No. 19-1039

In the

Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC

PETITIONER,

V.

STATE OF NEW JERSEY, ET AL.

RESPONDENTS,

On Petition For Writ Of Certiorari
To The Third Circuit Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Natural Gas Act authorizes private parties to file lawsuits against States, and whether such lawsuits are consistent with the States' sovereign immunity.

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STATEMENT OF THE CASE

On September 24, 2015, PennEast Pipeline Company filed an application with the Federal Energy Regulatory Commission (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.* The proposal would include a new compressor station and three proposed lateral pipes. *Id.*

FERC has the power to approve or deny PennEast's application under the Natural Gas Act (NGA), 15 U.S.C. § 717f(c)(1)(A), a federal law enacted pursuant to Congress's Article I Commerce Clause power. Pet. App. 39; 15 U.S.C. § 717(a). On January 19, 2018, FERC issued a Certificate of Public Convenience and Necessity, which allowed PennEast's project to move forward.

Less than a month later, PennEast filed condemnation actions in the U.S. District Court for the District of New Jersey seeking to condemn 42 property interests that were possessed by the State of New Jersey or arms of the State (New Jersey or State). Pet. App. 5. The State held two of these 42 properties in fee. *Id.* For the other 40, the State held property interests that run with the land—typically, easements requiring the land be preserved for recreational, conservation, and/or agricultural uses—that PennEast had to condemn before it could begin constructing its pipeline. *Id.* In each action, PennEast's Complaint sought an order of condemnation, immediate possession of the property for the project, an injunction to prevent New Jersey from interfering in any way, and, of course, a determination of just compensation. Pet. App. 50-51.

PennEast made no good-faith effort to seek these state properties by negotiation before resorting to condemnation actions. Before filing its suits, 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 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 particular interests before it could begin construction. JA97; JA101; JA110; JA116; JA156.

That failure was especially notable because the State had expended considerable sums and effort to obtain these property interests. Since New Jersey is the most densely populated state in the Nation, the State 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, and programs are maintained for open space and farmland preservation by the New Jersey Department of Environmental Protection, State Agriculture Development Committee, and Delaware and Raritan Canal Commission. See N.J. Const. art. VIII, § 2, ¶¶ 6, 7; N.J. Stat. Ann. §§ 13:8A-1 to -56; *id.* § 4:1C-11 to -48; *id.* § 4:1C-32; *id.* § 13:13A-1 to -15. At the affected properties alone, New Jersey spent millions of dollars to obtain its interests. See JA97-JA98; JA101-02; JA110-12; JA116-19. Some of these property interests individually took over one million dollars to obtain. JA111.

Given New Jersey's sovereign immunity, and given the significant interests—including financial interests—it had in the affected properties, the State moved to dismiss the actions. The State argued that the Eleventh Amendment prevented the court from exercising jurisdiction over a suit brought by a private party against the State, including one to condemn state properties. Pet. App. 6.

On December 14, 2018, the district court denied New Jersey's motion and granted PennEast's application for 42 orders of condemnation and to take immediate possession of the properties. Pet. App. 6. The court held that sovereign immunity could not apply since PennEast "has been vested with the federal government's eminent domain powers and stands in the shoes of the sovereign." *Id.*

In a unanimous decision, a panel of the Third Circuit (Judges Bibas, Jordan, and Nygaard) reversed. Pet. App. 3. The Court recognized that there were two related questions at stake: whether the federal government *could* delegate to

PennEast the power file condemnation actions against the States, consistent with the Constitution, and whether the federal government in fact *did* delegate such power with sufficient clarity when it enacted the NGA. *See id.* The court found that there was "deep doubt" as to PennEast's constitutional position, Pet. App. 26, but did not have to resolve the issue because the company's statutory analysis was incorrect, Pet. App. 30. The panel vacated the district court's order insofar as it condemned New Jersey's real property interests and remanded for dismissal of claims against the State. Pet. App. 31.

The Third Circuit began with an analysis of PennEast's constitutional claims. The Court first explained that "the federal government's ability to condemn state land … is, in fact, the function of two separate powers: the government's eminent domain power and its exemption from Eleventh Amendment immunity." Pet. App. 12. While all agreed that the federal government could delegate its inherent eminent domain power, which was enough to allow private parties to condemn *private* lands, the delegation of its exemption from Eleventh Amendment immunity—an exemption that it received from the States themselves when they joined the union—was another matter entirely. Pet. App. 12-13.

The court described three concerns with the notion that such delegations would be possible:

First, "there is simply no support in the caselaw" for the notion that the U.S. government can *delegate* its authority to sue the States to a private party. Pet. App. 14. To the contrary, this Court's decisions established that the States' "consent, 'inherent in the convention,' to suit by the United States … is not consent to suit by anyone whom the United States might select." Pet. App. 15 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991)); *see also id.* (noting that this Court had "express[ed] its doubt" that the right to sue the States "*can* be delegated" (quoting *Blatchford*, 501 U.S., at 785)).

Second, the panel found that first principles justified this Court's precedents. The panel described "fundamental differences between suits brought by accountable federal

agents and those brought by private parties," which "militate against concluding that the federal government can delegate to private parties its ability to sue the States." Pet. App. 14. Here, "the condemning party … 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." Pet. App. 18. The court held that "the identity of the party filing the condemnation action is not insignificant." *Id.*

Third, the unanimous panel added, any delegation of this sort "would undermine the careful limits established by the Supreme Court on the abrogation of State sovereign immunity." Pet. App. 14. As the panel put it, this Court has repeatedly limited the instances in which such abrogation is proper, because the "abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States." Pet. App. 19 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989)). And because Congress could not abrogate state sovereign immunity in passing the NGA—which was adopted under its Commerce Clause authority—it could not make an end run around the rule by simply "delegating" that authority instead.

As the Third Circuit noted, contrary to PennEast's view, nothing about this analysis changes simply because the condemnation actions were styled as *in rem* actions. Pet. App. 24. For one, the panel concluded, "the Supreme Court has consistently recognized that sovereigns can assert their immunity in *in rem* proceedings in which they own property," Pet. App. 25, which made sense in light of the Court's admonition that a "court cannot summon a State before it in a private action seeking to divest the State of a property interest." *Id.* (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 289 (1997) (O'Connor, J., concurring)). For another, the opinions PennEast relied on to contend that the States did not have immunity in *in rem*

cases were "confined—by their terms—to the specialized areas of bankruptcy and admiralty law." Pet. App. 24.

Ultimately, however, the court did not have to resolve the issue of whether the United States *could* delegate its right to sue States because "nothing in the NGA indicates that Congress intended to do so." Pet. App. 27. The court found that the governing standard dictated this result. As the court held, Congress's intent to delegate the authority to sue States "must be 'unmistakably clear in the language of the statute.'" Pet. App. 27 (quoting *Blatchford*, 501 U.S., at 786).[1] That meant the evidence of a delegation had to be unequivocal and textual. *Id.* But here, the panel held, there was no "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," Pet. App. 30—the law "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." Pet. App. 27. The Third Circuit would not assume "Congress intended—by its silence—to upend a fundamental aspect of our constitutional design." Pet. App. 29-30.

For these reasons, the Third Circuit vacated the district court order and remanded for the purpose of dismissing the claims against New Jersey. Pet. App. 31.

PennEast then filed for panel rehearing and rehearing en banc, which the court denied without any noted dissent on November 5, 2019. Pet. App. 32-33.

REASONS FOR DENYING THE PETITION

None of the traditional criteria support certiorari. Most notably, there is no split for this Court to resolve—and no disagreement between any federal appellate judges on the questions presented. Nor is this the rare splitless case that nevertheless involves an error in need of correction, both because the Third Circuit's constitutional analysis and its

[1] The Third Circuit noted that a second well-established doctrine, the canon of constitutional avoidance, pointed the same way—calling on courts to adopt "a construction of the statute [that] is fairly possible by which the question may be avoided." Pet. App. 28 (citation omitted).

statutory holding were in fact plainly correct, and because PennEast greatly overstates the consequences of the Third Circuit's ruling for future pipelines and for this one.

I. There Is No Split That Warrants Review.

This Court's review on certiorari is primarily focused on addressing disagreements between the courts of appeals that require uniform resolution. No such circuit split exists here. To the degree this case raises important issues, but see Part III, *infra*, they can be resolved in a future case after additional review among the lower courts.

The Third Circuit's conclusion that the text of the NGA does not allow private parties to file condemnation lawsuits against States, and that a contrary reading would generate serious constitutional issues, does not split with—or even create tension with—the decisions of any other circuit. This is undisputed; as the parties recognize, the Third Circuit is the first court of appeals to discuss both the statutory and constitutional questions that this case implicates.

Two additional points are especially notable. First, not only is there no split among the circuits on this issue, but there is no dispute among *any* federal appellate judges on the issue either. The panel decision ruling for the State was unanimous, and there was no noted dissent by any member of the Third Circuit from the denial of rehearing en banc. Second, and strikingly, beyond the lack of any split among the courts of appeals, the Third Circuit's decision is also in line with the only two federal district courts to consider the question, too. See *Sabine Pipe Line, LLC v. A Permanent Easement of 4.25 +/- Acres of Land in Orange Cty., Texas*, 327 F.R.D. 131, 141 (E.D. Tex. 2017) (finding that the NGA did not, and could not, delegate the federal government's ability to sue the States under the Eleventh Amendment); *Colum. Gas Transmission v. 0.12 Acres of Land,* No. 19-1444 (Dkt. 47) (D. Md. Aug. 21, 2019) (oral ruling reaching same conclusion). In short, the analysis on these issues so far has been entirely consistent.

The lack of any split or inter-circuit tension provides an especially compelling reason to deny certiorari in this case because this Court will have other opportunities to address

the same issues in the future, with the benefit of additional consideration by the federal courts of appeals. In fact, there is a pending case before the Fourth Circuit that raises the same questions regarding private parties' authority to hale States into court pursuant to delegated authority under the NGA. See *Colum. Gas Transmission v. 0.12 Acres of Land,* No. 19-2040 (CA4). To the degree that the Fourth Circuit agrees with the decision below, that will provide additional evidence that the panel's unanimous decision is the right one; to the degree that it disagrees, its opinion would help to crystallize the issues for review.[2]

Finally, the fact that FERC later advanced a different statutory analysis in a declaratory order is not a dispute that calls for review. For one, were that the rule, all court decisions interpreting a statute in any way different than an agency would justify certiorari—a radical break from this Court's practice. For another, FERC's declaratory order addressed only the statutory interpretation issues and explicitly "ma[d]e no attempt to address the Eleventh Amendment question," see *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,064, ¶ 21 (Jan. 30, 2020)—notwithstanding the important role that constitutional avoidance played in the Third Circuit's analysis. If FERC's approach leads another court to resolve this issue differently—although, for the reasons in Part II, *infra*, it should not—the Court can review that split at that time.

II. The Unanimous Decision Below Reflects A Proper Application Of Sovereign Immunity Law And Statutory Interpretation Rules.

Without a split, there is no basis for certiorari because the Third Circuit's ruling reflects core sovereign immunity principles and basic rules of statutory interpretation. So

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[2] Although PennEast may highlight that the parties to the *Columbia Gas Transmission* litigation are engaged in mediation, that does not help justify certiorari. If that lawsuit settles, that will mean there is no other pending case raising the same issues, undermining PennEast's claim that the ramifications of the decision below are so sweeping that this issue will arise again and again. And to the degree that this issue *does* arise again in the future, this Court can simply address the issue at that time, with the benefit of additional percolation.

even were this Court more willing to countenance requests for mere error correction, no error is apparent here.

PennEast and the State agree private parties generally lack the power to hale States into court. PennEast and the State also agree Congress cannot abrogate that sovereign immunity through passage of the NGA, which was adopted under its Commerce Clause authority. *Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm'n*, 341 U.S. 329 (1951). The remaining issue is whether Congress can nevertheless "delegate" to private parties the federal government's own ability to sue the States. And the related statutory issue is whether Congress in fact did "delegate" that authority in passing the NGA—even as the law does not mention States or condemning state lands. The Third Circuit was right to express deep doubt as to PennEast's constitutional claims and to reject PennEast's statutory interpretation.

A. The Constitution Does Not Allow Private Parties To Sue The States Under The NGA.

PennEast is wrong to insist that certiorari is warranted, even absent a split, to hold that the Constitution permits a private company to condemn the States' real property.

i. PennEast incorrectly argues that the right to sue the States can be "delegated" to private parties.

The Constitution's structure and history 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 v. Maine*, 527 U.S. 706, 712-13 (1999). As the Court has held, such immunity is confirmed by, but is not limited to, the Eleventh Amendment. See *id*. In short, the States "entered the federal system with their sovereignty intact," and the limited surrender of immunity they gave at the Founding encompassed "only two contexts: suits by sister States … and suits by the United States." *Blatchford*, 501 U.S., at 782. They did not consent to suit by private parties.

PennEast, however, argues the federal government can *delegate* its power to sue the States to private entities. As

the Third Circuit correctly found, however, that position is highly questionable for at least three reasons.

First, this Court's precedents "strongly suggest[] that … the federal government cannot delegate to private parties its exemption from state sovereign immunity." Pet. App. 17. In *Blatchford v. Native Village of Noatak*, a group of Native villages filed a lawsuit against a State, arguing (as PennEast argues here) that they had been "delegated" the power to do so by a federal statute. 501 U.S., at 785. The Court found that the law at issue was only a jurisdictional grant to federal courts to hear claims by Native tribes, and did not empower them to file actions against the States. *Id.* But the majority went on to specifically express its "doubt" that the federal government's right to sue the States "*can* be delegated." *Id.* Rather, the Court wrote, "[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." *Id.*; see also *id.,* at 786 (describing the concept of such delegation as a "strange notion"). The Court has subsequently reiterated this same concern. See *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 787 (2000) (noting "serious doubt" that a qui tam relator's suit against a State could be constitutionally valid).

Second, there are good reasons to think that the States' consent to federal government suits did not include consent to suits by private delegees: the "meaningful differences between suits brought by the United States … and suits by private citizens." Pet. App. 15. The former "are 'commenced and prosecuted … by those who are entrusted with the constitutional duty to take Care that the Laws be faithfully executed,'" but private parties "face no similar obligation." *Id.* (quoting *Alden*, 527 U.S. at 755). And private delegees are not "accountable in the way federal officials are." *Id.* This means the two could easily take different approaches to the same suit (from the amount of damages demanded to the willingness to settle amicably) "especially in dealing with a sovereign State." Pet. App. 18. In short, *Blatchford*'s

conclusions were well justified; there are many reasons the States would have been wary of private delegee suits, even as they acceded to suits by the United States.

Finally, permitting the United States to "delegate" its authority to sue the States would allow Congress to easily evade the limits this Court has repeatedly placed upon its ability to *abrogate* the States' sovereign immunity. There is, after all, a standard "way that Congress can subject the States to suits by private parties"—by abrogating it. Pet. App. 18. But this Court has carefully limited the instances in which abrogation can occur to reflect the "proper balance between the supremacy of federal law and the separate sovereignty of the States." *Alden*, 527 U.S., at 757. The theory PennEast espouses is nothing more than an "end-run around" that rule. Pet. App. 20.

PennEast acknowledges that some of these issues may well be triggered in the normal course, and PennEast does not seriously dispute that *Blatchford* supports the Third Circuit. But PennEast says condemnation is different, both as a matter of practice and doctrine. See Pet. 30. PennEast is wrong on both counts.

Contrary to PennEast's view, a condemnation action is a "clear[]" example of why the identity of litigating parties matters. Pet. App. 18. In PennEast's explanation, the only significant decision in this case was made by the federal government—when FERC approved a pipeline across New Jersey's property and allowed PennEast to file an action taking the land. Pet. 29. But significant issues remain to be resolved in the condemnation action itself. As the Third Circuit noted, even where a substantive right to condemn is shown, "the condemning party controls the 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*." Pet. App. 18 (emphasis added). Especially when it comes to compensation owed for public lands preserved for conservation, the United States may take a "very different" approach than "a private, for-profit entity like PennEast." *Id.* To take one example, a private company might be willing to argue that publicly preserved

lands have little value; the federal government is far less likely to do so given that it, too, maintains such lands. See Pet. 1, 13 (diminishing significance of property interests New Jersey obtained, even though the State paid millions to obtain them). The point is not that this will be true in every case; the point is that the identity of the plaintiff still makes a difference. If allowing a private party to seek damages from a State raises constitutional concerns—as it rightly does—then so does allowing that party to litigate compensation owed *for State land*.

Nor can PennEast offer this Court a test for effectuating its rule. PennEast's argument seems to be that although a private party cannot file suit against a State if the action is purely private—even if the party is acting with delegated authority from the federal government—the rule changes if the underlying action is "inherently governmental." Pet. App. 25-26 & 28. But PennEast invents its new theory out of whole cloth; it has no support in the case law or original evidence, and it is an unworkable standard in practice.

This Court's precedents already refute any distinction between purely private suits and suits by private parties that are "inherently governmental." The best example is in the False Claims Act (FCA) context. A qui tam case brought under the FCA is filed in the name of the government; the suit is based on "false claims submitted to the government"; the United States receives "the lion's share of any amount recovered"; the United States "may choose to intervene and pursue the action itself"; the "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. E.g., *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 48-49 (CA4 1992). But despite these features—which suggest that qui tam suits to recover federal dollars are "inherently governmental"—this Court expressed its "serious doubt" as to whether a relator could sue a State under the Eleventh Amendment. *Stevens*, 529 U.S., at 787. Were PennEast's approach the right one, the doubt expressed by this Court in *Stevens* would have been misplaced.

This Court was right to reject any such distinction. The basic problem for PennEast is that it gives no reason, based in original understanding or case law,[3] to think that while "consent to suit by the United States … is not consent to suit by anyone whom the United States might select," it *is* consent to suit by anyone whom the United States might select if the substantive action is inherently governmental. Further, it defies logic to think such governmental actions have *less* of a need to be carried out by responsible federal officials than other suits—especially if, as here, such suits still involve disputes over just compensation for sensitive and important public lands. And finally, it is not clear how a vague standard like "inherently governmental" would operate in practice. This particular lawsuit is purportedly inherently governmental—even as a private party stands to receive the property and the profits through construction and operation of a private pipeline, controls the suit, and is the entity responsible for paying compensation—but (as explained above) a qui tam suit cannot be. PennEast says nothing about how this Court and the lower courts should resolve the other cases sure to come from its new rule.

This Court has never distinguished between suits by private parties and "inherently governmental" suits by private parties, and it should not start now. The Third Circuit's analysis instead reflects a well-trodden approach to state sovereign immunity.

ii. PennEast incorrectly relies on a purported *in rem* exception to sovereign immunity.

PennEast errs again when arguing, in the alternative, that there is an *in rem* exception to sovereign immunity. See Pet. 30-31. The panel was correct to doubt PennEast's proposition.

The conclusion that no generalized *in rem* exception to state sovereign immunity exists follows from the consistent decisions of this Court going back over a century. See, e.g., *United States v. Alabama*, 313 U.S. 274, 282 (1941) ("A

[3] The few cases PennEast cites in support of its novel distinction are inapposite, as they involve condemnations of private lands rather than state lands. See Pet. 26.

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, in a condemnation action); *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869) (finding "no distinction between suits against the government directly, and suits against its property"); *United States v. Nordic Village, Inc.,* 503 U.S. 30, 38 (1992) (noting this Court has "never applied an in rem exception to the sovereign-immunity bar against monetary recovery, and [that it has] suggested that no such exception exists"); *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699 (1982); *Coeur d'Alene*, 521 U.S., at 289 (O'Connor, J., concurring) ("A federal court cannot summon a State before it in a private action seeking to divest the State of a property interest."). That is why PennEast has not found a *single* case that identifies a sweeping *in rem* exemption.

To be sure, and as PennEast argues, federal courts have recognized that the States consented to *specific* types of *in rem* suits—namely, bankruptcy and admiralty matters—but the States never consented to *in rem* actions generally. See *Central Va. Community College v. Katz*, 546 U.S. 356, 378 (2006) (based on unique history and text of Bankruptcy Clause, finding exception to state sovereign immunity for adjudications over res as part of bankruptcy proceedings); *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998) (noting the "unique role in admiralty cases since the birth of this Nation" and permitting *in rem* admiralty suits to proceed, but even then only if the State lacks possession of the res). If anything, these specialized cases prove the point—confirming the proposition that the States maintain their immunity in adjudications over their property rights, but that particular features of bankruptcy and admiralty law called for a different result.

Just this Term, this Court rejected the argument that a generalized *in rem* exception to state sovereign immunity exists. *See Allen v. Cooper*, No. 18-877 (U.S. Mar. 23, 2020). In *Allen*, the question presented was whether states were immune from private actions brought under the Copyright Remedy Clarification Act. In holding that the States were immune, this Court rejected the argument that *Katz* would

apply beyond bankruptcy cases, finding that "everything in *Katz* is … limited to the Bankruptcy Clause." Slip op., at 7. This Court added that the *in rem* nature of bankruptcy proceedings is "premised on the debtor and his estate, and not on the creditors." *Id.*, at 7-8. Condemnation suits could not be more different, as they focus entirely on condemning the *State's* real property interests.

It makes sense that courts have rejected any purported *in rem* exception. As a threshold matter, calling a lawsuit *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). In practice as in name, then, this *in rem* action is as much a suit against New Jersey—which stands to lose properties, and is forced to litigate what it is owed—as against its parcels. It also makes no sense for state sovereign immunity to turn on such state-law naming conventions. Even if this suit 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." *Id.*, at 206. There is no reason that the Eleventh Amendment should depend on these distinctions, which is why PennEast's alternative argument is without precedent and is no basis for certiorari.[4]

B. The NGA Does Not Empower Private Parties To Sue The States With Sufficient Clarity.

The Third Circuit correctly held that it did not need to decide whether Congress *could* delegate its authority to sue States because Congress *did not* do so when it passed the NGA. PennEast's objections to that ruling misunderstand the governing legal test.

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[4] Relatedly, PennEast suggests that *even if* delegations of sovereign immunity are not permissible, and *even if* states enjoy immunity in *in rem* actions, delegations of the United States's exemption from state sovereign immunity must still be allowed in *in rem* suits. Pet. App. 31. But the sum of zero and zero is still zero. If the federal government cannot "delegate" the right to sue the States in *in personam* actions, it cannot do so in *in rem* actions.

There is no dispute as to what the NGA does and does not say. Section 7(h) of the NGA says that private entities who have obtained a Certificate of Public Convenience and Necessity to build a natural gas pipeline may acquire the "necessary right[s]-of-way" for a pipeline "by the exercise of the right of eminent domain." 15 U.S.C. § 717f(h). The statute does not mention States, state lands, the Eleventh Amendment, or actions involving the States' real property. While the NGA does not "carve out" the States, Pet. 18, it does not include them. According to PennEast, the lack of textual language specifically *excluding* States proves that they are proper defendants. See Pet. 20-24. But PennEast has it backwards.

As the Third Circuit explained, and as this Court has held repeatedly, the issue in a sovereign immunity case is not whether Congress wants to *exclude* States, but whether it spoke with unmistakable textual clarity to *include* States as defendants. See *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" in the text of a statute); *Dellmuth*, 491 U.S., at 231 (noting a "general authorization for suit" is "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment"); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (same). That is true no matter whether the suit involves a purported "delegation" of a right to sue the States, an abrogation of state sovereign immunity, or a waiver of state sovereign immunity. See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (waivers). For good reason: anytime that "Congress intends to alter the usual constitutional balance between States and the Federal Government," Congress "must make its intention to do so unmistakably clear in the language of the statute." *Stevens*, 529 U.S., at 787.

This Court's precedent thus dictated the Third Circuit's sound conclusions. Just as language in the FCA allowing for qui tam suits against "persons" was not clear enough to sweep in States, *Stevens*, 529 U.S., at 787, and just as a federal law authorizing private suits against "*any* recipient of Federal assistance" could not be enough to permit suits

against *state* recipients of such assistance, *Atascadero*, 473 U.S., at 245-46 (emphasis added), a statute permitting parties to file condemnation actions for rights-of-way generally is not enough to permits lawsuits against States to condemn their properties. These are "ordinary principles of statutory construction," Pet. 18, that govern whenever a statute risks trammeling on state sovereign immunity.

As the Third Circuit noted, this analysis is bolstered in this case by the canon of constitutional avoidance, which requires federal courts to adopt any "construction of the statute" that "is fairly possible" in order to avoid a serious constitutional concern. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). That doctrine fits this case perfectly: if the Third Circuit had found that Congress intended to delegate its exemption from state sovereign immunity in adopting the NGA, the Third Circuit would also have had to decide whether the delegation is constitutionally proper. See Part II(A), *supra*. So long as the NGA is susceptible to a reading that does not delegate the federal government's right to sue the States to private parties, it must be adopted.

None of PennEast's responses demonstrate error in the above analysis, let alone show this Court should engage in error correction. Its first argument is that plaintiffs should not have to show both that the U.S. government delegated eminent domain power and that it delegated its exemption from Eleventh Amendment immunity. Pet. App. 25 (calling this "double counting"). But anytime a private party wishes to sue the State, it must show there is an underlying cause of action *and* a way to overcome sovereign immunity. That is why a qui tam relator has to show both that it is qualified to bring a suit (e.g., that it is an "original source"), and that the States are proper defendants. See *Stevens*, 529 U.S., at 787. And that is why plaintiffs in suits for damages against a State have to show both a private right of action and that the States are proper defendants. See, e.g., *Atascadero*, 473 U.S., at 246. That PennEast can establish its right to file condemnation actions against private landowners does not simultaneously establish its right to sue the States.

Lacking any evidence that is "'unmistakably clear in the language of the statute,'" Pet. App. 27 (quoting *Blatchford*,

501 U.S., at 786), PennEast also seeks resort beyond the text, relying on legislative history and other federal laws in support of its position. But these cannot demonstrate the need for error correction either, because this Court cannot turn to extra-textual tools in divining whether there is a clear statement to overturn 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."). In any event, the Third Circuit rejected all these arguments, placing them in context and explaining their lack of relevance. See Pet. App. 28-30 & 28 n. 20.

Nothing about FERC's subsequent declaratory order—on which PennEast heavily relies—changes this analysis. See *PennEast Pipeline Co.,* 170 FERC ¶ 61,064, at ¶ 25 (stating the NGA "does not limit a certificate holder's right to exercise eminent domain authority over state-owned land"). First, as noted previously, the parties agree that the NGA's text neither includes nor excludes States, and FERC adds nothing to that analysis. PennEast's dispute with the Third Circuit is really over the legal *standard* that applies. FERC's agreement with PennEast, and disagreement with the Third Circuit, can be traced to that mode of analysis—i.e., FERC asked whether the NGA had language "limiting" States from its reach, instead of seeking a clear statement that States in fact are included. *Id.* FERC has no expertise on what standard governs this question, which happens to be arising in an NGA action but could arise (and has arisen to this Court before) in any lawsuit that touches on state sovereign immunity. This Court's decisions have answered that question, and the Third Circuit followed them.

Second, FERC declined to evaluate the constitutional problems presented by this case, given its lack of expertise on questions of state sovereign immunity. See *id.*, at ¶ 27 (refusing to "evaluate the constitutional sufficiency of … delegating federal authority" to sue the States). As a result, FERC also did not engage with the canon of constitutional

avoidance. See *id.*, at ¶ 14 (after New Jersey explained that this canon trumps *Chevron* deference, replying only that it "decline[s] to address the constitutional issues raised in the Petition"). But because the Third Circuit's interpretation was driven by a need to avoid a vexing constitutional issue, that leaves FERC's order nonresponsive, and certainly not a basis for this Court to grant certiorari.

III. The Consequences Of The Third Circuit's Decision Are Overstated.

Unable to overcome the Third Circuit's straightforward legal analysis, and absent a split, PennEast relies heavily on the predictions about the purported "dire consequences" of the decision below. Pet. i. But this is not the exceedingly rare petition in which impacts alone justify certiorari since PennEast overstates the possible impacts of this decision both for other cases and for this one.

A. PennEast Overstates The Impacts Of The Third Circuit's Decision On NGA Cases.

While PennEast's petition relies heavily on the notion that the Third Circuit created a "state veto" of natural gas pipelines that will prevent development of such pipelines across this country, PennEast is wrong. By its own terms, the Third Circuit's decision does not establish such a veto, instead only identifying which parties can file appropriate condemnation suits against States for their real property. That is why this question has arisen so infrequently, and why it is not likely to arise frequently in the future.

The Third Circuit rightly rejected the argument that its holding "will give States unconstrained veto power over interstate pipelines, causing the industry and interstate gas pipelines to grind to a halt." Pet. App. 30. As Judge Jordan explained, though the members of this panel were "not insensitive" to the needs of the natural gas industry, *id.*, PennEast was mischaracterizing their decision. After all, this case is not about whether *an* entity can file these condemnation actions—the exclusive issue is *which* entity must file them: PennEast or a public official. As a result, the panel held, "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." *Id.* Indeed, given the States' consent to all suits by the United States, see *United States v. Carmack*, 329 U.S. 230, 240-42 (1946) (noting the federal government has power to condemn state lands), the Third Circuit's explanation is clearly the right one.

PennEast then hangs its hat on the argument that even if the federal government could, as a constitutional matter, file the same condemnation action that PennEast pursued here, it lacks statutory authority to do so. And it highlights that FERC found the same in a declaratory order. But the company's analysis runs into two problems. First, even if the "government needs a different statutory authorization to condemn property for pipelines, that is an issue for Congress, not a reason to disregard sovereign immunity," Pet. App. 31—a point that this Court has made repeatedly in its own sovereign immunity decisions. Indeed, Congress has granted precisely this kind of statutory authorization in a similar context. See 16 U.S.C. § 824a-4 (authorizing federal agency to "acquire [the] rights-of-way by purchase, including eminent domain" necessary for electric power facilities, and requiring agency to transfer those rights to a permit holder "if such holder has made payment to the Secretary of the entire costs of the acquisition of such property interest, including administrative costs"). Should it become necessary, the same could happen here.

Second, New Jersey has consistently taken the position that the federal government *does* enjoy statutory authority to file condemnation actions—as the Third Circuit itself suggested. Pet. App. 31. No court has had the opportunity to formally resolve whether the NGA permits the federal government to directly condemn state real property, and resolution of that question need not control resolution of this petition. But New Jersey argued below that FERC's authorities to approve or modify interstate pipeline routes and to decide which properties can be taken for use in interstate pipeline construction, see 15 U.S.C. § 717f(c), show that FERC has implied power to acquire real estate. See 40 U.S.C. § 3113 (giving federal government power to

condemn on behalf of any officer authorized to acquire real estate).[5] At a minimum, the State already explained, this interpretation offers a savings construction of the law by advancing a "comprehensive scheme of federal regulation" over interstate natural gas, *N. Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 91 (1963), that still accommodates the States' sovereign immunity.[6]

To be clear, this Court need not decide whether and when a federal agency could file these actions pursuant to existing law. All that matters for the purpose of certiorari is that there is an interpretation that lower courts could and likely will adopt that addresses PennEast's concerns. See, e.g., *United States v. 14.02 Acres*, 547 F.3d 943, 951 (CA9 2008); *Davenport v. Three-Fifths of an Acre of Land*, 252 F.2d 354, 356 (CA7 1958) (two decisions that allowed condemnations by the federal government absent express textual authority based on a rule of implied necessity); Pet. App. 31 (decision below). This Court should allow further percolation to see whether the problems that PennEast decries really arise—rather than grant review of the first decision on point, especially one based on traditional immunity and statutory interpretation analyses.

The above analysis also helps explain why, in contrast to PennEast's proclamations, the facts on the ground do

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[5] The concept of implied authority is not foreign to the NGA. FERC has implied authority to consider racial discrimination practices in rate setting, *NAACP v. FPC*, 425 U.S. 662 (1976), and occupies the field of securities' issuance by natural gas companies despite silence in the NGA, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 309 (1988). In both cases, this Court reviewed FERC's broad NGA authority to find that, though the Act did not expressly address racial discrimination or securities, both concerns were within the scope of FERC's authority.

[6] FERC's protestations to the contrary in a declaratory order fall short for similar reasons. As explained above, FERC did not consider any of the constitutional issues in this case because it takes the position that only "courts can determine whether … section 7(h) of the NGA conflicts with the Constitution." *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042 at ¶ 81 (Oct. 13, 2017). But whether a savings construction is justified is tied to the underlying constitutional issue. FERC's failure to address Eleventh Amendment immunity means the remainder of its analysis is of little help to this Court.

not support its claims of industry-wide harm. As explained above, the Third Circuit's decision built on a prior district court decision, issued in September 2017, upholding Texas's analogous assertions of sovereign immunity in a condemnation action brought under the NGA. See *Sabine Pipe Line,* 327 F.R.D. 131. The sky has not fallen. Since *Sabine* was decided, FERC has received 53 applications for major natural gas pipeline transportation facilities; the agency approved 34, 19 remain pending, and none have been denied.[7] Likewise, companies have continued to file condemnation suits after *Sabine* and the decision below. See, e.g., *Gulf S. Pipeline Co., LP v. TX-MQ-0050.00000: 5.26 Acres, More or Less, in the Jose Maria De La Garza Survey, Abstract No. 15, Montgomery Cty*, No. CV H-19-2885 (S.D. Tex. Dec. 13, 2019); *Atl. Coast Pipeline, LLC v. 2.62 Acres, More or Less, in Halifax Cty., N. Carolina*, No. 4.18-CV-87-BO (E.D.N.C. Mar. 10, 2020). Yet despite the progress of the natural gas industry, the parties have identified only two cases after *Sabine* (including this one) in which the States asserted immunity, suggesting that this issue will not arise frequently and will not present a serious practical roadblock.

The history to date, as well as the content of the Third Circuit's holding, undermine PennEast's claims that the decision below will interfere with other pipelines in future cases. But even if New Jersey is mistaken, the Court will have other opportunities to take up the question presented if it should arise again. At that point, the Court can benefit from further percolation, including as to these practical implications—which is precisely why the Court is traditionally loath to take up even undeniably important questions in the first case in which they arise.

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[7] Compare *Major Pipeline Projects Pending*, FERC, https://www.ferc.gov/industries/gas/indus-act/pipelines/pending-projects.asp (last accessed May 31, 2020) (pending natural gas pipeline projects from 2017 through 2020), with *Approved Major Pipeline Projects (2015-Present)*, FERC, https://www.ferc.gov/industries/gas/indus-act/pipelines/approved-projects.asp (last accessed May 31, 2020) (approved pipeline projects for each year from 2009 to 2020).

B. PennEast Overstates The Impacts Of The Third Circuit's Decision On This Case.

Nor do the consequences in *this* case justify a departure from this Court's traditional practice. The judgment below affects only this particular proposal for this one pipeline, and there are two reasons why the claimed impacts on this pipeline are less significant than PennEast makes it seem. For one, PennEast's proposal still faces other, independent legal obstacles. For another, PennEast has more recently reconceptualized its project, seeking authorization to build a modified pipeline in two phases—with a first phase that does not involve New Jersey real property interests at all. That new proceeding both creates uncertainty and raises the prospect that PennEast may get most of what it wants even if the Third Circuit's decision stands. Those unusual circumstances would make this case an unsuitable vehicle for addressing the question presented even if it otherwise warranted review in another case.

PennEast's original pipeline proposal faces significant legal hurdles separate and apart from the Third Circuit's decision. First, the Certificate of Public Convenience and Necessity that FERC granted to PennEast required the company to obtain a variety of authorizations it does not yet have, including New Jersey's approval under the Clean Water Act. See *PennEast Pipeline Co.*, 164 FERC ¶ 61,098, at App. A ¶ 10 (2018). Further, FERC's certificate itself remains subject to a host of serious challenges in litigation the D.C. Circuit has held in abeyance pending the outcome of this litigation. See *Del. Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir.). In other words, even if this Court granted certiorari and reversed, there is good reason to believe the pipeline will not be built as proposed.

Two examples of the strength of these other challenges stand out. For one, New Jersey has argued that FERC erred by ignoring the evidence that this particular pipeline is unnecessary—that the Mid-Atlantic region already has a glut of capacity. See Brief of Pet'rs N.J. Dep't of Envtl. Protection (Doc. No. 1791464) at 21-24, *Del. Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir.). Although FERC had to find there was a "need" for this pipeline before the

agency could approve it, FERC held that it could make that finding based solely on PennEast's contracts to serve its own affiliates—contracts that benefit the parties even if they do not meet any real public need. *Id.*, at 15-21. As one sign of the force of this argument, FERC's own prior policy documents have recognized that "[u]sing contracts as the primary indicator of market support" necessarily "raises … issues when the contracts are held by pipeline affiliates." *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 at 61,648, 61,743 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000).

The D.C. Circuit litigation also includes a challenge to FERC's issuance of a certificate authorizing PennEast to take land under §717f(h) before it secures the regulatory approvals required to build the pipeline. See Brief of Pet'rs Del. Riverkeeper Network (Doc. No. 1791473) at 27-29, *Del. Riverkeeper Network v. FERC*, No. 18-1128 (D.C. Cir.). That means landowners could have property condemned and permanently altered through excavation and other "pre-construction" activities—only to discover later, after the damage is done, that the pipeline must be rerouted or cannot be built at all. *Id.* Private landowners have raised to the D.C. Circuit the serious legal issues that approach presents. See *id.*, at 27-33 (noting that Congress permitted condemnation only of property "necessary ... to construct, operate and maintain a pipe line," and that land that may ultimately not be authorized for pipeline use at all is not necessary) (citing 15 U.S.C. § 717f(h)). The D.C. Circuit has explicitly not yet resolved the question whether FERC can issue a certificate that allows the taking of property in this fashion, *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 271 n.* (D.C. Cir. 2015); *id.* at 281 (Rogers, J., dissenting in part and concurring in the judgment), so it is quite possible the D.C. Circuit will vacate the Certificate on these grounds, too.

In light of these independent legal obstacles, there is reason to doubt that PennEast would be able to proceed with its original proposal even if this Court granted review and reversed.

Nor does PennEast wish to proceed with that proposal in any event. A few weeks before filing its petition for certiorari, PennEast opened a new docket before FERC seeking approval for a modified project in two "phases." App. for Amend. 1, *PennEast Pipeline Co.*, Dkt. No. CP-20-47-000 (Jan. 30, 2020). "Phase 1" is the Pennsylvania portion of the original proposal, along with a new connection to the grid near the New Jersey border. *Id.* "Phase 2" is the shorter New Jersey portion of the original proposal, which PennEast seeks to build only if it both prevails here and secures the required regulatory approvals from New Jersey. *Id.*, at 1-2. PennEast's petition omits that new development, which counsels against this Court's review for two reasons.

First, the proposal modification request means that PennEast may be able to achieve most of what it seeks even if this Court denies review. PennEast has told FERC that Phase 1 is a "standalone" project that is "in no way contingent on or otherwise implicated by" its ability to construct Phase 2. App. for Amend. 1, 8. PennEast has also represented that Phase 1 alone would allow the company to serve some of the same New Jersey-based shippers who had contracted for service from the full pipeline. Mot. for Leave to Answer & Answer 20-21, *PennEast Pipeline Co.*, Dkt. No. CP20-47-000 (Mar. 24, 2020). For a petition for certiorari that is based on the consequences of a lower court decision, it is notable that PennEast has a plan in place to achieve so much of the financial value it seeks.

Second, PennEast's proposal creates uncertainty about the fate of what it now calls "Phase 2." This bifurcation request appears to be unprecedented, but if FERC allows PennEast to build Phase 1 as a "standalone project," then as the State has explained, FERC should "undertake a new analysis" to determine "whether Phase 2 is needed." N.J. Comment 2, *PennEast Pipeline Co.*, Dkt. No. CP20-47-000 (Mar. 30, 2020). Among other things, Phase 1—which serves many of the same customers—qualifies as a major intervening development diminishing any need for Phase 2. It is thus far from clear whether or when FERC will approve PennEast's proposal for Phase 2. At a minimum,

the uncertainty and complexity created by the new FERC proceedings provide more reason for this Court to adhere to its traditional certiorari standards and deny review.

CONCLUSION

The petition for certiorari should be denied.

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