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

APPELLANTS' MERITS BRIEF

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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

take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity") (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). This Court has jurisdiction to review the grant of a preliminary injunction under 28 U.S.C. § 1292(a). *See Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres & Temporary Easements for 3.59 Acres in Conestoga Twp.*, 907 F.3d 725, 733 (3d Cir. 2018).

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.

Id. § 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[1] 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

[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.

FERC nevertheless issued a Certificate to PennEast on January 19, 2018. JA211-31. Multiple parties—including New Jersey—filed a petition for review in the D.C. Circuit challenging FERC's decision. *See Delaware Riverkeeper Network v. FERC*, No. 18-1128. That appeal remains ongoing.

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

[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 *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 condemnation actions. *See* 15 U.S.C. § 717f(h).

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 *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

intent to permit condemnation actions against the States. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985). And the relevant statutory language makes no reference to the Eleventh Amendment or to sovereign immunity, which are critical factors in evaluating intent. *See Dellmuth v. Muth*, 491 U.S. 223 (1989).

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

[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*

[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").[6]

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

[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.*

[7] In any event, for all the same reasons that the NGA does not reflect an unmistakable intent to delegate the U.S. government's exemption from state sovereign immunity, *see* Section I(A)(b), its text does not reflect an unmistakable intent to abrogate that immunity. *See Dellmuth*, 491 U.S. at 231; *Sabine*, 327 F.R.D. at 141.

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).

[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).[10] 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

[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

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of 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.[12] The traditional understanding of a property owner—which covers the owner of a property interest—thus fits the structure of the NGA perfectly.

[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,[13] and at the very least, the NGA required PennEast to try to negotiate with New Jersey over the interests before

[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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Dated: April 18, 2019

CERTIFICATION OF BAR MEMBERSHIP

I certify that 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

By: s/ Mark Collier
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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:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,615 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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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