit{does} not do so. \textit{See} Br. 11 (noting “no arm of the federal government … exercises the federal eminent domain power to build interstate pipelines”). But the federal government can and has filed condemnation actions in other contexts, and it can start doing so here.
never to exercise those eminent domain powers—even where doing so is necessary to permit construction of an approved natural gas pipeline. It is not clear how FERC could empower others to do that which it could not do itself.

Amici make one additional consequentialist point. At the end of their brief, amici say that “New Jersey historically has not resisted condemnation of its property interests” under the NGA and that it instead has a clear “history of contracting” with Certificate holders “to access lands in which the State has a property interest” or to “allow[] ‘friendly’ condemnation actions … to proceed.” Amici Br. 25-26. But that does not help them. Amici are not saying that New Jersey has “consented to” this action just because it consented to condemnation actions in the past. Nor could they: states are free to waive immunity in certain cases and not in others. See, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999) (“[A] State’s sovereign immunity is a personal privilege which it may waive at pleasure.”) (citation omitted). Rather, this prior practice confirms the sky will not fall should New Jersey prevail, because states will regularly engage in negotiations over their interests. The only change is that, in cases where a state refuses to consent or where a Certificate holder refuses to negotiate in good faith, the United States—rather than that Certificate holder—must file the condemnation action.
II. PENNEAST FAILED TO COMPLY WITH THE REQUIREMENT TO NEGOTIATE WITH ALL PROPERTY OWNERS BEFORE FILING CONDEMNATION ACTIONS.

As New Jersey explained in its Opening Brief, the court below misinterpreted the NGA when it held that PennEast did not have to negotiate with New Jersey for 41 of the 42 state property interests that it sued to condemn. According to the court below, entities that hold specific interests in a property do not qualify as an “owner of property,” and a Certificate holder thus need not engage in pre-suit negotiations with them. JA48 (quoting 15 U.S.C. § 717f(h)). New Jersey also explained why this was wrong: “property” as used in the NGA is not limited to real property owned in fee, but sweeps in any property interests—including easements—that the Certificate holder will have to condemn. See Opening Br. 34-41.

PennEast’s responses on this point do not correspond with New Jersey’s arguments. PennEast never mentions the “owner of property” requirement, and does not disagree with the legal points in Section II of New Jersey’s Opening Brief. See Br. 52-53. Instead, misunderstanding the “State’s argument” as being “that PennEast has not negotiated in good faith,” Br. 52, PennEast argues that its duty to negotiate with owners of property do not require it to engage in good faith. But New Jersey makes no arguments about the disputed “good faith” requirement on appeal. Instead, the Opening Brief explained that PennEast failed to make any offers to New Jersey, let alone an appraisal-backed offer, vis-à-vis the properties in which the State held
an interest (as opposed to properties it held in fee). And the district court’s reasoning regarding interest holders had nothing to do with “good faith” either—instead, the court rested on its view that PennEast had “no obligation” to negotiate with interest holders under the NGA. JA48. That decision was wrong for the reasons given in the Opening Brief, and PennEast does nothing to rehabilitate it.

PennEast also argues that it did make good faith efforts to negotiate with the State more generally, and that New Jersey rejected its efforts out of hand. But again, when it came to interest holders, the district court did not make any such finding. To the contrary, the district court relied only its erroneous statutory interpretation. This Court should not address those factual questions in the first instance; it should simply correct the statutory misinterpretation, and remand to the district court to make the findings regarding what, if any, negotiations took place with interest holders.

**CONCLUSION**

For the foregoing reasons, the district court’s decision should be reversed.

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Deputy Attorney General

Dated: May 20, 2019
CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: May 20, 2019

By:     s/ Mark Collier
        Mark Collier (013942004)
        Deputy Attorney General
CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), as well as L.A.R. 31.1(c), I certify that:


2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 word-processing system in Times New Roman, 14 point font.

3. Pursuant to Local Appellate Rule 31.1(c), I certify that the text of the electronic brief is identical to the text of the paper copies.

4. The electronic brief has been scanned for viruses with a virus protection program, McAfee VirusScan Enterprise + Antispyware Enterprise, version 8.8.0, and no virus was detected.

Dated: May 20, 2019

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CERTIFICATE OF SERVICE

I certify that on May 20, 2019, the foregoing Reply Brief was electronically filed with the clerk of the court with the United States Court of Appeals for the Third Circuit through the Court’s CM/ECF system, which filing effected service upon counsel of record through the CM/ECF system. I certify that I caused the same Reply Brief to be served via U.S. Mail upon Pro Se Appellee Michael Voorhees.

Dated: May 20, 2019

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