

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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PENNEAST PIPELINE COMPANY, LLC,)
 Petitioner,)
 v.) No. 19-1039
NEW JERSEY, ET AL.,)
 Respondents.)
- - - - -

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Place: Washington, D.C.
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PENNEAST PIPELINE COMPANY, LLC,)

Petitioner,)

v.) No. 19-1039

NEW JERSEY, ET AL.,)

Respondents.)

- - - - -

Washington, D.C.

Wednesday, April 28, 2021

The above-entitled matter came on
for oral argument before the Supreme Court of the
United States at 11:55 a.m.

1 APPEARANCES:
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3 of the Petitioner.
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7 supporting the Petitioner.
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9 Jersey; on behalf of the Respondents.
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1 P R O C E E D I N G S

2 (11:55 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 19-1039, PennEast Pipeline
5 versus New Jersey.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

9 MR. CLEMENT: Mr. Chief Justice, and
10 may it please the Court:

11 Long before the framing, it was clear
12 that eminent domain was an essential element of
13 sovereignty and that private parties could
14 be deputized to exercise that power for
15 infrastructure projects. Once the federal
16 eminent-domain power was exercised, this Court
17 made clear that state lands are not immune, but
18 states are entitled to just compensation like
19 other property owners.

20 New Jersey does not take issue with
21 those precedents but still asserts immunity from
22 the process used to ensure just compensation if
23 not initiated by the federal government itself.

24 That claim fails for two interrelated
25 reasons. First, states succeeded to the federal

1 government's superior eminent-domain authority
2 in the Plan of the Convention. In our system of
3 dual sovereignty, only one sovereign can
4 have the ultimate authority over land when the
5 federal and state governments assert conflicting
6 claims. The Supremacy clause largely settles
7 that debate, and New Jersey concedes that its
8 sovereignty must yield when the federal
9 government decides to take state property.

10 But, once it concedes that, it has no
11 immunity left to assert in the proceedings
12 necessary to effectuate the taking. That
13 follows from the immovable property exception,
14 which long predates the framing. No sovereign
15 has ever had immunity from the eminent domain
16 authority of the superior sovereign over
17 immovable property. It also follows from the
18 very nature of eminent domain. Eminent domain
19 that depends on consent is an oxymoron.

20 Second, the proceedings here are in
21 rem and can only augment the state treasury.
22 This Court has recognized that in rem
23 proceedings pose a lesser threat to state
24 sovereignty. Justices Washington and Story made
25 the same point when the Eleventh Amendment was

1 new. And of all in rem actions, eminent-domain
2 proceedings pose the least concerns. They
3 allege no wrongdoing, they impose no liability,
4 and they cannot be brought without federal
5 authorization. The whole point of the
6 proceeding is to ensure just compensation for a
7 taking.

8 New Jersey's effort to convert a
9 constitutional remedy into a veto over the
10 federally authorized taking is simply
11 incompatible with our constitutional design.

12 CHIEF JUSTICE ROBERTS: Mr. Clement,
13 do you have any other examples outside the area
14 of eminent domain where the federal government
15 can delegate its powers to a private party and
16 then the private party can exercise those --
17 those powers in a way that's inconsistent with
18 state rights?

19 MR. CLEMENT: I'm not sure we do, Your
20 Honor, I mean, in the sense that, you know, I do
21 think there is a long and unbroken tradition of
22 the eminent-domain power being delegated, or
23 maybe the better way to think about it is that a
24 private entity is deputized to exercise the
25 power. And I don't think we're asking for any

1 ruling that would extend outside the
2 eminent-domain context, but I think all
3 sovereigns, including New Jersey, have
4 recognized that the ability to deputize the
5 private actors to exercise the eminent-domain
6 power is really essential to developing
7 infrastructure.

8 CHIEF JUSTICE ROBERTS: Well, what --
9 what is it that makes the eminent-domain power
10 so unique? That it's the only --

11 MR. CLEMENT: So the difference --

12 CHIEF JUSTICE ROBERTS -- the only
13 example we have? It's really quite
14 extraordinary to have private parties overriding
15 state immunities.

16 MR. CLEMENT: Well, first of all,
17 Mr. Chief Justice, I'm not sure that's the right
18 way to think about it, which is to say I think,
19 when somebody like PennEast asks -- acts
20 pursuant to a deputized eminent-domain power, it
21 really is exercising the federal power directly
22 and it's not an ordinary citizen. I think one
23 way to understand that is, if PennEast doesn't
24 provide sufficient compensation, it has violated
25 the Just Compensation Clause of the Takings

1 Clause.

2 Now we generally don't think that the
3 Takings Clause applies to anyone other than a
4 federal actor. It applies here because
5 distinctly you have somebody exercising the
6 federal eminent-domain authority.

7 CHIEF JUSTICE ROBERTS: Why -- why is
8 this such a problem? Why can't the private
9 party join a federal officer as an indispensable
10 party or whatever so that the federal government
11 is part of the condemnation proceedings?

12 MR. CLEMENT: So, Your Honor, I
13 suppose Congress could alter the statute and do
14 that, but, you know, Congress has been
15 delegating or deputizing parties to exercise its
16 eminent-domain authority for well over 100
17 years. It's never done that, and I don't think
18 there any -- there is any reason that they need
19 to do that in order to save the authority.

20 And, again, New Jersey exercises the
21 ability to delegate or deputize private parties,
22 and they don't appear in those proceedings
23 either to my knowledge.

24 CHIEF JUSTICE ROBERTS: Justice
25 Thomas.

1 JUSTICE THOMAS: Thank you, Mr. Chief
2 Justice.

3 Mr. Clement, could you give me the
4 language here that effectuates the deputizing of
5 -- of PennEast?

6 MR. CLEMENT: Sure, Your Honor. I
7 think it comes right from 15 U.S.C. 1717f(h),
8 and it says when any holder of a certificate of
9 public convenience and necessity cannot acquire
10 by contract or is unable to agree with the owner
11 of the property the compensation to be paid for
12 the -- the necessary right-of-way to construct,
13 operate, and maintain a pipeline for the
14 transportation of natural gas, it may acquire
15 the same by exercise of the right of eminent
16 domain.

17 JUSTICE THOMAS: So is that -- how is
18 that deputizing versus simply delegating?

19 MR. CLEMENT: So I -- I -- I -- look,
20 it's a fine line, Your Honor. I think the
21 reason I would think of it as -- it's -- it's
22 better as deputizing is for two reasons. One,
23 even if you go back to the old treatises, like
24 the -- I believe it's the Lewis treatise of 1888
25 that you relied on in your Kelo dissent, you

1 know, he says it's really wrong to think about
2 delegating the eminent-domain authority because
3 it is an inherently sovereign authority. So
4 that's one reason I think of it more as
5 deputizing rather than delegating.

6 But the other reason is what I alluded
7 to with the Chief Justice, which is it seems to
8 me that when a private party does exercise the
9 eminent-domain authority, it is a
10 limited-purpose federal actor for purposes of
11 the Takings Clause, and by parity of reasoning,
12 it seems like it is also a federal actor for
13 purposes of the Eleventh Amendment.

14 JUSTICE THOMAS: Is there anything in
15 any of the pleadings that suggests that, say,
16 the -- that PennEast is bringing this on behalf
17 of itself and the United States?

18 MR. CLEMENT: I don't think we really
19 put it in those terms, Your Honor. I guess what
20 I would say, though, is one thing that is
21 evident from the pleadings is this is
22 principally an in rem proceeding. So, you know,
23 the proceeding is PennEast versus 1.90 Acres of
24 -- of Land for Purposes of an Easement. So I --
25 I do think it matters that this is not an action

1 directly against the state in -- in personam but
2 is an in rem action.

3 JUSTICE THOMAS: You know, I think you
4 might have a better argument, in rem argument if
5 possession of the land or the rem was in the
6 custody of the courts, but this is -- the
7 interest we're talking about is in New Jersey
8 and it's under either possessory or control of
9 New Jersey. It's not in -- under the control of
10 a court.

11 MR. CLEMENT: Well, two things, Your
12 Honor. First, 40 of the 42 parcels here are not
13 possessory interests of the state, they're just
14 environmental easements and the like. And,
15 second, I -- I think, as a matter of doctrine,
16 immovable property in the jurisdiction is always
17 in the possession of the court.

18 It's not like personal property, where
19 maybe the court has to issue in personam process
20 to a defendant to bring the property within the
21 jurisdiction of the court. The land itself is
22 in the territorial jurisdiction of the court,
23 and that's why there's never been a sovereign
24 immunity defense to an eminent domain action by
25 the superior sovereign, because of the immovable

1 property exception.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer.

5 JUSTICE BREYER: There are a number of
6 cases where this Court has said if you're going
7 to interfere with the sovereign immunity rights
8 of the state, Congress has to do so clearly.
9 You've read them.

10 What are the ones -- take the ones,
11 whatever three or two or three you think are the
12 strongest against you, and then explain to me
13 how you distinguish them. I'd appreciate that.

14 MR. CLEMENT: Thank you, Justice
15 Breyer. What I would say is all the cases that
16 are looking for a clear statement are looking
17 for it in the abrogation context. So they
18 assume that there is a sovereign immunity that
19 has to be abrogated.

20 And we don't think there is any
21 sovereign immunity here that needs to be
22 abrogated at all, and I think that's true for
23 two -- two primary reasons.

24 One is because no sovereign has ever
25 had a sovereign immunity defense to an

1 eminent-domain proceeding by the superior
2 sovereign, ever, in the history of the world. I
3 mean, the immovable property exception was
4 established well before the framing of the
5 republic, and so we think there's just no
6 sovereign immunity here to abrogate for that
7 reason.

8 But we also think you can get to the
9 same result simply by looking at this as not
10 just an in rem proceeding that is against the
11 property and not against the state but an
12 extraordinary in rem proceeding where there is
13 no allegation of wrongdoing, no effort to impose
14 liability on the state, and the action can't be
15 brought at all unless it's authorized by the
16 federal government here in the process of a FERC
17 certificate.

18 JUSTICE BREYER: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Alito.

20 JUSTICE ALITO: Mr. Clement, let's
21 start with the reason why a state may be sued by
22 the United States.

23 Is this a correct understanding of the
24 reason for that rule? When New Jersey and other
25 states entered the union and they read the

1 Constitution, they saw the federal structure
2 that was set up, and they read the -- the scope
3 of federal power -- federal judicial power under
4 Article III, they had to realize that this meant
5 that they were surrendering that portion of
6 their sovereign immunity.

7 MR. CLEMENT: I think that's fair,
8 Justice Alito, though I would emphasize I think
9 what principally did it for them and what they
10 should have read is the Supremacy Clause as
11 opposed to necessarily Article III.

12 JUSTICE ALITO: All right.

13 MR. CLEMENT: And you have a case like
14 United --

15 JUSTICE ALITO: Okay. The Supremacy
16 Clause and Article III. But this was something
17 that this Court thought they must have realized
18 when they entered the union. This was part of
19 the bargain.

20 Now I understand your argument that
21 they must also have realized that a sovereign
22 can deputize a private party to exercise a
23 condemnation power, and, therefore, because they
24 were surrendering their immunity from a
25 condemnation suit by the United States, they

1 necessarily were also surrendering their
2 immunity with respect to a private party that
3 might be deputized to exercise that power.

4 But is that a fair inference? Is it a
5 -- is it a sufficient inference? Would it not
6 have been entirely reasonable for a state to
7 think, look, okay, we understand we're giving up
8 our sovereign immunity against a condemnation
9 suit by the United States, but we don't think
10 that we necessarily are giving up our sovereign
11 immunity with respect to a condemnation suit by
12 a delegee, even though this is a rule that
13 applies in other contexts?

14 MR. CLEMENT: So, Justice Alito, I
15 don't think that would have been a reasonable
16 inference because the eminent-domain power has
17 always been delegable. That is something that
18 was well-established before the framing. So, if
19 they accepted it at -- at the framing, as I
20 think they must have, because of the Supremacy
21 Clause, that they would not be able to assert a
22 sovereign immunity from an eminent-domain action
23 brought by the federal government because they
24 would presumably know about the immovable
25 property exception and they would understand

1 that it's essentially an oxymoron to say that
2 I'm going to assert a sovereign immunity defense
3 against the superior sovereign who had
4 eminent-domain over everything in the realm.

5 I think they would have understood
6 that that was equally true whether the federal
7 government exercised that through it -- itself
8 or by delegating a -- a limited-purpose federal
9 agent.

10 JUSTICE ALITO: Is -- is that a
11 correct understanding of what the constitutional
12 question boils down to? In -- in a word,
13 because my time has run out.

14 MR. CLEMENT: Well, I think that's one
15 way for us to prevail, but I don't think the
16 constitutional question boils down just to that
17 because I do think that you could decide this
18 case just on the ground that there is properly
19 understood no action against the state, it's
20 against the property, and along the lines of
21 Hood and other decisions that have said in rem
22 is different.

23 JUSTICE ALITO: All right. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor.

1 JUSTICE SOTOMAYOR: Mr. Clement,
2 perhaps I don't understand these features and --
3 and delegation is troublesome for me. And this
4 doesn't apply to FERC, but can a -- can -- if --
5 if we didn't have FERC, could the government
6 have delegated in your use of the term to a
7 private entity the decision as to what route was
8 necessary and to then condemn those portions of
9 the route that it thought necessary?

10 MR. CLEMENT: So, Justice Sotomayor, I
11 think there would be a separate question there
12 about whether the delegation was essentially
13 sort of, you know, ascertainable enough for
14 these purposes. I would say, though, if you go
15 back to the exercise of eminent-domain power
16 historically, there have certainly been
17 situations where the federal government gave
18 less direction than you have here with respect
19 to FERC.

20 So, for example, you know, when the
21 railroads were built, there was, you know, a
22 fair amount of discretion given to the railroads
23 to determine what land that they would be able
24 to condemn.

25 Now I -- I would say also that I think

1 particularly when the -- the sort of delegee has
2 greater discretion, that's when you would
3 probably look for Congress to put in more
4 restrictions that certain land is off limits,
5 and I do think, when you have a situation like
6 this, where no pipeline traverses any land
7 without the approval of FERC and they can take
8 into account whether, you know, this is
9 excessive or whether not going through this
10 particular piece of state land would require the
11 pipeline to be substantially rerouted that would
12 create additional environmental problems and the
13 like, especially when the federal government is
14 playing that role, it seems like most of the
15 concerns that you have under the Eleventh
16 Amendment with some private party with an
17 unfettered right to sue are just simply
18 misplaced.

19 JUSTICE SOTOMAYOR: Counsel, your
20 adversaries point to certain aspects of a
21 condemnation proceeding that seem to lend
22 themselves to sovereign-to-sovereign
23 decisionmaking.

24 I do agree with you that just the
25 simple appraisal is different, how much is this

1 land worth, and you could -- you hire a lawyer
2 and the lawyer helps you with that. You can
3 hire a party that does the same thing. That's
4 basically your argument.

5 But how about the negotiation aspects?
6 The state argues that there is a
7 sovereign-to-sovereign part of this process,
8 which is you're not supposed to start
9 condemnation until you had negotiation, and why
10 should I be forced as a sovereign to negotiate
11 with a nonsovereign?

12 MR. CLEMENT: So, Your Honor, I guess
13 I would say that, you know, that is part of
14 their concern, but I think it's an odd concern
15 because, you know, sovereign immunity, the
16 Eleventh Amendment immunity doesn't kick in
17 until you really get to court.

18 And, you know, honestly, if at the end
19 of the day their problem was with -- that they
20 had to negotiate with us, I still don't think
21 that that would sound in any kind of normal
22 sovereign immunity.

23 I also think that it's not really the
24 challenge that they have preserved for that sort
25 of negotiation. And I still think they would be

1 negotiating with FERC's agent. And I think it
2 is important to keep in mind that in this
3 process uniquely, PennEast is a limited federal
4 actor for purposes of the Takings Clause, and
5 the same logic should apply to the Eleventh
6 Amendment.

7 JUSTICE SOTOMAYOR: Thank you,
8 counsel.

9 CHIEF JUSTICE ROBERTS: Justice Kagan.

10 JUSTICE KAGAN: Mr. Clement, you told
11 the Chief Justice that we shouldn't think of
12 this as a case about a private party condemning
13 land, that we should think that -- that PennEast
14 essentially steps into the shoes of the
15 government.

16 And that raises questions in my mind
17 as to what the government involvement in this
18 case was. In other words, was there any
19 supervision by the government? Was there any
20 participation by the government? Did any
21 lawyers for the United States approve the timing
22 of the condemnation action? Did any lawyers for
23 the United States approve the parcels to be
24 condemned? Is there anything that the -- that
25 the U.S. itself was involved in in this case?

1 MR. CLEMENT: Well, Justice Kagan, I
2 guess you have to distinguish between what
3 happened at FERC through the FERC agents and
4 what happened sort of after that point. And,
5 you know, I'm not here to tell you that -- after
6 the specific route of the pipeline was approved
7 by FERC in a process where objections were heard
8 from all the property owners, including the
9 state, and over 70 route modifications were
10 made. That was all done under the auspices of
11 the federal government. They approved the route
12 and the certificate right down to which parcels
13 were affected.

14 Now, once that happened, the way it
15 has worked for 70 years is that the certificate
16 holder then gets to go into federal court. And,
17 certainly, FERC can, by its -- by its -- by its
18 rulemaking, sort of determine, you know,
19 generally speaking, when the timing is. It
20 could, as it suggested and has done recently,
21 promulgate a rule that says that the -- that the
22 certificate holder should not initiate the
23 condemnation proceedings until the rehearing
24 period at FERC is closed. It could change that
25 timing. All of that's within their control.

1 But -- but I don't want to suggest
2 that FERC is kind of directly sitting over our
3 shoulder in --

4 JUSTICE KAGAN: Right.

5 MR. CLEMENT: -- the district court
6 action.

7 JUSTICE KAGAN: So New Jersey says
8 that there were a whole range of things that
9 PennEast did that the U.S. Government would not
10 have done. You know, New Jersey says the U.S.
11 has an obligation to negotiate in good faith,
12 while New -- while you refused to negotiate,
13 that -- that you rushed to condemn the land
14 before the route was finalized in a way that the
15 U.S. Government would have -- wouldn't have,
16 that your interest in land valuation is
17 different, in other words, that there were a
18 whole set of litigation tactics or moves that a
19 private party would have been -- would have
20 perfectly legitimately made that the U.S.
21 Government would not have.

22 MR. CLEMENT: So, Justice Kagan, I --
23 I don't think that's true, and, you know, if you
24 go through each of those things, I mean, we
25 didn't do anything here in terms of the timing

1 that FERC didn't approve. And so I -- I don't
2 think FERC will say we did anything wrong in
3 that respect, and I don't think, if FERC were
4 forced to do this differently, they would have
5 necessarily done anything different.

6 With respect to the negotiations, the
7 district court found that, in fact, we did
8 negotiate in good faith here. And so I don't
9 think that's a material difference.

10 And in terms of the valuation and the
11 paying of just compensation, I mean, the way the
12 federal government has been doing this for 100
13 years is for some of these infrastructure
14 projects, they think that it's just much more
15 efficient to have the private party act as the
16 federal actor deputy, and they're not doing that
17 to shortchange the property owner. And I would
18 bet, if you ran the empirical numbers, the
19 property owners probably did better. But, in
20 all events, it's something that has been done by
21 all sides --

22 JUSTICE KAGAN: Thank you,
23 Mr. Clement.

24 MR. CLEMENT: -- including New Jersey,
25 for a long time. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch.

3 JUSTICE GORSUCH: We focused a lot
4 on what -- what I call structural immunity under
5 the Constitution and maybe a little less on the
6 Eleventh Amendment. I -- I'd just like to ask a
7 question about that.

8 I -- I understand the argument that
9 PennEast steps into the shoes of the federal
10 government in many senses, but -- and I
11 understand that PennEast is a citizen of
12 Delaware. That's what the lower court said. We
13 have before us a suit in law or equity. Kohl
14 says that. So why doesn't this case fall within
15 the plain text of the Eleventh Amendment itself,
16 which limits the judicial power of the United
17 States in cases by a citizen of one state
18 against another state?

19 MR. CLEMENT: So thank you, Justice
20 Gorsuch. I think there's three answers to that.
21 One is that this is not an action against the
22 state within the meaning of the Eleventh
23 Amendment. It's an action against property. I
24 also think, although PennEast here --

25 JUSTICE GORSUCH: Put -- putting aside

1 the in rem argument, right.

2 MR. CLEMENT: Sure.

3 JUSTICE GORSUCH: Yeah. Fair enough.

4 Yeah. Okay. Put that aside.

5 MR. CLEMENT: And the second -- the
6 second is that although PennEast is a citizen of
7 Delaware for all other purposes, I think, for
8 these purposes, it is a fed -- a limited-purpose
9 federal actor and it has liability under the
10 Takings Clause. So I think that's another
11 reason why the text is not a problem.

12 And then the third reason is that even
13 the most textualist justices, such as Justice
14 Scalia, have kind of understood that the
15 Eleventh Amendment -- what it's really doing is
16 kind of restoring the immunity that was there at
17 the framing and --

18 JUSTICE GORSUCH: Yeah. Got it. The
19 Eleventh Amendment does other things, has been
20 read to do structural immunity, but just on its
21 plain terms, we have a citizen of one state
22 suing another state, right?

23 MR. CLEMENT: Again, I would beg to
24 differ on both counts because I think what you
25 have is a federal deputy suing land. And if you

1 look at the principal captions of these cases
2 below, they are PennEast versus --

3 JUSTICE GORSUCH: But the federal
4 deputy exists as a -- as a citizen of a state.
5 It -- it -- it doesn't lose its citizenship,
6 does it? How would that work? What authority
7 is there for that?

8 MR. CLEMENT: I -- I don't think it
9 loses its citizenship, but I don't think that's
10 the capacity in which it's suing. And as a --
11 as a mere citizen of Delaware, it doesn't have
12 takings liability. It has takings liability
13 because it is a limited-purpose federal actor,
14 and that is really the posture in which it's
15 coming into court.

16 JUSTICE GORSUCH: But it is a citizen
17 of Delaware. It doesn't lose that by virtue of
18 being deputized. It's just a deputy from
19 Delaware.

20 MR. CLEMENT: It -- it -- it's a
21 deputy from Delaware, but, you know, if -- if
22 they were a human being who was a federal deputy
23 from Delaware, they would still be a citizen of
24 Delaware, but, when they walked into federal
25 court and filed an action, they wouldn't be

1 filing it in that capacity. And I -- and I do
2 think that's what ultimately matters.

3 But I also think, you know, as to the
4 text, you -- you -- you know, I mean, obviously,
5 we put the in rem matter to one side, but, you
6 know, I -- I -- I do think that is an important
7 distinction here, and I think this is very
8 parallel to this Court's decision in Hood.

9 JUSTICE GORSUCH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh.

12 JUSTICE KAVANAUGH: Thank you, Chief
13 Justice.

14 And good afternoon, Mr. Clement. I
15 just want to ask a question that might be both a
16 softball and a fastball, but, if you lose this
17 case, what will happen?

18 MR. CLEMENT: So, Justice Kavanaugh,
19 if we lose this case, then, you know, this
20 pipeline will, you know, not be built at least
21 in anything like its current configuration, and
22 depending on exactly how we lose this case, I
23 think this pipeline would -- this federal
24 interstate pipeline, until the law is changed,
25 will, you know, be at the mercy of New Jersey

1 because I don't think there is a way to reroute
2 this pipeline in a way that doesn't implicate a
3 state interest in land.

4 The parcels at issue here don't
5 implicate it, but this pipeline has to cross the
6 Delaware River somewhere and half the Delaware
7 River belongs to New Jersey. So there's just no
8 way for this pipeline to exist under the current
9 law. And I think that does show why there is
10 something fundamentally wrong here. I mean, New
11 Jersey would be operating as a property owner in
12 this context, and yet, as a property owner, they
13 would be trying to do something that they can't
14 do as a sovereign, which is to exercise a veto
15 over a interstate infrastructure problem that
16 they recognize is concededly legitimate under
17 FERC's authority, at least for purposes of this
18 case.

19 JUSTICE KAVANAUGH: I think your
20 answer encompasses, but does that mean you don't
21 think FERC has any way to get involved and to
22 avoid the problem that would be in your way if
23 you were to lose this case?

24 MR. CLEMENT: That's correct, Your
25 Honor. I don't think there's any way, short of

1 an amendment of the statute, for FERC to deal
2 with this problem.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett.

6 JUSTICE BARRETT: Good morning,
7 Mr. Clement. I want to talk about your Plan of
8 the Convention argument. At least as I read the
9 briefs, I don't see any historical support for
10 the proposition that a state could be sued by a
11 private party, you know, standing in the
12 stead -- the private party standing in the stead
13 of the federal government's eminent-domain
14 power. The cases that you cite, like immovable
15 property cases, like Georgia versus Chattanooga,
16 all kind of rely on inference. And, I mean, so
17 far as I can tell too, it wasn't until 1876 in
18 Kohl that the federal government even instituted
19 a condemnation action against a state.

20 So is your Plan of the Convention
21 argument not really your strongest one, and is
22 your in rem and Hood argument better?

23 MR. CLEMENT: I think they're both
24 pretty good, Your Honor. And if I could just
25 try to convince you that the Plan of the

1 Convention argument is a little better than you
2 suggested, I'd just point out that the situation
3 here is almost directly parallel to the
4 situation in United States against Texas, which
5 New Jersey, of course, says is a legitimate Plan
6 of the Convention ceding of sovereign immunity.

7 As a matter of fact, it look longer
8 for the federal government to assert an original
9 jurisdiction action against the state than it
10 took the federal government to exercise its
11 federal eminent-domain authority in the states.
12 By -- by my count, the first original action
13 against a state was against -- U.S. against
14 North Carolina in 1890.

15 But, in both cases, even though it
16 took 70 to 100 years for the federal government
17 to exercise the power, the courts still looked
18 and said, okay, going back to the framing, we
19 understand that the Supremacy Clause, which is
20 part, obviously, of the Plan of the Convention,
21 has certain implications, and one implication
22 that is here is that once New Jersey concedes,
23 as it does and I think it must, that the federal
24 government has the eminent-domain authority over
25 this property, then no sovereign ever has had an

1 immunity defense against the taking of property
2 pursuant to the eminent-domain authority by the
3 superior sovereign without respect to whether
4 it's been delegated.

5 JUSTICE BARRETT: Okay. Immovable
6 property doctrine, don't you think that the
7 Chattanooga case had more to do with the fact
8 that the land that Georgia had was located
9 within another sovereign's borders as opposed to
10 here where this is land within New Jersey's own
11 borders? Do we have to read that case your way.

12 MR. CLEMENT: Obviously, Your Honor,
13 you don't have to read it that way. But what I
14 would say is I think the principle is the same,
15 which is in both cases there is a recognition
16 that there is a superior sovereign. The
17 mechanism for making that recognition is
18 different.

19 In the Chattanooga case, Tennessee is
20 the superior sovereign because the property is
21 territorially within Tennessee. Here this
22 property is subject to the superior
23 eminent-domain claim of the federal government
24 because of the supremacy clause, and what is so
25 odd about New Jersey's position is they -- they

1 concede that the federal government has the
2 power to take this property from them, which is
3 the principal sort of, you know, recognition of
4 eminent-domain yet they still think they can
5 assert a sovereign immunity defense and that has
6 never been the case since before the frame.

7 JUSTICE BARRETT: Thank you, Mr.
8 Clement.

9 CHIEF JUSTICE ROBERTS: A minute to
10 wrap up, counsel.

11 MR. CLEMENT: Thank you, Mr. Chief
12 Justice. In the end New Jersey's position
13 amounts to a claim that the federal government
14 has less eminent-domain authority than any other
15 sovereign. New Jersey itself not only exercises
16 eminent-domain but frequently deputizes a wide
17 range of utilities, including pipelines, to
18 exercise that power and provide just
19 compensation.

20 The claim that the federal government
21 is only a junior varsity sovereign was rejected
22 in the plan of the convention. Where the
23 federal eminent-domain power exists it is
24 complete and there can be no sovereign immunity
25 defense to its implementation.

1 Indeed, thanks to the immovable
2 property exception, a sovereign immunity defense
3 is the ultimate sovereign's eminent-domain
4 authority is an oxy-moron. That's particularly
5 true because eminent-domain proceedings are
6 unique in rem proceedings that assert no wrong
7 doing and impose no liability and can only
8 augment the state treasure.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 General Kneedler. General Kneedler.

12 EDWIN S. KNEEDLER

13 FOR THE UNITED STATES, AS AMICUS

14 CURIAE, SUPPORTING THE PETITIONER

15 MR. KNEEDLER: I'm sorry. Mr. Chief
16 Justice and may it please the court.

17 Under the Natural Gas Act and this
18 court's decision in City of Tacoma, the courts
19 below were without jurisdiction to resolve
20 Respondents' statutory challenge to PennEast's
21 exercise of the right of eminent-domain. By
22 contrast the courts below were not precluded
23 from resolving the state's contention that the
24 Eleventh Amendment bars PennEast's condemnation
25 actions but there is no such Eleventh Amendment

1 bar.

2 This Court held in Kohl that the
3 federal government's power of eminent-domain is
4 complete in itself and that no state can
5 prescribe the manner in which it may be
6 exercised. That power indisputably extends to
7 state-owned property and it has been established
8 since before the founding that the sovereign's
9 right of eminent-domain includes the power to
10 authorize private entities to exercise that
11 right for roads, canals and other infrastructure
12 projects. The district court, therefore, may
13 proceed with these actions to determine the
14 amount of compensation that is owed to the state
15 for this federally-authorized taking of its
16 property.

17 CHIEF JUSTICE ROBERTS: Putting aside
18 your jurisdictional issue, Mr. Kneedler, a
19 private party with the certificate under the
20 Natural Gas Act, could they bring a condemnation
21 action against federally-owned land?

22 MR. KNEEDLER: No -- no, they could
23 not, Mr. Chief Justice. There are separate
24 statutes that deal with the acquisition of a
25 right-of-way across federal property. The

1 court's decision last year, excuse me, in the
2 Atlantic Coast Pipeline case, dealt with -- with
3 some of those issues in terms of getting a
4 right-of-way for a -- for across federal
5 property, and this statute would not authorize
6 that.

7 CHIEF JUSTICE ROBERTS: Well, but I --
8 I thought the idea was the private parties are
9 actual -- actually federal delegees and that
10 would be the capacity in which they would be
11 acting.

12 MR. KNEEDLER: They would be federal
13 delegees but they would still have to comply
14 with the statutory structure that Congress has
15 established for acquiring rights-of-way over --
16 over federal land. And also a -- a statute
17 would ordinarily not be regarded as dealing with
18 the enacting sovereign's own rights and own
19 rights in property.

20 This -- this is a statute that deals
21 with -- with nonfederal property with
22 state-owned property in this case or -- or
23 private property.

24 CHIEF JUSTICE ROBERTS: Your client
25 wants this pipeline to be built. Why don't you

1 just have a federal official join the action and
2 then, you know, advise the court that -- that
3 the federal government is proceeding along with
4 PennEast?

5 MR. KNEEDLER: I -- I don't think that
6 the -- I -- I think in order for the United
7 States to become a party there would have to be
8 some statutory authorization for the United
9 States to conduct the eminent-domain proceeding.
10 You know, I suppose a federal attorney could
11 attend and -- and advise and participate in some
12 sense, but that doesn't seem to be the -- the
13 defense being offered by -- by the state.

14 Congress --

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. Justice Thomas.

17 JUSTICE THOMAS: Thank you, Mr. Chief
18 Justice. Mr. Kneedler, do you agree with
19 Petitioner that they are somehow a limited
20 purpose federal actor or that they've been
21 deputized by the U.S. to condemn property?

22 MR. KNEEDLER: I -- I think basically,
23 yes, I mean, various terminologies have been
24 used. Cooley describes it, that the person is a
25 public agent. This court in Cherokee Nation

1 said that a private person is an instrumentality
2 of the government delegee, and a lot of labels
3 are used but basically the constitution
4 authorizes Congress to vest, or allow a private
5 party to exercise the right of eminent-domain.

6 So I -- I think saying that the
7 private party is deputized is -- is a fair
8 characterization but I don't think anything
9 turns on the particular label.

10 JUSTICE THOMAS: Would -- do you need
11 a clear statement to -- in order to accomplish
12 that, or do we just simply imply that?

13 MR. KNEEDLER: You do not need a clear
14 statement. The clear statement issue comes in
15 where the question is whether Congress has
16 abrogated an existing immunity. In our view,
17 and we agree with Petitioner on this, there is
18 no immunity to abrogate to begin with.

19 So the question is applying ordinary
20 principles of statutory construction, whether
21 the statute authorizes a private party to
22 commence the eminent-domain proceeding and here
23 we think it's clear that it does.

24 Respondent acknowledges that FERC
25 could properly site this pipeline across state

1 lands and the statutory provision here says that
2 whenever a certificate is issued, the
3 certificate holder can exercise the right of
4 eminent-domain if it can't acquire the property
5 by agreement in order to complete the project.
6 And that authorization has to be -- has to apply
7 to all of the land over which the pipeline has
8 issued, otherwise the pipeline couldn't be
9 built.

10 JUSTICE THOMAS: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer.

13 JUSTICE BREYER: Yes, thank you. If
14 you were to lose this case what would happen to
15 the network of pipelines across the country now,
16 at least those segments which were taken from
17 states, or on state land that were taken through
18 eminent-domain?

19 MR. KNEEDLER: Well, those that -- I
20 -- I assume those that were acquired by
21 agreement or --

22 JUSTICE BREYER: No, no, forget that.
23 Those taken by eminent-domain.

24 MR. KNEEDLER: To the extent there are
25 ones taken by eminent-domain I think the

1 judgments in those cases would stand. I -- you
2 know, perhaps the states in those cases might
3 try to have those judgments reconsidered but
4 I -- but I think they would --

5 JUSTICE BREYER: Suppose, suppose that
6 an owner of one of those segments states that we
7 do not want inspectors or repair people to come
8 onto our property which was taken by
9 eminent-domain, though improperly?

10 MR. KNEEDLER: I think, I think the
11 eminent-domain judgment would still stand. Now,
12 there could be situations in which the -- what
13 the pipeline acquired was a -- a time limited
14 easement and so, if that had to be renewed, even
15 though the pipeline's now in place, if the state
16 said, well, we don't want -- we don't want this
17 pipeline any more and we're not going to renew
18 your easement, that -- that could be a problem.
19 That would be a problem. So in that situation
20 the Court's decision could have an impact on
21 existing pipelines.

22 JUSTICE BREYER: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice Alito.

24 JUSTICE ALITO: Do you agree that the
25 condemnation actions here are really in rem

1 proceedings that don't implicate sovereign
2 immunity at all?

3 MR. KNEEDLER: They -- they are in
4 rem. It is not our position that the mere fact
5 that something is in rem means that it is not --
6 that sovereign immunity principles don't apply
7 at all. I mean, that's an important principle
8 for the United States Government, that a suit
9 against the government's property is a suit -- a
10 suit against the United States. We've got
11 Minnesota versus United States and United States
12 versus Alabama for that proposition.

13 But we do think that in the end,
14 the -- the -- the nature of the proceeding as in
15 rem, when coupled with the -- with the
16 longstanding tradition of -- of enabling private
17 parties to exercise it, we think those things in
18 -- in combination do support the validity of it,
19 because what's left after -- I mean, what's left
20 after FERC has approved the pipeline route?
21 It's a federally authorized taking. All that is
22 at issue anymore is the amount of compensation
23 to be paid to the state. It -- it's not -- it's
24 not the -- the sort of situation involved in
25 Blatchford or other cases where the -- where

1 it's a claim for money from the state based on
2 state wrongdoing.

3 So I think that the -- the nature of
4 it as an in rem procedure that is triggered by
5 federal authorization -- we do think that that
6 supports the position that there is no sovereign
7 immunity.

8 JUSTICE ALITO: All right. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor.

11 JUSTICE SOTOMAYOR: I'd like to
12 address your jurisdictional argument. It does
13 seem strange to require a state to initiate
14 litigation in one court of appeals, in D.C., in
15 order to invoke sovereign immunity in another
16 when it hasn't been sued yet, so there's no
17 existing claim against it that it could raise a
18 defense in. How does that make sense?

19 MR. KNEEDLER: Well, the statutory
20 question of PennEast's capacity to sue is not an
21 immunity question. It is a question of whether
22 they have the power under the certificate issued
23 by FERC to execute that certificate, which is
24 the way the Court put it in the City of Tacoma
25 case, to execute that specifically with respect

1 to exercising the right of eminent domain
2 against state property. That was the very
3 question at issue in City of Tacoma, and the
4 Court held that that had to be litigated, if at
5 all, on direct review of the -- of FERC's
6 petition. So --

7 JUSTICE SOTOMAYOR: Well, isn't
8 this -- I mean, instead of requiring a suit in
9 -- in the D.C. Circuit to decide this issue, why
10 couldn't you just -- why couldn't PennEast have
11 just raised this as, I guess, collateral
12 estoppel? Because that's really its argument,
13 isn't it? That the delegation to PennEast could
14 have and wasn't -- wasn't challenged in the D.C.
15 Circuit, so it's collateral estoppel?

16 MR. KNEEDLER: Well, I would --

17 JUSTICE SOTOMAYOR: Or claim
18 preclusion? I always --

19 MR. KNEEDLER: -- I guess it would be
20 claim preclusion.

21 JUSTICE SOTOMAYOR: Yes, claim
22 preclusion.

23 MR. KNEEDLER: I -- I suppose they
24 could --

25 JUSTICE SOTOMAYOR: I think you're

1 right.

2 MR. KNEEDLER: I -- I -- I think that
3 -- I mean, that would apply, but I think City of
4 Tacoma and the statute are statutory strong
5 forms of claim preclusion because they also
6 require that the issue be raised before the
7 agency. And, in fact, FERC did address various
8 questions about the right of eminent domain, but
9 the state did not make this argument and didn't
10 raise it on -- on judicial review. And we
11 think, under City of Tacoma, it can't be raised
12 in the -- in the district court.

13 But that doesn't mean that the actual
14 immunity, Eleventh Amendment immunity question
15 can't be raised, and that -- that's properly
16 before the Court, and we think there is no such
17 Eleventh Amendment immunity.

18 JUSTICE SOTOMAYOR: Thank you,
19 counsel.

20 CHIEF JUSTICE ROBERTS: Justice Kagan.

21 JUSTICE KAGAN: Mr. Kneedler, suppose
22 the federal government didn't like something
23 about the way PennEast was conducting this
24 litigation, whether it had to do with
25 negotiating with New Jersey or with valuation

1 decisions or anything else. If the U.S. didn't
2 approve of something, could it do anything and,
3 if so, what?

4 MR. KNEEDLER: Well, I -- I'm not --
5 we -- we haven't addressed that. I suppose
6 it -- it -- it's possible. I don't know what
7 the FERC procedures would be. But I -- but it
8 -- it might be possible for the state to request
9 suspension or a stay of the certificate. I
10 don't know if that would be something would --
11 that FERC could do. It -- it -- it could be
12 asked to do that. I -- perhaps some appeal to
13 FERC to exercise some sort of persuasion in the
14 conduct of this. I mean, after all, FERC does
15 not have an interest in a -- in a pipeline
16 behaving badly. But I don't think there's any
17 basis for -- for -- for thinking that that's
18 going to be true. These are ordinary --

19 JUSTICE KAGAN: I guess --

20 MR. KNEEDLER: -- condemnation-type --

21 JUSTICE KAGAN: -- I guess, Mr.

22 Kneedler, my concern here is that, I mean, in
23 several cases, we've talked about the need for a
24 suit against states to be conducted by
25 politically responsible actors, federal lawyers,

1 and -- and whether there's not something that's
2 really lost by giving this over to private
3 parties, who have their own interests separate
4 and apart from what the government's might be.

5 MR. KNEEDLER: Well, the -- the
6 critical decision with respect to these
7 condemnation actions, whether the state's
8 property will be taken, has been made by FERC,
9 which is politically responsible. There's no
10 question that FERC is responsible --

11 JUSTICE KAGAN: Right, but --

12 MR. KNEEDLER: -- for --

13 JUSTICE KAGAN: -- in the conduct of
14 the suit, and we all know that the conduct of
15 the suit can involve important questions.

16 MR. KNEEDLER: Well, here, it is a
17 very narrow question in terms of the amount of
18 compensation, and that's the sort of -- that's
19 the sort of issue that courts decide all the
20 time with -- with a party on one side and, in
21 this case, a state on the other side. But it --
22 but condemnation proceedings are handled in
23 court all the time. And --

24 JUSTICE KAGAN: Thank you,
25 Mr. Kneedler.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch.

3 JUSTICE GORSUCH: So, Mr. Kneedler,
4 I'd just like to return to the Eleventh
5 Amendment itself, putting aside larger questions
6 of structural or sovereign immunity. And we --
7 I discussed with Mr. Clement, you know, whether
8 PennEast is a citizen of Delaware. That's one
9 issue. And then the other is whether we have a
10 suit in law and equity, and the in rem was --
11 was proffered as a way to get around that.

12 But I'm not sure how that happens when
13 this Court has said repeatedly, as far back as
14 1875 in Kohl versus United States, that a
15 proceeding to take land and determine
16 compensation is a proceeding in -- at common
17 law, would seem to be a suit in law and equity,
18 whatever else it is.

19 So what -- what -- what's wrong with
20 that? Why -- why -- why doesn't this fall
21 within the plain text of the Eleventh Amendment
22 itself?

23 MR. KNEEDLER: Well, I -- I -- I think
24 there is the -- the -- the argument that the --
25 that PennEast is -- in its capacity is suing as

1 a -- as an agent, or -- or however you want to
2 describe it, of the federal government --

3 JUSTICE GORSUCH: Yeah. No, I
4 understand it's a delegate, an agent -- we've
5 got a lot of words -- a deputy. But a deputy
6 has a residence, and -- and this deputy's
7 residence is Delaware.

8 MR. KNEEDLER: Right, and -- and I --
9 I -- I accept that and -- and we're not saying
10 that it's not -- that the company is not a
11 citizen of Delaware. Whether this is a -- a
12 suit against the state under the particular
13 circumstances of this case is another -- is
14 another question given the in rem nature of it.
15 But we think the basic point --

16 JUSTICE GORSUCH: Well, just -- but, I
17 mean, help me with that, because a suit against
18 the state at -- at law or in equity, and this
19 Court has said a taking -- a proceeding to take
20 land and determine compensation is just such a
21 thing.

22 MR. KNEEDLER: It is a suit in law or
23 equity, and there's the further question of
24 whether it is against the state, but -- because
25 of the in rem nature. But our -- our basic

1 point, though, is that the federal -- that the
2 Eleventh Amendment --

3 JUSTICE GORSUCH: I mean --

4 MR. KNEEDLER: -- wouldn't make a real
5 --

6 JUSTICE GORSUCH: -- the state's the
7 one entitled to compensation, right?

8 MR. KNEEDLER: Yes.

9 JUSTICE GORSUCH: Money will be
10 provided to the state?

11 MR. KNEEDLER: Right.

12 JUSTICE GORSUCH: So how is it not a
13 suit against the state at -- at common law?

14 MR. KNEEDLER: I -- I think probably
15 the better understanding is that it -- that it
16 is a suit against the state, but -- but -- but I
17 -- I -- I think -- I think the point is that
18 it -- that it -- this is a proceeding of a
19 distinct character, and the Eleventh Amendment
20 was simply meant to restore an immunity that --
21 that had been taken away by -- by the Court, and
22 that preexisting immunity was one that
23 structurally did not bar this sort of action by
24 someone whom Congress has vested with
25 eminent-domain authority.

1 JUSTICE GORSUCH: Thank -- thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh.

4 JUSTICE KAVANAUGH: Thank you. I have
5 no additional questions.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett.

8 JUSTICE BARRETT: Mr. Kneedler, I have
9 a question just to follow up on one that Justice
10 Gorsuch asked you. You said that you thought,
11 when he was asking you about the Eleventh
12 Amendment, that maybe the better way to think of
13 this was that it was a suit against the state.

14 And I've been trying to get my mind
15 around what role this in rem issue plays in all
16 this and particularly because Federal Rule of
17 Civil Procedure 71.1 required the state to be
18 joined as a -- as a party, as the property
19 owner. So, if you say the better way to think
20 of it is really as a suit against the state, you
21 said you've accepted PennEast's argument about
22 the in rem nature of the proceeding, how does
23 71.1 and the in rem nature of the proceeding and
24 your concession to Justice Gorsuch bear on that?

25 MR. KNEEDLER: Well, the -- the --

1 71.1 requires that the property owner be
2 identified for purposes of getting notice. What
3 the consequence of that is in terms of -- of
4 party status and the Eleventh Amendment, I
5 think, is a -- is a different question.

6 But -- but, again, our basic point is
7 that this is not the sort of action to which the
8 states were immune to begin with.

9 JUSTICE BARRETT: Well, no, no. I
10 understand that, but I'm asking specifically,
11 you said to Justice Gorsuch that the better way
12 to think of this is that it's a party against
13 the state. I'm asking how that bears on how we
14 should think about this specifically as an in
15 rem proceeding, because that's one of PennEast's
16 arguments, of course, that sovereign immunity
17 doesn't apply here.

18 So is it in rem or is it more in
19 personam?

20 MR. KNEEDLER: I -- I think it's -- I
21 think that frankly it's character is more in
22 rem. The state obviously has an interest in it.
23 But it -- and it's a particular kind of in rem
24 where the consequences, the payment of money to
25 the state in exchange for its property, it's

1 sort of a contractual exchange in that -- in
2 that respect.

3 So it's not the sort of -- it -- it --
4 it's not the sort of proceeding that the
5 Eleventh Amendment, as this Court has described,
6 is most concerned about, which is a -- a suit
7 for damages against the state where the state
8 might be a wrongdoer and -- and here where the
9 federal government itself has decided that the
10 particular land should be taken, the only
11 question is -- is the compensation.

12 So it's in that respect we think that
13 the in rem character of the suit matters and --
14 and -- and also plays into or -- or coincides
15 with the fact that the states were not immune
16 from this sort of action by the federal
17 government or its agent --

18 JUSTICE BARRETT: Thank you, Mr.
19 Kneedler.

20 CHIEF JUSTICE ROBERTS: A minute to
21 wrap up, Mr. Kneedler.

22 MR. KNEEDLER: Yes. I'd like to
23 underscore that the importance of the immovable
24 property exception in City of Chattanooga here,
25 because in -- in City of Chattanooga, the city,

1 a delegee of Tennessee, which was the superior
2 sovereign in that case, was permitted to sue
3 Georgia and there was no immunity in that
4 situation.

5 What we had -- and that's the same as
6 the immovable property exception that the Court
7 discussed in the Permanent Mission of India.
8 What we have here is the equivalent in the
9 supremacy clause where the superior sovereign
10 comes from the fact that the United States has
11 to have complete authority with respect to the
12 exercise of the -- of eminent-domain and the
13 state is not immune from an action by the United
14 States through its agent for these purposes.
15 With respect to property within the territory of
16 the United States, that's the relevant
17 situation.

18 And Justice Bradley's decision in
19 Stockton is also instructable on -- on this
20 point which was quoted in the Cherokee Nation
21 case extensively, that Congress can utilize
22 private entities to carry out public functions.
23 It's more efficient. The -- the pipeline here
24 is the entity that is going to construct, profit
25 from it, and to require the United States to

1 become involved in a suit like this in aid of
2 something that has already been federally
3 approved would not promote the values of --
4 of -- of sovereign immunity.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 General Feigenbaum.

8 ORAL ARGUMENT OF JEREMY M. FEIGENBAUM
9 ON BEHALF OF THE RESPONDENTS

10 MR. FEIGENBAUM: Mr. Chief Justice and
11 may it please the Court:

12 PennEast cannot hale New Jersey into
13 Federal Court for two independent reasons.
14 First, the Eleventh Amendment bars this suit.
15 The United States has a necessary and proper
16 power to file condemnation suits against the
17 state to effectuate all its other enumerated
18 powers.

19 But private companies like PennEast do
20 not because as Aldman held, private party suits
21 against the states are never proper. State
22 consent to sue by the United States was not
23 consent to suit by those U.S. might select and
24 there are important differences between lawsuits
25 by responsible and politically accountable

1 sovereigns and those by private parties.

2 The only way to justify this private
3 site against the state is to provide evidence of
4 founding error consent. The condemnation law is
5 against nonconsenting states were unheard of at
6 the framing.

7 Second, even where Congress can
8 subject a state to private suit, it's choice
9 must be explicit in the statute. Congress would
10 not subject the states to private suit without
11 doing so clearly and this approach advances
12 fundamental protections for fellow sovereigns.

13 That rule also dictates the result
14 here because the NGA is silent as to the states.
15 That leaves PennEast's complaint about the
16 practical consequences but those concerns have
17 not been borne out in reality.

18 Other industries expressly lack the
19 power to file condemnation suits against
20 nonconsenting states in federal court. Yet oil
21 pipelines and electric transmissions like other
22 infrastructure project proceed at pace. And New
23 Jersey itself has continued to grant
24 rights-of-way to other natural gas projects even
25 after the decision below.

1 In any event, this is the rare
2 constitutional case in which the parade of
3 horrors can be easily fixed by Congress and it
4 provides no basis for eliminating the state's
5 immunity to private suit.

6 I welcome this Court's questions.

7 CHIEF JUSTICE ROBERTS: Counsel, you
8 talked near the end there about the practical
9 problems. Does the state oppose the pipeline?

10 MR. FEIGENBAUM: The state has opposed
11 the pipeline in a separate D.C. circuit
12 proceeding, although that's distinct from the
13 challenge we've raised below in this case.

14 CHIEF JUSTICE ROBERTS: Well, that
15 seems to present a significant practical
16 problem.

17 MR. FEIGENBAUM: So I don't think it
18 does. I don't think that the sort of landowner
19 veto concern that PennEast raises holds up for
20 two reasons. The first is that other industries
21 expressly lack the power to file these sorts of
22 actions. And as I noted, oil pipelines proceed,
23 electric transmissions proceed and so on.

24 CHIEF JUSTICE ROBERTS: Well, I don't
25 know, maybe those did or did not cross state

1 property or maybe the state didn't oppose those
2 but you oppose this one and it crosses state
3 property. That seems to be a pretty practical
4 problem.

5 MR. FEIGENBAUM: So there's no reason
6 to think that other industries have to cross
7 state land any more frequently than the natural
8 gas industry does. And we've included in our
9 briefing examples from other states and in the
10 New Jersey Conservation Foundation
11 briefing indicating that those other industries
12 do cross state land all the time. But what --

13 CHIEF JUSTICE ROBERTS: Well, but
14 you -- your -- your -- your -- your client
15 opposes this pipeline. So if they say no it --
16 it doesn't -- it doesn't go forward.

17 MR. FEIGENBAUM: So to the degree that
18 this court has concerns about that, this is the
19 rare constitutional case in which all of the
20 consequences can be remedied by Congress, and it
21 requires a sort of double speculation on
22 PennEast's part.

23 PennEast is speculating that states
24 will impermissibly try to yield veto powers when
25 there's no evidence from any industry to support

1 that view and New Jersey itself has granted
2 rights-of-way to other natural gas pipelines
3 even after the decision below.

4 And then it's again speculating
5 Congress won't step in, even though Congress has
6 consistently passed new statutes to address
7 problems that industries confront in the
8 condemnation context. I don't think that sort
9 of double speculation is enough to justify
10 eliminating the state's sort of historic
11 immunity to private suit without evidence of
12 founding error consent.

13 CHIEF JUSTICE ROBERTS: No, no, I --
14 I'm not suggesting that it's enough to eliminate
15 the immunity, but it does strike me as a concern
16 why supporting Mr. Clement and Mr. Kneedler's
17 argument that you're dealing here with a federal
18 delegee.

19 And what the state is doing is -- in
20 other words, the -- the federal government in
21 this scenario does become a junior varsity
22 sovereign. The state is blocking the NGA
23 certificate issued by the -- by the federal
24 sovereign.

25 Do you have a response to that?

1 MR. FEIGENBAUM: Absolutely. I don't
2 think the United States is becoming a junior
3 varsity sovereign. I do think that the United
4 States still has the complete power of
5 eminent-domain. I just don't think that
6 resolves this case.

7 The United States has all kinds of
8 complete or superior powers, like the power to
9 recover federal dollars or the power to set
10 patents and punish infringers, but it can't
11 subject the states to private party suit as a
12 means of effectuating that power. And that's, I
13 think, especially true in condemnation.

14 Eminent-domain itself is an implied
15 power, meaning it's a necessary and proper way
16 to accomplish other enumerating powers like the
17 commerce clause. But we know that when states
18 are acting under the commerce clause, private
19 suits -- or when Congress is acting, private
20 suits can't be implied against the state because
21 they aren't necessary and proper.

22 And the way to square that is easy.
23 The United States can condemn sovereign land
24 when it takes responsibility and ownership of
25 the suit but it can't select a private party to

1 do so over a state's objection, exactly as
2 Justice Scalia put it in Blatchford.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas.

6 JUSTICE THOMAS: Thank you, Mr. Chief
7 Justice. Counsel, what difference would it make
8 if the U.S. sanctioned the proceedings, the
9 condemnation proceedings that -- or efforts that
10 PennEast is now making?

11 MR. FEIGENBAUM: I think it would make
12 both dignitary and practical differences for the
13 states. So obviously as to the dignitary harms,
14 I don't think we should forget that PennEast is
15 trying to directly subject the state to the
16 jurisdiction of a federal court over its
17 objection. Which is the sort of offense to the
18 dignity of coequal sovereigns that is exactly
19 what the framers were --

20 JUSTICE THOMAS: But in the end what
21 does that all mean?

22 MR. FEIGENBAUM: So in practical
23 sense, our concern in this case is that a
24 private plaintiff is the one that gets to
25 decide whether to take state land it might

1 never need, while the pipeline and the route
2 remain subject to so much change, which is
3 something we think a more responsible and
4 politically accountable sovereign would be less
5 likely to do.

6 So at pages 168, 175 and 235 of the
7 record, there's considerable evidence that
8 PennEast's actual route might change and FERC
9 itself instructed the company to consider a
10 change of the final two miles of the route and
11 it -- as part of the future permitting stage and
12 as the process unfolds.

13 But PennEast went and sought
14 eminent-domain along the entire original route
15 which is something that we think the United
16 States would be less likely to do relative to
17 our sovereign land when all of this process is
18 still ongoing.

19 JUSTICE THOMAS: Well, you said --
20 you've said a number of times that it's your
21 sovereign land. How much of this land do you
22 have a possessory interest in?

23 MR. FEIGENBAUM: Of the 49 parcels
24 that we're talking about, we have nine in fee
25 and 40 we have other sorts of property interests

1 to which we hold title.

2 JUSTICE THOMAS: What kind of property
3 interests?

4 MR. FEIGENBAUM: It depends.
5 Sometimes agricultural easements, development
6 easements and the like. They -- they're not all
7 the same kind across the 40.

8 JUSTICE THOMAS: So the -- let me ask
9 you, just an opportunity, I'd like you to -- to
10 respond to the Petitioner and to some extent the
11 U.S.'s argument that because this is an in rem
12 action it doesn't implicate sovereign immunity
13 at all.

14 MR. FEIGENBAUM: I appreciate the
15 opportunity, Justice Thomas. As I think the
16 United States admitted, there are a number of
17 cases from this Court that suggest just the
18 opposite, that parcels to which the United
19 States or a state have an interest in are
20 lawsuits against the state or the United States
21 itself.

22 And that makes sense. The United
23 States is the one that actually has to litigate
24 this case. The United -- the state is the one
25 that has to. The state is the one that's going

1 to lose its parcels where a private plaintiff is
2 deciding when that happens. And the state is
3 the one that has to participate in an
4 adversarial compensation trial.

5 The immovable property doctrine on
6 which Petitioner and the United States are
7 relying was about something else entirely. It
8 wasn't about a general in rem exception or an in
9 rem exception that would extend to New Jersey's
10 land that we own within our borders. It was
11 about property that we own outside of our
12 borders where we "assumed the character" of a
13 private landowner and don't function as a
14 sovereign. This Court said that in Chattanooga
15 and Schooner Exchange and in the separate
16 opinions in Upper Skagit.

17 And the reason that matters is that
18 the immovable property doctrine would also open
19 us up to private suits, as this Court may
20 remember from the Upper Skagit case and the
21 Lundgren quiet title suit against a tribe.

22 Immovable property isn't just about
23 eminent-domain but is about property suits
24 generally, and everyone agrees New Jersey is not
25 open to that sort of private property suit for

1 land we own within our borders.

2 JUSTICE THOMAS: Finally, I'd like you
3 to take an opportunity to comment specifically
4 on the delegation, the U.S.'s delegation of a
5 sovereign -- of its sovereign exemption.

6 MR. FEIGENBAUM: So I don't think
7 anything changes because PennEast is relying on
8 delegated or deputized authority. As Alden and
9 Blatchford explain, the United States can always
10 sue the states and, when it does so, it takes
11 political responsibility for the lawsuit itself,
12 controls the decisions in the lawsuit, and
13 doesn't offend our sovereignty. But a private
14 lawsuit is different because it leaves the
15 private parties --

16 JUSTICE THOMAS: But what would it
17 take for this to happen, though? Can the U.S.
18 even delegate this, its exemption?

19 MR. FEIGENBAUM: We don't think so,
20 no, because, as Justice Scalia put it, consented
21 to by the United States is not consented to by
22 those who the U.S. might select. So select or
23 delegate or deputize, whatever word we want to
24 use, I don't think this sort of workaround from
25 the usual abrogation rules can really exist in

1 our constitutional scheme.

2 JUSTICE THOMAS: Okay. And on what
3 base -- on what do you base that?

4 MR. FEIGENBAUM: I think we base that
5 on Alden and Blatchford and the lack of any
6 evidence at the founding or at any time since
7 that there's an understanding that simply
8 because the U.S. can bring suit, that it can
9 delegate or deputize to someone the ability to
10 bring that same lawsuit. It would really blow a
11 hole in the way this Court has always understood
12 sovereign immunity.

13 JUSTICE THOMAS: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Breyer.

16 JUSTICE BREYER: Yeah. Thank you.

17 Go back for a minute to the late
18 1940s, early 1950s. Most of the natural gas was
19 in the Permian Basin in Oklahoma and in Texas,
20 and they were on the verge of or had built
21 pipelines to carry that natural gas to
22 California, San Diego, El Paso Natural Gas, or
23 up to Pennsylvania, over to Illinois, up to
24 Massachusetts. A lot of the states -- not a
25 lot, but some were objecting in a whole variety

1 of complex ways. And so Congress passed the
2 Natural Gas Act.

3 Now they couldn't have built the
4 pipelines unless they had this power, I think,
5 I'm not certain of that, but I don't see how
6 they could have because they need -- go look at
7 the map on the -- the map of waterways in which
8 Pennsylvania claims an interest in the Marcellus
9 Shale Coalition. They zone water beds. They
10 own all kinds of obstacles. But this was passed
11 to build a pipeline. How could they have done
12 it? I don't see it.

13 And having known a little bit about
14 that, since you need the federal power or a
15 government power to -- for a private person to
16 use eminent-domain for anything against a
17 private land or by a state, I don't understand
18 how they would have -- how any reasonable person
19 would have delegated any eminent-domain power to
20 the Natural Gas Act, which was for interstate
21 pipelines, without including the power to
22 proceed against the state.

23 Am I right about that? And, if I am
24 right and, therefore, it is clearly in this
25 statute, why in heaven's name can't the Federal

1 Power Commission then, or FERC now, have done
2 the same thing? And if they could have done the
3 same thing under law of Congress, why can't they
4 hire somebody, just as Mississippi hires private
5 prosecutors sometimes in criminal cases? Or
6 there are dozens of examples where private
7 persons are delegated under supervision, and,
8 here, the supervision is close, to go and do
9 something that the public can do by bringing a
10 criminal case, et cetera, et cetera.

11 Do you see the thrust of my argument?
12 Very historical. But that's been the
13 understanding for the last 80 years.

14 MR. FEIGENBAUM: So I think I have
15 three responses to that, Your Honor, if I might.

16 JUSTICE BREYER: Please.

17 MR. FEIGENBAUM: The first is that I
18 think the premise of that question relies on the
19 same misconception that's at the heart of
20 PennEast's brief, which is a speculation about
21 the way that states behave.

22 We know from other industries,
23 including the interstate oil pipeline
24 industry --

25 JUSTICE BREYER: No, sorry. My -- the

1 thrust of my question, why I kept saying
2 historical, is I do know how states behaved in
3 the late '40s and early '50s. And from reading
4 the newspapers, I know that natural gas is a
5 subject of a big argument politically in a lot
6 of states, some thinking it's great for the
7 environment and others think -- others thinking
8 it doesn't go far enough, it has risks. Those
9 are the two things I know. Not speculation.

10 MR. FEIGENBAUM: So I appreciate that,
11 Your Honor. I think those same things could be
12 said about the oil industry, but we don't see
13 the concerns being raised here even though they
14 don't have any sort of federal eminent-domain
15 authority that anyone would purport allows them
16 to haul a non-consenting state into court, and
17 yet they are built anyway. There was no
18 evidence --

19 JUSTICE BREYER: Are there building
20 now big oil pipelines like down from Canada to
21 New Orleans?

22 MR. FEIGENBAUM: Sure, but there
23 hasn't been any evidence that a problem in that
24 process has been sovereign immunity, even though
25 everyone agrees that there's no ability to raise

1 federal eminent-domain claims against
2 non-consenting states in that context. And I
3 think what that shows is that there's plenty of
4 reasons why pipelines might not get built having
5 nothing to do with sovereign immunity, but that
6 uncertainty does exist in the industry, which is
7 one of the reasons why we were so nervous about
8 condemnations even before the permitting process
9 had finished.

10 But, to take your point on the
11 statutory question for a moment, it's also
12 notable that other times that Congress has
13 spoken to the issue, it has understood that
14 sometimes it wanted the statutes to include
15 state land and sometimes it didn't and sometimes
16 it excluded them, which, if it was true that
17 every industry going through state lands was
18 going to need this power, well, then it would be
19 very strange to see those inclusion --
20 exclusions. Congress was silent here, and it
21 doesn't give us much to work with.

22 JUSTICE BREYER: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice Alito.

24 JUSTICE ALITO: Counsel, sometimes
25 form is dispositive and you may in the end have

1 a winning formal argument, but what I want to
2 look into is whether you have anything more than
3 a purely formal argument.

4 Now you argue that things might have
5 worked out better for you if FERC as opposed to
6 PennEast were conducting the proceeding because
7 the federal government is obligated to negotiate
8 in bad faith and there's the issue of timing.
9 But I take it your constitutional argument would
10 be in the end exactly the same if none of those
11 features appeared in the statute that's involved
12 here, would it not?

13 MR. FEIGENBAUM: So I think formally
14 it would, although I would agree with you that
15 functionally, in what's at stake, we'd be
16 talking about something different.

17 JUSTICE ALITO: So, really, it's just
18 about the form? It's the fact that it's
19 PennEast and it's not FERC?

20 MR. FEIGENBAUM: So I -- I don't think
21 that's right. It's not just about the form for
22 New Jersey. In your hypothetical, you, of
23 course, took out the substantive concerns that
24 we were afraid of. But, in this case, in the
25 case we're actually facing, we do have

1 substantive concerns about this litigation and
2 the calls that PennEast rather than the United
3 States are making. We think it should be --

4 JUSTICE ALITO: Yeah. No, I -- I
5 understand that, but if PennEast were require --
6 required to negotiate in good faith, if all of
7 this was -- the timing was they couldn't bring a
8 condemnation action until the route had been
9 finalized so that FERC had approved the very
10 route in question and knew that it was going
11 over state land and wanted the -- presumably
12 wanted the land condemned, and all that was left
13 to be done was to file a condemnation action,
14 ascertain the value of the property, you would
15 have exactly the same constitutional objection?

16 MR. FEIGENBAUM: As a formal matter,
17 yes, because it's still a lawsuit directly filed
18 against the state by a private party, which we
19 think is exactly what the framers thought would
20 be an offense to the fundamental dignity of
21 sovereigns who can't be hauled into court
22 without their consent.

23 JUSTICE ALITO: Is New Jersey's
24 dignity really, in any kind of practical terms,
25 compromised to a greater degree based on the

1 caption of the lawsuit?

2 MR. FEIGENBAUM: We think yes because,
3 if it were otherwise, then all manner of this
4 Court's cases would have to come out, I think,
5 differently. In Alden, for example, the Court
6 was facing private suit that everyone agreed the
7 United States could have brought instead. But
8 it was the fact the private party was bringing
9 it, instead of the United States, that created
10 an offense, even if it was sort of just the
11 state as employer, just like New Jersey as
12 landowner.

13 The fact is the offense to a state's
14 dignity is the private party lawsuit, and that's
15 the through line of all of this Court's cases in
16 sovereign immunity.

17 JUSTICE ALITO: No, I understand that,
18 but it is a purely formal -- it is a purely
19 argument. Okay. Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor.

22 JUSTICE SOTOMAYOR: Counsel, just to
23 be clear, other than your argument that PennEast
24 didn't negotiate in good faith, contrary to the
25 finding of the court below, all of the other

1 arguments you mentioned throughout your
2 presentation to Justice Alito and others are
3 about issues that you litigated in the D.C.
4 courts, didn't you --

5 MR. FEIGENBAUM: No, Your Honor.

6 JUSTICE SOTOMAYOR: -- about -- well,
7 you litigated about whether they should wait,
8 and -- and the government responded, not in the
9 way you liked, but it did. What else -- what
10 else did you not have an opportunity to or
11 didn't litigate in that case?

12 MR. FEIGENBAUM: So two things, Your
13 Honor. First, the adversarial compensation
14 trial, to which we're going to be subject if
15 PennEast prevails on its posture in this case,
16 is a contested compensation trial over the value
17 of sovereign land where a company can fight
18 tooth and nail to keep away from us the money to
19 which we think we're entitled. So none of that
20 is ever going to come out --

21 JUSTICE SOTOMAYOR: Well, that's true,
22 but that would be true whether it was the
23 government or you.

24 MR. FEIGENBAUM: That's right.

25 JUSTICE SOTOMAYOR: And you're -- once

1 the -- once the decision is made that land is
2 necessary for a public service, that you're
3 subject to anyway. What was the second thing,
4 counsel?

5 MR. FEIGENBAUM: The second thing was
6 that we did raise issues around the timing, but
7 FERC didn't just say we disagree with you on the
8 timing, we want it to go forward. At page 239
9 and 240 of the record, FERC said the timing is
10 something to be worked out in the district court
11 with the private party and New Jersey. So it
12 was sort of washing its hands clean, exactly as
13 we say shouldn't be able to be done by a
14 responsible sovereign. And so --

15 JUSTICE SOTOMAYOR: Well, you had --
16 you had the opportunity to litigate that, and
17 you lost, correct?

18 MR. FEIGENBAUM: So we raised it, but
19 they didn't say you had the opportunity and you
20 lose.

21 JUSTICE SOTOMAYOR: But, counsel --

22 MR. FEIGENBAUM: They said go raise it
23 somewhere else. So we did.

24 JUSTICE SOTOMAYOR: Well, but you
25 could have appealed that.

1 Going to Justice Alito's question
2 about formalistic, it seems to me that --
3 history is very important to me, and I think
4 that was the point of Justice Breyer's position,
5 which is that for at least 150 years, states,
6 some states, not all, have been delegating to
7 private parties their power -- their -- the
8 power of eminent domain, and the federal
9 government and other agencies have done it, and
10 no one has raised this argument because, if one
11 accepts Mr. Clement's argument, there was no
12 sense that there was a sovereign immunity to
13 eminent domain, the exercise of eminent domain
14 by the federal government or by a state against
15 its own citizens, and, hence, who they delegate
16 that power to, unlike the other cases that we've
17 addressed this issue or this issue has been
18 around that only the state can do, and at least
19 in this narrow field, the in rem nature of this
20 proceeding has gone differently in history than
21 in the normal cases.

22 MR. FEIGENBAUM: I don't --

23 JUSTICE SOTOMAYOR: How do you respond
24 to that?

25 MR. FEIGENBAUM: I don't think that's

1 what the history shows for a couple of reasons.

2 First, the history of the fact that
3 states haven't asserted this argument before I
4 don't think is all that telling, because the
5 Natural Gas Act is Commerce Clause legislation,
6 and it wasn't crystal-clear until 1996 in
7 Seminole Tribe that Congress lacked the
8 authority to subject states to private suit
9 under that power.

10 Since that time, a couple of states
11 have raised this. Texas raised it in 2017.
12 Connecticut raised it in 2003. And we know from
13 1992 legislative materials that New York did
14 even earlier.

15 But, more importantly, I think it
16 makes sense that this comes up infrequently
17 because PennEast is, again, wrong about the way
18 that states behave. Even where states clearly
19 have the authority to withhold consent, we
20 frequently allow for rights-of-way, which is why
21 this hasn't been a problem for other industries
22 and why New Jersey itself granted multiple
23 rights-of-way to pending natural gas pipeline
24 projects even after the decision below.

25 But, finally, as FMC put it, modern

1 practice can't overcome the lack of founding-era
2 consent. And so, in addition to being not that
3 compelling, I think, in the unique context of
4 sovereign immunity itself, the sort of practice
5 to which PennEast and the Solicitor General's
6 Office are pointing just isn't that relevant and
7 certainly can't overcome the very clear
8 historical evidence from the founding that no
9 one would have contemplated private condemnation
10 suits against non-consenting states.

11 JUSTICE SOTOMAYOR: Thank you,
12 counsel.

13 CHIEF JUSTICE ROBERTS: Justice Kagan.

14 JUSTICE KAGAN: Mr. Feigenbaum, does
15 this suit have to be labeled United States
16 versus New Jersey? I mean, what if there was
17 meaningful supervision by the federal government
18 over PennEast's conduct? Would that be enough?

19 MR. FEIGENBAUM: So you're right, Your
20 Honor, this suit does not have to be named as
21 United States versus New Jersey. It is PennEast
22 versus New Jersey, as the Court's caption
23 suggests, and -- and there's no naming
24 convention that would have it be the United
25 States in this case. However --

1 JUSTICE KAGAN: No, no, no. I -- I
2 meant, is -- is there -- could the U.S. delegate
3 the power to PennEast, in your view, but keep
4 some sort of supervisory capacity over the suit?
5 Would that satisfy the Eleventh Amendment?

6 MR. FEIGENBAUM: So I think the answer
7 in that case is probably the same one this Court
8 gave in Stevens, which is I doubt it, but what
9 would make that case hard makes this one easy.
10 If the United States actually contained -- or
11 oversaw and directly supervised the litigation
12 itself in some meaningful way, it would look a
13 lot more like the kind of control that led to
14 the circuit split over qui tam, and, therefore,
15 you could see a different result with the
16 U.S. being the real party in interest. But none
17 of that exists here.

18 JUSTICE KAGAN: You spoke to Justice
19 Alito about the state's dignitary interest and
20 said that this has been a consistent through
21 line in our sovereign immunity cases.

22 Most of those cases in the modern era
23 have had powerful dissents attached to them, and
24 those dissents have -- have -- have basically
25 said what are you talking about, about this

1 dignitary interest? What dignitary interest
2 does a state have in -- in being -- why is it --
3 why is it any less or greater if a private party
4 or the United States is involved? So can you
5 explain that to me? Like, what is the supposed
6 dignitary interest?

7 MR. FEIGENBAUM: The dignitary
8 interest, which I think comes from the
9 founding-era documents, is that it was always
10 understood for any sovereign that you could not
11 be haled into court without your consent. That
12 was sort of black-letter, free-sounding
13 understanding, and so, if it was true that
14 states really did retain the true sovereignty
15 that everyone had promised them when they joined
16 the union, then they would -- as a matter of
17 actually being co-equal sovereigns treated with
18 that sovereignty, they would have the ability to
19 withhold consent as well.

20 Now it's not true vis-à-vis other
21 states and the United States because, as we know
22 in international law as well, it's always looked
23 different for sovereign-on-sovereign sort of
24 litigation, in part because of their
25 responsibility and control and in part because

1 that's never been understood to offend
2 sovereignty. But, if you allow private suits
3 forward against the states when they don't
4 consent to them, it suggests that states really
5 aren't the kind of sovereigns that they were
6 promised and that the founders understood them
7 to be.

8 JUSTICE KAGAN: If you go back to this
9 question of whether there was founding-era
10 consent, I think what PennEast would say is that
11 you knew you were consenting to suits against
12 the federal government and you knew that
13 governments routinely use delegations to -- to
14 effectuate eminent-domain suits. So you put
15 those two things together, why didn't you
16 consent to suits of exactly this kind?

17 MR. FEIGENBAUM: So I don't think you
18 can just put those two things together because
19 that syllogism would cause all sorts of
20 problems. Imagine in, say, a normal property
21 context or in the patent context, you know that
22 the United States would be able to have a patent
23 power and file patent lawsuits against
24 infringing states if it saw fit. You know that
25 the United States would be able to empower

1 private patent holders to sue private patent --
2 patent infringers, so why can't private patent
3 holders sue state infringers?

4 Everyone understands that that last
5 step in the syllogism doesn't follow from the
6 others, because what we're actually looking for
7 in sovereign immunity cases is state
8 understanding and consent to the idea that they
9 could be haled into court, not if a federal
10 power existed but if a private party could use
11 them against their consent.

12 JUSTICE KAGAN: Thank you, Mr.
13 Feigenbaum.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch.

16 JUSTICE GORSUCH: I'd like to return
17 to the question of whether this is a suit
18 against the state. In some respects, it seems
19 pretty hard to dispute that the state is named
20 as a party, and under Rule 71.1, the complaint
21 had to file suit against both property and at
22 least one of the property owners. And, of
23 course, there's going to be compensation due to
24 the state. That would seem to be more in
25 personam than -- than in rem.

1 But there's also a long strand of
2 thinking about condemnation proceedings as in
3 rem, as the notes to the rule make clear. And,
4 of course, we've heard some argument today that
5 this -- that's the better way to conceive of
6 these kinds of suits. Can you speak to that a
7 little further?

8 MR. FEIGENBAUM: Absolutely, Your
9 Honor. So I don't think there's any sort of
10 general in rem exception to sovereign immunity.
11 As this Court has recognized, a suit directly
12 against a sovereign's property is a lawsuit
13 directly against the state both formally and
14 functionally, and that's why the Rule 71.1 --

15 JUSTICE GORSUCH: And what -- what's
16 your best common law authority for that?

17 MR. FEIGENBAUM: So I think the best
18 authority that we have actually could come from
19 the immovable property doctrine, which existed
20 specifically to draw a contrast to the land that
21 states owned within their borders.

22 So the idea of the immovable property
23 doctrine being cited by both PennEast and the
24 United States was that states, when they owned
25 property outside of their borders and got sued,

1 that wasn't --

2 JUSTICE GORSUCH: No, I -- I -- I'm
3 sorry to cut you off there, but I -- I
4 understand that. I remember Upper Skagit. I
5 may be the only person who does, but I do having
6 gotten saddled with that one, but it was a
7 delightful assignment. But that -- that has to
8 do with property outside the state. What about
9 inside the state?

10 MR. FEIGENBAUM: Well, I think it's
11 Kohl and I think it's Minnesota versus United
12 States explaining that these are suits at law
13 and that a lawsuit against the United States in
14 which -- or a lawsuit against land in which the
15 United States has an interest is a lawsuit
16 against the United States.

17 That's why states can't condemn, for
18 example, tribal land where the United States
19 holds a fee interest. And we can't condemn that
20 land simply by naming the land and choosing not
21 to name the United States because that is in
22 both form and function a lawsuit against the
23 United States we don't have the ability to
24 bring.

25 It was entirely different in cases

1 like Admiralty and Bankruptcy, which are the
2 only exceptions where this Court has allowed in
3 rem to move forward in that way based on really
4 unique founding-era history that's not present
5 here. In Admiralty, it was that admiralty
6 issues were not understood to be law or equity
7 and, therefore, didn't trigger the application
8 of the Eleventh Amendment clause, as we know
9 from Justice Story. And then, in Hood, it was
10 specifically about the uniqueness of the
11 bankruptcy clause and the fact that jurisdiction
12 is over the debtor's property, not the state's
13 property, and so it isn't formally seeking any
14 affirmative relief from the state. That's put
15 at page 450.

16 There's no historical evidence and no
17 example that anyone can point to that would
18 allow for a direct lawsuit against a state's
19 land as somehow distinct from a direct lawsuit
20 against a state.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you.

25 And welcome, General. I just want to

1 ask one question. In your brief, you respond to
2 PennEast's arguments about what will happen if
3 you were to prevail in this case, and you
4 respond by saying, well, of course, Congress
5 could take action. And then you say -- this is
6 page 45 -- but even absent congressional action,
7 PennEast is hardly without options.

8 And then I want to focus on your first
9 one there. First, while the United States
10 disclaims authority under the NGA to condemn
11 property, the lower courts have had no occasion
12 to consider this question, and this issue
13 deserves greater exploration.

14 So is that a real thing or -- or -- or
15 not, what you're offering there?

16 MR. FEIGENBAUM: So below before the
17 Third Circuit -- and you can find this, I think,
18 most clearly at pages 20 to 22 of our reply
19 brief -- we articulated a theory in which the
20 United States might have an implied power under
21 the structure of the NGA to itself step in
22 essentially on the theory like the Third Circuit
23 suggested, that it's strange to think of FERC
24 being able to grant private parties the ability
25 to file these suits and not retain that power

1 itself.

2 Since that time, the United States
3 itself has come in at PennEast's urging to say
4 we actually don't have that authority. They
5 obviously say it in the gray brief, but they
6 said it in the declaratory order as well. So I
7 don't want to pull this Court's leg and say
8 they're definitely going to move forward with
9 that. We thought it was a workable theory
10 worthy of exploration, but the U.S. continues to
11 disclaim it.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett.

15 JUSTICE BARRETT: Is there any space
16 for an inverse condemnation proceeding in this
17 scheme, you know, where the FERC certificate
18 could issue and PennEast could just take over
19 the property and then you could pursue
20 an inverse condemnation proceeding?

21 MR. FEIGENBAUM: I don't think so,
22 Your Honor, because, as this Court held recently
23 in *Knick*, a taking without compensation violates
24 the self-executing Fifth Amendment at the time
25 of the taking.

1 And so, you know, PennEast basically
2 says this lawsuit is to remedy a Fifth Amendment
3 problem, but we think it's a false choice
4 between the Fifth Amendment and the Eleventh
5 Amendment because the U.S. could bring this
6 lawsuit in a way that is absolutely coherent
7 with the Fifth Amendment and with the Eleventh
8 Amendment simultaneously.

9 JUSTICE BARRETT: Let me ask you about
10 the Fifth Amendment and how it might relate to
11 the immovable property doctrine. Do you agree
12 that all of your land or your property is
13 private property for Fifth Amendment purposes,
14 which is what permits you to have a takings
15 claim in the first place?

16 MR. FEIGENBAUM: Yes, we agree with
17 the Court that state land, sovereign land, can
18 be condemned and we have the same rights under
19 the Takings Clause.

20 JUSTICE BARRETT: Okay. So, if it's
21 -- if it's private property for purposes of the
22 Fifth Amendment, why shouldn't we treat it as
23 private property for purposes of state sovereign
24 immunity as well?

25 MR. FEIGENBAUM: So I think the Court

1 didn't say it was actually private but just that
2 it was sort of incomprehensible under the
3 Takings Clause that you would be able to have
4 condemnations of sovereign land to which the
5 sovereign was even less entitled to relief than
6 for a private party, and that's how they
7 reasoned it.

8 There's no sort of reasoning here that
9 I think would justify a private lawsuit against
10 a state as somehow necessary and proper from
11 that reading of the Takings Clause.

12 JUSTICE BARRETT: Well, doesn't it
13 bear on the immovable property argument that
14 PennEast is making that, you know, if a state
15 has property, if Georgia has property within the
16 borders of Tennessee, you know, the immovable
17 property, Georgia can be sued because it's
18 treated basically as the equivalent of a private
19 landowner because it's not land within its
20 sovereign territory, but if the Fifth Amendment
21 treats this as private property for those
22 purposes, doesn't that strengthen PennEast's
23 argument about the immovable property doctrine?

24 MR. FEIGENBAUM: I don't think so,
25 because the reason that the property was private

1 property outside of our borders was specifically
2 because a state can't be a sovereign in another
3 state's territory. So Switzerland can't be
4 sovereign in the United States. We can't be
5 sovereign in Georgia or in Pennsylvania. And
6 the consequence of that and why I think the
7 theory proves far too much is that it opens the
8 state up to private property suits like
9 the Lundgrens' quiet title suit in Upper Skagit.
10 So suggesting that immovable property doctrine
11 has a role to play here goes well beyond eminent
12 domain because it is not a theory that is
13 actually linked at all to the -- the teachings
14 of the Takings Clause.

15 JUSTICE BARRETT: I want to go back to
16 something you said to Justice Thomas about
17 possessory and -- or the kinds of property
18 interest at stake. You told Justice Thomas that
19 the state had nine possessory property
20 interests. If that's right -- is that right?

21 MR. FEIGENBAUM: That's right. So
22 this action has 42, and then there are seven
23 that are stayed. So, when you combine out of
24 those 49, we get to nine possessory interests.

25 JUSTICE BARRETT: Should we treat that

1 as significant? I mean, Deep Sea Research, we
2 treated that line as -- as mattering. Should we
3 treat that line as mattering here in distinction
4 between possessory and non-possessory interests
5 --

6 MR. FEIGENBAUM: So I'd put --

7 JUSTICE BARRETT: -- for sovereign
8 immunity purposes?

9 MR. FEIGENBAUM: With one important
10 caveat, which is that everyone has always
11 understood for intangible property interests,
12 which is what an easement is, there's no such
13 thing as sort of actual possession in that way,
14 and so the Restatements define possession for
15 intangible interests as having title, and we
16 have title to all of the easement interests that
17 we have in this case. So even drawing that line
18 would sweep in all of New Jersey's interests in
19 this particular dispute.

20 JUSTICE BARRETT: Okay. Last
21 question. In your view, would there be anything
22 to stop you or any other state from waiting
23 until FERC approves the pipeline drought and
24 then purchasing a property interest in land
25 within the pipeline's path and then asserting

1 state sovereign immunity?

2 MR. FEIGENBAUM: Anything to formally
3 stop, no, but there's no evidence any state has
4 ever done that in any --

5 JUSTICE BARRETT: No, no, no, no, I
6 just asked if there was formal you need to stop?

7 MR. FEIGENBAUM: No.

8 JUSTICE BARRETT: Thank you.

9 CHIEF JUSTICE ROBERTS: A minute to
10 wrap up, counsel.

11 MR. FEIGENBAUM: Thank you, Mr. Chief
12 Justice.

13 A ruling for PennEast would be
14 unprecedented because it would allow a private
15 party to subject the state to the indignity of a
16 federal suit without their consent because it
17 would allow a private company rather than a
18 responsible and accountable sovereign to control
19 the litigation and because it would allow
20 PennEast to decide whether to risk needless
21 condemnations of state land while the pipeline
22 and route remain subject to so much challenge
23 and change and to decide how much sovereign land
24 is worth in an adversarial compensation trial.

25 But PennEast lacks the evidence to

1 justify that drastic step. When it comes to the
2 Constitution, PennEast provides ill-founding
3 error evidence that states contemplated private
4 condemnation suits. And when it comes to the
5 NGA, PennEast identifies nothing in the text to
6 show that Congress explicitly endorsed private
7 suits against them. PennEast's condemnation
8 carveout thus relies on the very evidence this
9 Court has rejected so many times before:
10 silence in the Constitution, silence at the
11 founding, and silent in the text of the statute.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Rebuttal, Mr. Clement.

16 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

17 ON BEHALF OF THE PETITIONER

18 MR. CLEMENT: Thank you, Mr. Chief
19 Justice, and may it please the Court.

20 I'd just like to make three basic
21 points in rebuttal.

22 First, on the delegation or
23 deputization point, I don't think it's right for
24 the state to suggest that this is just like
25 Blatchford or this is just like Stevens. This

1 is a power that's constrained completely by the
2 federal government.

3 PennEast cannot get into court at all
4 unless it is given a certificate for particular
5 properties. FERC continues to have the
6 authority to oversee the -- the actions and
7 could modify the certificate, and the authority
8 that FERC asserts for that -- this is directly
9 responsive to Justice Kagan's question -- is 15
10 U.S.C. 717(o).

11 But even beyond that, eminent domain
12 is not like the ability to have a delegated
13 chance to bring a damages action against the
14 state. It's an inherently government function.
15 The state's treasury will be augmented. And for
16 purposes of the action, PennEast is a federal
17 actor for Fifth Amendment purposes. So all
18 we're asking is to extend this parallel logic to
19 the Eleventh Amendment.

20 Second, I want to talk about the in
21 rem and form versus substance. As Justice
22 Alito's colloquy showed, the position of New
23 Jersey here is entirely a formal argument, but
24 if we're going to go on form, and I'm going to
25 talk about substance in a minute, but if you go

1 on form, the form of an in rem action is an
2 action against the land, or if you want a
3 historical framing here of sorts, look at
4 Bushrod Washington's decision in the United
5 States against Bright where he talks about an in
6 rem action being an action against the world.

7 What you're doing is you're settling
8 the rights of the land and that's why in rem
9 actions are fundamentally different. They are
10 not in personam action. A foreign owner of land
11 can't block eminent-domain or other in rem
12 proceedings just by not showing up because the
13 territorial process of the court doesn't reach
14 them.

15 And importantly, Rule 71.1 does say
16 that the -- PennEast is supposed to name the
17 state as a property owner, but this Court in
18 Hood specifically said the provisions of the
19 rules don't change the fundamental form of the
20 action. It was in rem there, it is in rem here,
21 and it is a fortiori be specifically an in rem
22 action that can only augment the state treasury.
23 And as to dignity interest, there's not even an
24 allegation of wrongdoing here.

25 So lastly, let me just close by --

1 by -- by inserting the point that to insert a
2 sovereign immunity defense to the eminent-domain
3 authority is to lose the forest for the tree.

4 Sovereign immunity is a stranger in a
5 strange land when it comes to an assertion of
6 eminent-domain. And they -- the -- New Jersey
7 concedes the validity of the federal exercise of
8 eminent-domain here. They just want to insist
9 on how it's exercised and that is not an
10 authority that an inferior sovereign gets under
11 any authority, especially when they're wielding
12 that authority as a property owner to veto a
13 federal infrastructure project. Thank you, Your
14 Honors.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

17 (Whereupon, at 1:24 p.m., the case was
18 submitted.)

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