No. 18-1106

In the Supreme Court of the United States

DELAWARE RIVERKEEPER NETWORK; DELAWARE RIVERKEEPER, MAYA VAN ROSSUM; AND LANCASTER AGAINST PIPELINES,

Petitioners,

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; AND TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC

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QUESTIONS PRESENTED

Under the Natural Gas Act, any appeal from a State acting pursuant to federal law to issue or deny a permit required under federal law for an interstate natural gas pipeline is subject to the **"original and exclusive jurisdiction"** of the federal Courts of Appeals. *See* 15 U.S.C. § 717r(d)(1) (emphasis added). Congress enacted this provision to avoid delays caused by "sequential administrative and State court and Federal court appeals that [could] kill a project with a death by a thousand cuts." *See Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 85 (2d Cir. 2006) (quotations omitted).

To obtain federal approval to construct a pipeline that may result in a discharge into navigable waters, an applicant must obtain "a certification from the State" certifying "that any such discharge will comply with" applicable, federally-approved water-quality standards, unless the State waives the Clean Water Act's requirements by failing to act "within a reasonable period of time (which shall not exceed one year)." 33 U.S.C. § 1341(a)(1).

The questions presented are:

1. Whether the Third Circuit, in accord with the Congressional mandates set forth in the Natural Gas Act, properly applied a federal finality standard to and correctly asserted jurisdiction over the review of the Pennsylvania Department of Environmental Protection's Section 401 Water Quality Certification for an interstate natural gas pipeline project, pursuant to

federal law and consistent with the decisions of this Court and the First, Second, and Third Circuits?

2. Whether Petitioners waived their argument, not presented below to the Third Circuit, that the Third Circuit's ruling violates the Tenth Amendment?

3. Whether the Third Circuit's ruling that it has exclusive jurisdiction under the Natural Gas Act to review a Clean Water Act Section 401 Water Quality Certification – without the Certification first being reviewed by the Pennsylvania Environmental Hearing Board – comports with the Tenth Amendment and this Court's precedent when: (a) the ruling does not dictate what Pennsylvania's legislature must or must not do; and (b) Pennsylvania's participation in the Clean Water Act's scheme of cooperative federalism is a voluntary choice?

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Transcontinental Gas Pipe Line Company, LLC ("Transco") is a natural gas pipeline company engaged in the transportation of natural gas in interstate commerce, which owns and operates an interstate natural gas transmission system that extends from Texas, Louisiana and the offshore Gulf of Mexico area to a terminus in the New York City metropolitan area. Its parent corporation is Williams Partners Operating, LLC, which is a wholly-owned subsidiary of The Williams Companies, Inc. (NYSE: WMB). We have no knowledge of any other entity owning 10% or more of Transco or Williams Partners Operating, LLC.

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INTRODUCTION

After several years of intensive review and consideration of thousands of comments from affected parties, the Federal Energy Regulatory Commission ("FERC") issued a certificate order to Transcontinental Gas Pipe Line Company, LLC ("Transco") approving the construction and operation of a fully subscribed and nearly $3 billion interstate natural gas pipeline project called the Atlantic Sunrise Project (the "Project"). *See Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61125 (Feb. 3, 2017) ("Certificate Order"). The Project involved the construction of almost 200 miles of pipeline located in rights of ways specifically reviewed and approved by FERC, the construction of two new compressor stations, and the modification of more than 42 other facilities along the Transco system. FERC determined that the Project was in the public interest. Among other things, the Project will provide enough clean-burning natural gas to meet the daily needs of more than 7 million American homes.

The Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, comprehensively regulates interstate natural gas pipelines – such as the Project at issue here – and preempts State regulation of interstate natural gas pipeline facilities, expressly limiting State regulation to the administration of three federal regulatory statutes, including the Clean Water Act.[1] *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 305, 308 (1988); *Islander E. Pipeline Co. v. McCarthy*,

[1] The other two statutes are the Coastal Zone Management Act and the Clean Air Act. *See* 15 U.S.C. § 717b(d).

525 F.3d 141, 143-44 (2d Cir. 2008); 15 U.S.C. § 717b(d)(3).

In order to prevent delays due to "a series of sequential administrative and State court and Federal court appeals that [could] kill a project with a death by a thousand cuts just in terms of the time frames associated with going through all those appeal processes," *Islander East Pipeline Co. v. Connecticut Department of Environmental Protection*, 482 F.3d 79, 85 (2d Cir. 2006) (quotations omitted), Congress expressly declared that any appeal from a State acting pursuant to federal law to issue or deny a permit required under federal law for an interstate natural gas pipeline is subject to the "original and exclusive jurisdiction" of the federal Courts of Appeals. *See* 15 U.S.C. § 717r(d)(1).

Under Section 401 of the Clean Water Act, any applicant seeking a federal permit for an activity that "may result in any discharge into the navigable waters" must obtain "a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with" the State's federally-approved water quality standards. 33 U.S.C. § 1341(a)(1). No such permit will be granted unless the certification has been obtained or the State waives the requirement by failing to act on an application within a reasonable period of time, not to exceed one year. *Id.*

Petitioners Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper (collectively, "Riverkeeper"), and Lancaster Against Pipelines, along with others who are not parties to this petition, challenged the Pennsylvania Department of

Environmental Protection's ("PADEP") decision to issue a Water Quality Certification for the Project under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. Tellingly, this petition does not seek review of the Third Circuit's decision that Petitioners' challenges to the PADEP decision failed on the merits. Instead, Petitioners ask this Court to review the Third Circuit's ruling that the Natural Gas Act gives the Court of Appeals original and exclusive jurisdiction over Petitioners' challenges to PADEP's issuance of the Water Quality Certification – as opposed to the Pennsylvania Environmental Hearing Board (the "Environmental Hearing Board"), a separate and independent quasi-judicial agency. Petitioners' apparent goal is to establish a process that creates additional delays by requiring review by an independent State Environmental Hearing Board, separate from PADEP, as a new prerequisite before pursuit of an appeal in the federal Courts of Appeals, all of which directly contravenes Congressional intent as expressed in the jurisdictional provisions of the Natural Gas Act.

The questions presented in the petition have no merit. The Third Circuit applied a federal finality standard to PADEP's issuance of the Water Quality Certification, as did all of the courts in the cases cited by Petitioners, so there is no conflict among the decisions of this Court or the federal Courts of Appeals on the finality issue. The different outcomes in the cases cited are attributable solely to the different way in which each State arrives at a final permitting decision. In each case, however, the finality standard remains the same: the federal finality standard.

The Court should also decline to entertain Petitioners' new Tenth Amendment challenge, which Petitioners never raised below, and which the Third Circuit did not address in its decision. Even if Petitioners had preserved a Tenth Amendment challenge, it would fail under this Court's precedent because: (1) the Third Circuit's decision does not dictate what the Commonwealth of Pennsylvania's legislature must or must not do; and (2) the Commonwealth voluntarily chooses to participate in the Clean Water Act's scheme of cooperative federalism.

STATEMENT OF THE CASE

I. The Atlantic Sunrise Project.

The Project is a nearly $3 billion investment in critical energy infrastructure designed to supply enough natural gas to meet the daily needs of more than 7 million American homes by connecting producing regions in northeastern Pennsylvania to markets in the mid-Atlantic and southeastern States. *See Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 190 (3d Cir. 2018), *cert. denied sub nom.*, *Adorers of the Blood of Christ, U.S. Province v. FERC*, No. 18-548, 2019 WL 660190 (U.S. Feb. 19, 2019).[2] Nine shippers have subscribed to 100% of the incremental firm transportation service provided by the Project, demonstrating the need for the Project's capacity. *Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61125, ¶ 11

[2] *See also* Williams, *Overview*, Atlantic Sunrise Pipeline Project, http://atlanticsunriseexpansion.com/about-the-project/overview/ (last visited Mar. 20, 2019).

(Feb. 3, 2017). Following a comprehensive multi-year review process, FERC approved the Project when it issued the Certificate Order for the Project on February 3, 2017, finding that "the public convenience and necessity requires approval of Transco's proposal," based on "the benefits that [the Project] will provide, the absence of adverse effects on existing customers . . . and the minimal adverse effects on landowners or surrounding communities." *Id.* ¶ 33.

Installation of the Project is complete, and FERC authorized Transco to place the Project into service on October 4, 2018.[3]

II. The FERC Review Process.

On July 29, 2014, FERC published a *Notice of Intent to Prepare an Environmental Impact Statement for the Planned Atlantic Sunrise Expansion, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings* in the *Federal Register*, *see* 79 Fed. Reg. 44,023-02 (2014), and mailed it to nearly 2,500 interested parties to provide notice of the proposed Project, *see Adorers*, 897 F.3d at 190-91. FERC received more than six hundred written comments from various interested parties, and ninety-three speakers provided comments at Project scoping meetings. *Id.* at 191. Thereafter, on March 31, 2015, Transco filed its formal application with FERC for a

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[3] Accession No. 20181004-3012, Letter order granting Transco's request to place facilities into service (Oct. 4, 2018), available on FERC's eLibrary in Docket Number CP15-138-000, https://www.ferc.gov/docs-filing/elibrary.asp.

Certificate of Public Convenience and Necessity for the Project. *Id.* at 191.

Over the course of its proceedings, FERC held multiple notice-and-comment periods and public meetings, and provided comprehensive responses to public input on the Project. ***1,185 written comments, 296 oral comments, and more than 900 letters*** were submitted to FERC addressing various issues regarding the Project. *See Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61125, ¶¶ 69, 72, 73 (Feb. 3, 2017). ***Each of the Petitioners intervened in the FERC proceedings and submitted comments to FERC regarding the Project***.[4]

FERC issued its Draft Environmental Impact Statement in May 2016 and received over 1,000 comments and letters in response. *See Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61125, ¶ 72 (Feb. 3, 2017). After considering the issues raised in these comments, FERC issued its Final Environmental Impact Statement in December 2016, *see id.* ¶ 75, and, on February 3, 2017, issued Transco a Certificate of Public Convenience and Necessity for the Project, *see Adorers*, 897 F.3d at 192.

III. Authorizations Required Under the Clean Water Act.

FERC included certain Environmental Conditions in its Certificate Order authorizing the Project. *See generally Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61125, Appendix C (Feb. 3, 2017). Among these

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[4] *See generally* FERC Dkt. CP15-138-000.

conditions is a requirement that Transco "file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof)," prior to receiving "written authorization . . . to commence construction of any project facilities." *Id.*, Appendix C ¶ 10. Among the federal authorizations required for the Project is a Section 404 permit under the Clean Water Act from the United States Army Corps of Engineers. A Section 404 permit authorizes the discharge of dredged or fill material into navigable waters. *See* 33 U.S.C. § 1344(a). Under Section 401 of the Clean Water Act, any applicant for a Section 404 permit to construct or operate a facility that may result in a discharge to navigable waters must provide the federal permitting agency with "a certification from the State in which the discharge originates . . . that any such discharge will comply with" applicable, federally-approved State water quality standards. 33 U.S.C. § 1341(a)(1). Because of these statutory requirements, Transco had to obtain a Section 401 Water Quality Certification from PADEP before FERC would approve construction activities for the Project. *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 903 F.3d 65, 69 (3d Cir. 2018), App. 6.

IV. PADEP Issues the Section 401 Water Quality Certification to Transco.

On April 9, 2015, Transco applied to PADEP for a Section 401 Water Quality Certification. *See Del. Riverkeeper Network*, 903 F.3d at 69, App. 6. Notice of receipt of Transco's application to PADEP was published in the *Pennsylvania Bulletin* on June 20,

2015. *See id.* This notice referenced Transco's March 31, 2015 application pending before FERC, informed the public of PADEP's intent to review Transco's application for a Section 401 Water Quality Certification, and invited the public to submit comments regarding Transco's application. After a public comment period, in which Riverkeeper participated by submitting comments, PADEP issued a Section 401 Water Quality Certification in April 2016 certifying that the Project would comply with Pennsylvania's water quality standards if Transco obtained the following additional permits: (1) a PADEP National Pollutant Discharge Elimination System permit (or coverage under an associated General Permit) for the discharge of water from hydrostatic testing; (2) a PADEP Chapter 102 Erosion and Sediment Control General Permit for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing or Treatment; and (3) PADEP Chapter 105 Water Obstruction and Encroachment Permits ("105 Permits").[5] *See id.*, App. 6-7. Transco subsequently obtained each of the approvals on which the Section 401 Water Quality Certification was conditioned.

[5] Notice of PADEP's issuance of the Section 401 Water Quality Certification was published in the *Pennsylvania Bulletin* on April 23, 2016. *See id.*, App. 6; *see also* App. 48.

V. Petitioners Appeal the Section 401 Water Quality Certification to the Third Circuit and the Pennsylvania Environmental Hearing Board.

Petitioners filed petitions for review of the Section 401 Water Quality Certification with the United States Court of Appeals for the Third Circuit under the ***exclusive*** review provision of the Natural Gas Act, 15 U.S.C. § 717r(d)(1). *See Del. Riverkeeper Network*, 903 F.3d at 69, App. 7. Petitioner Lancaster Against Pipelines (but not Riverkeeper) also filed a protective appeal with the Environmental Hearing Board.[6] *See id.* The Environmental Hearing Board stayed its proceedings pending the Third Circuit's determination as to jurisdiction over the petitions for review. *See id.* at 69–70, App. 7.

VI. The Third Circuit Rules That It Has Exclusive Jurisdiction Under the Natural Gas Act to Review the Section 401 Water Quality Certification and Denies the Petitions for Review.

On September 4, 2018, following briefing and argument, the Third Circuit issued a precedential opinion holding that it has exclusive jurisdiction under the Natural Gas Act, 15 U.S.C. § 717r(d), to review the

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[6] In addition, Lancaster Against Pipelines and Riverkeeper filed an appeal with the Environmental Hearing Board challenging PADEP's issuance of the 105 Permits for the Project. Lancaster Against Pipelines and Riverkeeper did *not* file petitions for review with the Third Circuit challenging PADEP's issuance of the 105 Permits.

Section 401 Water Quality Certification. *See Del. Riverkeeper Network*, 903 F.3d at 68, 74-75, App. 5, 16-18.

This was the third time in two years that the Third Circuit ruled that it had exclusive jurisdiction over PADEP's issuance of permits associated with an interstate natural gas pipeline project. *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 833 F.3d 360, 371-72 (3d Cir. 2016); *Del. Riverkeeper Network v. Sec'y of Pa. Dep't of Envtl. Prot.*, 870 F.3d 171, 176-78 (3d Cir. 2017). In the case below, where the issue of finality was affirmatively raised, the Third Circuit applied a federal finality standard to determine whether the Water Quality Certification was reviewable under the Natural Gas Act. *See Del. Riverkeeper Network*, 903 F.3d at 71-72, App. 10-12. In applying the federal finality standard, the court necessarily considered Pennsylvania law and procedure because "deciding on a PADEP decision's finality requires reference to the Pennsylvania procedures that produced it." *Id.* at 71, App. 10. The court performed a detailed analysis and concluded that PADEP's issuance of the Water Quality Certification was a final action over which it had exclusive jurisdiction pursuant to the Natural Gas Act because PADEP, "the *initial decisionmaker*," had "arrived at a definitive position" by issuing the Water Quality Certification to Transco. *Id.* at 74, App. 16 (quotations omitted) (emphasis in original); *see also id.* at 72-75, App. 11-18. The Third Circuit also carefully considered and held that the Petitioners' challenges to the Water Quality Certification failed on the merits. *Id.* at 68, App. 5.

On September 18, 2018, Petitioners filed a petition for rehearing *en banc* with the Third Circuit, arguing that the court's jurisdictional ruling was inconsistent with a decision of another Third Circuit panel in *Township of Bordentown v. FERC*, 903 F.3d 234 (3d Cir. 2018), issued just one day after the decision in this case. The Third Circuit submitted the rehearing petition "to the judges who participated in the decision of [the] Court and to all the other available circuit judges of the circuit in regular active service," including Judge Chagares, the author of the *Bordentown* decision. *See* Order on Sur Petition for Rehearing (Oct. 11, 2018), App. 56. The Third Circuit denied the rehearing petition on October 11, 2018 and issued its certified judgment in lieu of a formal mandate on October 19, 2018. *See id.*

REASONS FOR DENYING THE PETITION

I. The Third Circuit's Decision Does Not Conflict with the Decisions of This Court, or Any Other Federal Court, and Does Not Merit This Court's Review.

The decision below does not merit this Court's review. The Third Circuit performed a straightforward jurisdictional analysis under the Natural Gas Act using a federal finality standard that is fully consistent with the decisions of this Court and other federal courts, including the cases Petitioners cite from the First, Second, and Third Circuits. The Court should not entertain Petitioners' new Tenth Amendment challenge, which they did not advance below and the Third Circuit had no occasion to consider. The decision below also does not violate the Tenth Amendment

because it does not direct the State to do (or refrain from doing) anything, and because States voluntarily choose to participate in the Clean Water Act's scheme of cooperative federalism.

A. The Application of a Federal Finality Standard in the Decision Below Is Fully Consistent with the Decisions of This Court and Those of the First, Second, and Third Circuits.

1. The Third Circuit Applied the Same Federal Finality Standard as the First Circuit in *Berkshire*.

The Third Circuit applied the same federal finality standard in the decision below as the First Circuit in *Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline Company*, 851 F.3d 105 (1st Cir. 2017). *See Del. Riverkeeper Network*, 903 F.3d at 72-75, App. 11-18; *see also id.* at 71, App. 9-10 ("We therefore join the First Circuit in holding that the Natural Gas Act provides jurisdiction to review only 'final agency action of a type that is customarily subject to judicial review.'") (quoting *Berkshire*, 851 F.3d at 111). Applying a federal finality standard is appropriate because "federal courts are courts of limited jurisdiction" and can hear a "case only if authorized by [a federal] statute." *Bell v. New Jersey*, 461 U.S. 773, 777 (1983). States "cannot declare when and how an agency ***action taken pursuant to federal law*** is sufficiently final to be reviewed in

federal court." *Del. Riverkeeper Network*, 903 F.3d at 74, App. 17 (emphasis added).[7]

There is no question that the *Berkshire* court used a federal finality standard. *See Berkshire*, 851 F.3d at 110–11. As the First Circuit explained, Congress creates "judicial review of agency action . . . in the context of a long-standing and well-settled 'strong presumption . . . that judicial review will be available only when agency action becomes final.'" *Id.* at 109 (quoting *Bell*, 461 U.S. at 778). "[F]inality 'is concerned with **whether the initial decisionmaker has arrived at a definitive position on the issue** that inflicts an actual, concrete injury.'" *Id.* at 110 (quoting *Darby v. Cisneros*, 509 U.S. 137, 144 (1993)) (emphasis added). "An agency action is 'final' only where it 'represents the culmination of the agency's decisionmaking process and conclusively determines the rights and obligations of the parties with respect to the matters at issue.'" *Id.* at 111 (quoting *Rhode Island v. EPA*, 378 F.3d 19, 23 (1st Cir. 2004)); *cf. Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (holding that "final agency action" under the Administrative Procedure Act, 5 U.S.C. § 704, must be "the consummation of the

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[7] A State acts pursuant to federal law when it issues a Water Quality Certification. *See Del. Riverkeeper Network*, 903 F.3d at 70, App. 7-8 (citing *Del. Riverkeeper Network v. Sec'y Pa. Dept. of Envtl. Prot.*, 833 F.3d 360, 370–72 (3d Cir. 2016)). "To say otherwise would be to ignore the [United States Environmental Protection Agency]'s supervisory role in the setting of state water quality standards, the fact that Water Quality Certifications must verify compliance with federal standards, and the role of the federal government in regulating water quality . . . ." *Del. Riverkeeper Network*, 833 F.3d at 371.

agency's decisionmaking process," "must not be of a merely tentative or interlocutory nature," and "must be one by which rights or obligations have been determined, or from which legal consequences will flow") (quotations and citations omitted). The First Circuit determined that "the Massachusetts Water Quality Certification then under its review was **non-final so long as the petitioners could still appeal within**" the Massachusetts Department of Environmental Protection. *See Del. Riverkeeper Network*, 903 F.3d at 73, App. 14 (emphasis added). The Water Quality Certification in *Berkshire* also was non-final because it would not have "the force and effect of law," *Berkshire*, 851 F.3d at 111, until either the expiration of the available "Appeal Period" to the Massachusetts Department of Environmental Protection or "any appeal proceedings that may result from an appeal," *id.* at 108 (quotations omitted).

In the decision below, the Third Circuit used the same federal finality standard as the First Circuit in *Berkshire*, but reached a different outcome based on fundamentally different permitting processes in Pennsylvania and Massachusetts. The Third Circuit did not apply a different finality standard, as Petitioners suggest. As the Third Circuit explained, "PADEP's issuance of a Water Quality Certification was final in precisely the most important ways that the permit in *Berkshire Environmental* was not." *Del. Riverkeeper Network*, 903 F.3d at 74-75, App. 18. "Two aspects of Pennsylvania's system for issuing Water Quality Certifications distinguish PADEP's decision from the non-final one in *Berkshire Environmental*." *Id.* at 73, App. 14. "**First, [PADEP]'s decision here**

was immediately effective, notwithstanding Petitioners' appeals to the [Environmental Hearing Board]. [PADEP]'s decision was neither 'tentative [n]or interlocutory' and was one 'from which legal consequences . . . flow[ed].'" *Id.* (quoting *Del. Riverkeeper Network v. Sec'y of Pa. Dep't of Envtl. Prot.*, 870 F.3d 171, 176 (3d Cir. 2017)) (emphasis added). "The First Circuit, by contrast, faced a Massachusetts regulatory regime in which the agency's initial decision was ineffective until either the time to appeal expired or a final decision on appeal issued." *Id.* "**Second, unlike in Massachusetts, Pennsylvania law does not 'make[ ] clear that [Transco]'s application seeking a . . . water quality certification initiated a single, unitary proceeding' taking place within one agency and yielding one final decision.**" *Delaware Riverkeeper Network*, 903 F.3d at 73, App. 15 (quoting *Berkshire*, 851 F.3d at 112) (emphasis added). "**Quite the opposite. [PADEP] and the [Environmental Hearing] Board are entirely independent agencies.** Each conducts a separate proceeding, under separate rules, overseen by separately appointed officers." *Id.* (emphasis added).

Petitioners attempt to minimize this important distinction by using the metaphor that the Environmental Hearing "Board is, in essence, operating down the hall from, instead of within the same office as" PADEP. *See* Pet. at 15-16. Petitioners cannot so easily dismiss the legal significance attached to the fact that the Environmental Hearing Board "is wholly separate from PADEP" and an "'independent quasi-judicial agency,'" whose "members—full-time administrative law judges—are appointed by the

Governor of Pennsylvania without any involvement by either PADEP or the State's Secretary of Environmental Protection." *Delaware Riverkeeper Network*, 903 F.3d at 72, App. 13 (quoting 35 PA. STAT. ANN. § 7513(a)). "Whether state law permits further review by the same agency that makes the initial decision or provides for an appeal to a structurally-separate body is probative of whether that decision is final." *Id.* at 74, App. 16; *see also Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 269 n.22 (3d Cir. 2018) (recognizing that whether State "schemes . . . create a single or unitary proceeding" is probative in determining finality). Whether the Environmental Hearing Board is separate from PADEP is probative in determining finality because "[f]inality, at bottom, is 'concerned with whether the *initial decisionmaker* has arrived at a definitive position on the issue.'" *Id.* at 74, App. 16 (quoting *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985)) (emphasis added). PADEP – the initial decisionmaker – "has said its piece" by issuing the Water Quality Certification. *Id.*; *see also id.* at 73, App. 15 ("PADEP's issuance of a Water Quality Certification is that agency's final action, leaving nothing for [PADEP] to do . . . .").

Petitioners argue that the Third Circuit's reliance on this Court's decision in *Williamson* is misplaced because *Williamson* "is inapposite," Pet. at 18 n.2, and "did not, in any way, hold that a state's definition of finality in its regulatory scheme may be disregarded by the courts," Pet. at 19 n.2. *Williamson* applied the same federal finality standard, which focuses the finality inquiry on "whether the initial decisionmaker

has arrived at a definitive position." *Williamson*, 473 U.S. at 193. Tellingly, both the First Circuit in *Berkshire* and the Second Circuit in *Murphy v. New Milford Zoning Commission* relied on *Williamson*. *See Berkshire*, 851 F.3d at 110-11; *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347–53 (2d Cir. 2005).

In their discussion of *Berkshire*, Petitioners also cite this Court's decision in *Darby v. Cisneros*, 509 U.S. 137 (1993), which they incorrectly claim "recognized that an agency may require an initial administrative decision to be appealed administratively before it may be deemed to be the kind of 'final' administrative action that may be challenged in court." Pet. at 13. *Darby* does not support this proposition; finality was not even at issue in *Darby*. *See Darby*, 509 U.S. at 144 ("Respondents concede that petitioners' claim is 'final' . . . .").[8] At issue in *Darby* was "the judicial doctrine of exhaustion of administrative remedies" which is "conceptually distinct from the doctrine of finality." *Id.*; *see also id.* at 145 ("We therefore must consider whether § 10(c) [of the Administrative Procedure Act] . . . limits the authority of courts to impose additional exhaustion requirements as a prerequisite to judicial review.").

Petitioners never raised an exhaustion argument below, and the Third Circuit did not reach that issue. *See Delaware Riverkeeper Network*, 903 F.3d at 74,

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[8] Like the First Circuit in *Berkshire* and the Second Circuit in *Murphy*, the Court in *Darby* also cited *Williamson*'s holding that the "finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position." *See id.* (quoting *Williamson*, 473 U.S. at 193).

App. 16 ("Petitioners confine themselves to challenging the finality of PADEP's decision, and do not argue that we lack jurisdiction because of a failure to exhaust an appeal to the [Environmental Hearing Board]."). Petitioners now appear to argue that an exhaustion requirement should be added into Section 19(d) of the Natural Gas Act because Sections 19(a) and (b) – which govern review of FERC's orders – do not permit judicial review until FERC has ruled on requests for rehearing. *See* Pet. at 20 n.3.

While this Court has "in some instances . . . allowed a *respondent* to *defend* a judgment on grounds other than those pressed or passed upon below," this Court has declined "to allow a *petitioner* to assert new substantive arguments *attacking*, rather than defending, the judgment when those arguments were not pressed in the court whose opinion [the Court is] reviewing, or at least passed upon by it." *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (emphasis added). The Court should proceed no differently here and should decline to consider Petitioners' new exhaustion argument attacking the judgment below, which was neither pressed by Petitioners nor passed upon by the Third Circuit.

Even if Petitioners had raised exhaustion, the Third Circuit would have reached the same result and exercised jurisdiction over the challenges to the Water Quality Certification because Section 19(d) of the Natural Gas Act does not require exhaustion of administrative remedies to trigger the original and exclusive jurisdiction of the federal Courts of Appeals. *See Berkshire*, 851 F.3d at 112-13 (noting that

Congress, through 15 U.S.C. § 717r(d)(1), divested "states of their customary review of state agency orders and opinions in this field"); *see also id.* at 110 (citing decisions of "other courts that have found exhaustion of administrative remedies unnecessary to trigger the exclusive and original jurisdiction of a United States Circuit Court of Appeals under § 717r(d)(1)"); *Bordentown*, 903 F.3d at 271 n.25 ("[O]ur own limitation to hearing only final orders is not necessarily tantamount to creating an exhaustion requirement in the state process. . . . [W]e may consider a judicial challenge to [a final] order despite the petitioner's failure to exhaust . . . state administrative remedies.").

Moreover, that Congress expressly included an exhaustion requirement for FERC's orders but chose not to impose a similar requirement for permits issued by State agencies is further indication that it would be inappropriate to read an exhaustion requirement into Section 19(d). Indeed, Section 19(d)'s legislative history indicates that developers "were encountering difficulty proceeding with natural gas projects that depended on obtaining state agency permits," and that Congress enacted Section 19(d) to remedy this difficulty and avoid delays created by "sequential administrative . . . appeals" in State fora "that [could] kill a project with a death by a thousand cuts." *See Islander*, 482 F.3d at 85 (quotations omitted). In addition, the rehearing process for FERC's orders is part of a single, unitary proceeding before FERC, unlike in Pennsylvania where a separate quasi-judicial agency (the Environmental Hearing Board) reviews PADEP's final permitting decisions in a separate, independent proceeding.

2. The Second Circuit Applied the Same Federal Finality Standard as Part of Its Ripeness Analysis in *Murphy*.

The decision below presents no conflict with the Second Circuit's decision in *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342 (2d Cir. 2005). As an initial matter, *Murphy* involved an issue of local zoning law and did not involve a State acting pursuant to federal law, as with the decision below and *Berkshire*. *See id.* at 345. *Murphy* also was governed by "specific ripeness requirements applicable to land use disputes." *Id.* at 347.

Nevertheless, the ripeness standard is a federal standard, *id.* at 347, and the first component involves determining whether "the entity charged with implementing the zoning regulations" has taken a "final, definitive position," *id.* at 348 (citing *Williamson*, 473 U.S. at 186), which is the same federal finality standard applied below and in each of the decisions Petitioners cite.[9] Whereas in *Murphy* the local zoning authority had not taken a "final, definitive position" as to how the homeowners could use their property, *Murphy*, 402 F.3d at 347, 352, here, PADEP

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[9] Both the Third Circuit in *Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285 (3d Cir. 1993) and the Ninth Circuit in *Hoehne v. Cty. of San Benito*, 870 F.2d 529 (9th Cir. 1989) applied the same federal finality standard, relying on *Williamson*. *See Taylor*, 983 F.2d at 1290–94; *Hoehne*, 870 F.2d at 531–36. The third decision Petitioners cite – *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989) – does not even mention finality or the standard articulated in *Williamson*, much less provide any countervailing analysis to support Petitioners' argument. *See* Pet. at 18.

– the entity charged with implementing the Water Quality Certification permitting program in Pennsylvania[10] – had taken a "final, definitive position" by issuing the Water Quality Certification to Transco.

3. The Decision Below Is Consistent with the Third Circuit's Contemporaneous Decision in *Bordentown*.

The Third Circuit's decision below is fully consistent with its contemporaneous decision in *Bordentown*. Both decisions are precedential decisions of the Third Circuit and were circulated to all active judges of that court before they were published. *See* 3d Cir. Internal Operating Procedure 5.5.4. Petitioners submitted a petition for rehearing *en banc* with the Third Circuit, arguing that the decision below and *Bordentown* conflict, but the Third Circuit denied rehearing *en banc*. *See* Order on Sur Petition for Rehearing (Oct. 11, 2018), App. 56. Petitioners ask this Court to recognize a conflict between the Third Circuit's decisions where apparently the Third Circuit saw none.

It is hardly surprising that the Third Circuit declined to rehear this case *en banc*. The absence of any conflict between the two decisions is plain. As the

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[10] *See Tenn. Gas Pipeline Co. v. Del. Riverkeeper Network*, 921 F. Supp. 2d 381, 390 (M.D. Pa. 2013) ("PADEP is the state administrative agency that is charged by the Clean Water Act to issue, condition, or deny water quality certifications, not the [Environmental Hearing Board]."), *rejected on other grounds by Del. Riverkeeper Network*, 903 F.3d at 71, App. 10-11; *see also Del. Riverkeeper Network*, 903 F.3d at 69, App. 6 ("Transco had to obtain a Water Quality Certification from PADEP . . . .").

Third Circuit explained, "[w]hether state law permits further review by the ***same agency*** that makes the initial decision or provides for an appeal to a structurally-separate body is probative of whether that decision is final." *Delaware Riverkeeper Network*, 903 F.3d at 74, App. 16 (emphasis added); *see also Bordentown*, 903 F.3d at 269 n.22 (recognizing that whether State "schemes . . . create a ***single or unitary proceeding***" is probative in determining finality) (emphasis added). "[T]he [Natural Gas Act] does not preempt the regular progression of ***intra-agency*** review of a permitting decision." *Bordentown*, 903 F.3d at 271 (emphasis added). Thus, the question is not simply, as Petitioners contend, "whether the proceeding is one before an administrative agency," *see* Pet. at 24, but instead whether the proceeding is part of a unitary, ***intra-agency*** review. *See id.*

In Pennsylvania, a separate agency – the Environmental Hearing Board – ordinarily conducts the review of PADEP's permitting decisions in a lengthy quasi-judicial proceeding. "Pennsylvania law does not 'make[ ] clear that [Transco]'s application seeking a . . . water quality certification initiated a single, unitary proceeding' taking place within one agency and yielding one final decision." *Delaware Riverkeeper Network*, 903 F.3d at 73, App. 15 (quoting *Berkshire*, 851 F.3d at 112). "Quite the opposite. [PADEP] and the [Environmental Hearing] Board are entirely independent agencies. Each conducts a separate proceeding, under separate rules, overseen by separately appointed officers." *Id.*; *see also id.* at 72, App. 13 ("The [Environmental Hearing Board] is wholly separate from PADEP. The Board is an 'independent

quasi-judicial agency,' and its members—full-time administrative law judges—are appointed by the Governor of Pennsylvania without any involvement by either PADEP or the state's Secretary of Environmental Protection.") (citations omitted). "Both in formal terms, and in the immediate practical effect discussed above, PADEP's issuance of a Water Quality Certification is that agency's final action, leaving nothing for [PADEP] to do other than await the conclusion of any proceedings before the Board." *Id.* at 73, App. 15 (citations omitted).

In *Bordentown*, the Third Circuit held that "the petitioners were entitled under New Jersey law to have alternatively first sought an ***intra-agency*** adjudicative hearing." *Bordentown*, 903 F.3d at 271 (emphasis added); *see also id.* at 271 n.24 (focusing analysis on whether the administrative review was ***within*** "the agency charged with administering the permitting process"). There is no inconsistency in the Third Circuit's rulings. The different outcomes are explained by the fact that, in the case below, review of PADEP's permitting decision would be conducted by a separate agency (the Environmental Hearing Board), which is not charged with administering the permitting process,[11] in a separate, quasi-judicial proceeding, whereas in *Bordentown*, the administrative review would occur within "an ***intra***-agency adjudicative hearing." *Bordentown*, 903 F.3d at 271 (emphasis added).

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[11] *See Tenn. Gas*, 921 F. Supp. 2d at 390; *see also Del. Riverkeeper Network*, 903 F.3d at 69, App. 6.

4. The Record on Appeal to Federal Courts of Appeals Is Sufficient.

Review of the Water Quality Certification before the Environmental Hearing Board is not necessary to develop a record for review. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court."). The Third Circuit had before it a robust record from PADEP – the record upon which the Water Quality Certification was issued – that consisted of more than 22,000 pages of material, including Transco's application, technical correspondence, comments from interested persons (including Riverkeeper), and responses to those comments from Transco and PADEP, among other things.[12] Further, the record before FERC is considered part of the record upon appeal. *See* 18 C.F.R. §§ 385.2014(b), (c). Here, the record was sufficient for review.

Petitioners rely on *Murphy* in support of their argument that State review processes are essential to developing a sufficient record for review, but their

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[12] Petitioners had access to Transco's application and a full opportunity to submit comments. PADEP published public notice of Transco's application on June 20, 2015 and requested public comments. *See* 45 Pa. Bull. 3274 (June 20, 2015).

reliance on *Murphy* is misplaced. The *Murphy* court considered a variety of factors – the development of the record among them – to determine whether it should apply a finality requirement as part of its ripeness determination. *Murphy*, 402 F.3d at 352. The court concluded that it should apply a finality requirement and that the plaintiffs "may not proceed in federal court until they have obtained a final, definitive position from local authorities as to how their property may be used." *Id.* *Murphy*'s ruling is consistent with the ruling below; indeed, the *Murphy* court used the same federal test for determining finality. Here, PADEP *did* issue a final, definitive position in issuing the Water Quality Certification, so it was appropriate for the challenges to proceed in federal court under the exclusive jurisdiction provisions of the Natural Gas Act.

Petitioners' emphasis on the Environmental Hearing Board's *de novo* review of PADEP's decision to issue the Water Quality Certification also is misplaced. As the Third Circuit explained in the decision below, the First Circuit in *Berkshire* "did not rely on the fact of de novo review for its own sake in finding the agency's initial decision non-final." *Del. Riverkeeper Network*, 903 F.3d at 73 n.3, App. 16. Instead, the *Berkshire* court "concluded that the decision was non-final because several features of Massachusetts's administrative scheme—de novo review among them—combined to produce a 'review' process that 'continue[d] more or less as though no decision ha[d] been rendered at all.'" *Id.* (quoting *Berkshire*, 851 F.3d at 112). Critically, "[t]he same cannot be said of review by the [Environmental Hearing Board] in

Pennsylvania, which takes place after a decision that has immediate legal effect." *Id.*

It bears emphasis that self-executing waivers of PADEP's authority under Section 401 of the Clean Water Act would be virtually guaranteed if Petitioners were correct that a Water Quality Certification is not final until the Environmental Hearing Board has an opportunity to review it. There is no realistic possibility that PADEP could review an application, issue a Water Quality Certification, and then have Environmental Hearing Board review (complete with discovery, hearings, post-hearing submissions, and a written decision) within the Clean Water Act's *maximum* one-year deadline for Section 401 Water Quality Certifications. *See* 33 U.S.C. § 1341(a)(1) (a State waives the certification requirement if it does not act on applications for Water Quality Certifications "within a reasonable period of time (which shall not exceed one year)"); *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1103-04 (D.C. Cir. 2019) (explaining that the "temporal element" under Section 401 is "within a reasonable period of time," and "[t]hus, while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year") (quotations omitted); *see also Solebury Twp. & Buckingham Twp. v. PADEP*, No. 2002-323-L, 2008 WL 5426378, at *6 (Pa. EHB Dec. 23, 2008) ("EHB appeals have a tendency to grind on for years. Litigation before the Board can be every bit as complicated as complex

litigation in state or federal court.").[13] Similar concerns arise under other States' regimes.

Petitioners mistakenly assert that the Natural Gas Act's "agency delay" provision avoids any "concern that a Board proceeding would cause undue delay to a Commission jurisdictional Project." Pet. at 32 n.5. The D.C. Circuit in *Weaver's Cove* – upon which Petitioners rely – held that an applicant for a Water Quality Certification ***lacks standing*** to sue for "agency delay" because it cannot demonstrate injury from a State's waiver. *See Weaver's Cove Energy, LLC v. Rhode Island Dep't of Envtl. Mgmt.*, 524 F.3d 1330, 1333 (D.C. Cir. 2008) ("[The applicant's] claim is that the States have waived their right to deny a certification. . . . Logically, a petitioner cannot challenge an action as 'an invasion of a legally protected interest' and simultaneously contend the action is of no legal significance."). The D.C. Circuit reaffirmed this holding in *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017), where the court held that an applicant for a Water Quality Certification "suffer[s] no cognizable injury from the violation" of "the Clean Water Act's statutory deadline" and dismissed a petition for review "for want of standing." *Id.* at 699-700. As the D.C. Circuit explained, "[o]nce

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[13] The First Circuit in *Berkshire* recognized the waiver issue but did not reach it. *See Berkshire*, 851 F.3d at 113 n.1 ("Our consideration of the jurisdictional issue posed by this case leaves us with no occasion to consider whether, because MassDEP did not finally act on Tennessee Gas's application within one year, the requirement that Tennessee Gas obtain a water quality certification from the Commonwealth of Massachusetts has been waived.").

the Clean Water Act's requirements have been waived, the Act falls out of the equation. As a result, if the [State agency] has delayed for more than a year . . . the delay cannot injure [the applicant]." *Id.* at 700 (citation omitted). The Natural Gas Act's "agency delay" provision applies only "when, unlike with the Clean Water Act, there is no built-in remedy for state inaction already in place." *Id.* at 701.

5. The Decision Below Presents No Threat to Petitioners' Due Process Rights.

Petitioners' argument that review before the Environmental Hearing Board is essential to protecting their due process rights is meritless when, as here, a federal statute provides the process they are due. In the Natural Gas Act, Congress determined that the review of federal authorizations issued by State agencies for interstate natural gas pipelines will occur in the federal Courts of Appeals. *See* 15 U.S.C. § 717r(d)(1). In this context, Petitioners receive due process in the Court of Appeals, rather than before the Environmental Hearing Board.

Petitioners cite several decisions as support for their argument that the opportunity for Environmental Hearing Board review is essential to providing due process, but none of those decisions involved permits issued for interstate natural gas pipelines governed by the Natural Gas Act, for which federal court review is available. *See* Pet. at 27-28. Unlike those cases, here the Natural Gas Act provides the exclusive process for review of PADEP's decision to issue a Section 401 Water Quality Certification for the Project.

Petitioners contend that due process requires they "have an opportunity to present evidence at a hearing before the [Environmental Hearing Board]," but "[t]he essence of due process is notice and an opportunity to be heard," and "does not entitle Petitioners to a de novo evidentiary hearing; the opportunity to comment and to petition [the Court of Appeals] for review is enough." *Del. Riverkeeper Network*, 903 F.3d at 74, App. 17. "[W]ith respect to decisions like the one under review here, the public comment period provided Petitioners 'with meaningful hearing rights sufficient under the circumstances to protect [their] interests.'" *Id.* (quoting *Bank of N. Shore v. Fed. Deposit Ins. Corp.*, 743 F.2d 1178, 1184 (7th Cir. 1984)).

Petitioners' arguments regarding their due process rights with respect to the National Pollutant Discharge Elimination System ("NPDES") permit for hydrostatic-test water discharges are misplaced here.[14] The decision below concerned the Clean Water Act Section 401 Water Quality Certification – not any of the other permits the Water Quality Certification required Transco to obtain. Each of those other permits – including the NPDES permit for hydrostatic test discharges – are separate authorizations and separately appealable under the Natural Gas Act, 15

[14] Hydrostatic testing refers to the use of clean water to test the hydraulic and structural integrity of pipelines under expected pressures that will exist when used for the transportation of natural gas. Upon completion of the test, the clean water is drained from the pipeline pursuant to established monitoring and effluent requirements.

U.S.C. § 717r(d)(1), as Petitioners admit. *See* Pet. at 29.

In fact, Riverkeeper filed in the Third Circuit a separate petition for review of PADEP's approval of Transco's request for coverage under an NPDES general permit for the hydrostatic test discharges. The petition remains pending before the Third Circuit as case number 17-3299. As a result, Petitioners' arguments concerning the NPDES permit are improper not only because they involve an authorization distinct from the Water Quality Certification at issue here, but also because the Third Circuit has not yet issued a decision in the pending appeal.[15]

B. The Decision Below Does Not Violate the Tenth Amendment.

Petitioners waived their belated Tenth Amendment challenge by failing to press it below. The Third Circuit had no occasion to address the Tenth Amendment in its decision. Nevertheless, even if Petitioners had preserved their Tenth Amendment challenge, it would fail under this Court's precedent

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[15] In any event, Riverkeeper's due process challenge concerning the NPDES has no merit. Among other things, federal law provides that the opportunity for *judicial review* of State permitting decisions is sufficient to provide for, encourage, and assist public participation in the NPDES permitting process. 40 C.F.R. § 123.30; *see also* 33 U.S.C. § 1369(b)(1) (noting that when the United States Environmental Protection Agency issues or denies an NPDES permit, that action may only be appealed to the *Circuit Court of Appeals* of the United States for the Federal judicial district in which the petitioner resides or transacts business) (emphasis added).

because (1) the decision below does not dictate what the Commonwealth of Pennsylvania's legislature must or must not do, and (2) the Commonwealth voluntarily chooses to participate in the scheme of cooperative federalism involved here.

1. Petitioners Waived Their Tenth Amendment Challenge.

As with their new exhaustion argument, Petitioners did not advance a Tenth Amendment challenge before the Third Circuit, and the Third Circuit did not address the Tenth Amendment in its opinion below.[16] The Court should decline to consider Petitioners' new Tenth Amendment challenge attacking the judgment below, which was neither pressed by Petitioners nor passed upon by the Third Circuit. *See United Foods, Inc.*, 533 U.S. at 417.

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[16] Petitioners' sole reference to the Tenth Amendment in the proceedings below occurred during oral argument when Petitioners' counsel stated: "I know that at least one Environmental Hearing Board judge has raised the issue of the 10th Amendment, about whether or not the 10th Amendment would preclude the cut-off of both EHB and the [state] appellate process." Tr. of Oral Arg. at 26, *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, Nos. 16-2211, 16-2212, 16-2218, 16-2400 (3d Cir. Nov. 7, 2017). Petitioners expressly declined to press this Tenth Amendment argument, however, by "conced[ing] for the purpose of this argument that" any appeal from an Environmental Hearing Board decision "would go directly to [the Third Circuit] and not the [Pennsylvania] [C]ommonwealth [C]ourt," to the extent the Third Circuit determined that the Environmental Hearing Board had jurisdiction to hear their appeals in the first instance (which the Third Circuit did not). *Id.*

2. This Court's Decisions in *Murphy* and *Hodel* Demonstrate That the Decision Below Does Not Violate the Tenth Amendment.

Relying on *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018), Petitioners incorrectly argue that the Third Circuit's decision commandeers "Pennsylvania's legislative and administrative processes," by "forcing the Commonwealth to legislate its administrative scheme to conform to the structure preferred by the Third Circuit." Pet. at 33. Petitioners assert that "[i]f the Commonwealth wants its preferred scheme for review of [PADEP] actions and its definition of finality to be respected, the Commonwealth will be required to dissolve the Board and move its functions back within [PADEP]," and claim "[t]his is unconstitutional." Pet. at 33-34.

This Court's decision in *Murphy* provides no support for Petitioners' argument. As the Court explained in *Murphy*, "[t]he anticommandeering doctrine . . . is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Murphy*, 138 S. Ct. at 1475. The statute at issue in *Murphy* – the Professional and Amateur Sports Protection Act – generally made "it unlawful for a State to authorize sports gambling schemes." *Id.* at 1468 (quotations omitted). The Court held that the statute's provision "prohibiting state authorization of sports gambling . . . violates the anticommandeering rule" because it "unequivocally dictates what a state legislature may

and may not do." *Id.* at 1478. As the Court explained, "[i]t is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine." *Id.*; *compare New York v. United States*, 505 U.S. 144, 175-76 (1992) (holding unconstitutional a federal law that required a State, under certain circumstances, either to take title to low-level radioactive waste or to regulate according to the instructions of Congress).

This case bears no resemblance to *Murphy* or any case in which the Court has found a violation of the anticommandeering doctrine. Petitioners claim that if the Commonwealth of Pennsylvania wishes to retain Environmental Hearing Board review for projects governed by the Natural Gas Act, the Commonwealth would need to amend its statutes to make the Environmental Hearing Board part of PADEP so that the same agency both issues and reviews permitting decisions. Even if Petitioners were correct, that does not constitute a violation of the Tenth Amendment. The Third Circuit's jurisdictional ruling does not order the Commonwealth to do anything. It neither dictates what the Commonwealth must legislate nor what it must not legislate. Indeed, the Commonwealth need not take any action at all in response to the Third Circuit's decision and remains free to legislate as it sees fit.

Additionally, this Court in *Murphy* explained that federal laws "involv[ing] what has been called 'cooperative federalism,' by no means commandeer[]

the state legislative process." *Murphy*, 138 S. Ct. at 1479 (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981)). In *Hodel*, "Congress enacted a statute that comprehensively regulated surface coal mining and offered States the choice of" participating in the federal regulation. *Id.* "Thus, the federal law *allowed* but did not *require* the States to implement a federal program." *Id.* (emphasis in original).

The same is true here. "By enacting the [Clean Water Act], Congress provided states with an offer of shared regulatory authority." *Islander*, 482 F.3d at 92 (citing *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (stating that "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective")). The Clean Water Act sets forth a scheme of "cooperative federalism" by allowing States to participate in the regulation of certain activities that may affect the navigable waters, but their participation is a voluntary choice, and the Natural Gas Act governs the procedures for review of all permitting decisions related to interstate natural gas pipelines.[17] *See Delaware*

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[17] A State's role under Section 401 of the Clean Water Act is limited to reviewing projects for compliance with the State's federally-approved water quality standards. *See* 33 U.S.C. § 1341(a)(1); *Millennium Pipeline Co. v. Seggos*, 288 F. Supp. 3d 530, 535 (N.D.N.Y. 2017) ("In reviewing applications for Section 401 certification, states may apply their own EPA-approved state water quality standards."); *see also Niagara Mohawk Power Corp. v. N.Y. State Dep't of Envtl. Conservation*, 624 N.E.2d 146, 149 (N.Y. 1993) ("Section 401 of the Clean Water Act . . . serves as the conduit for the incorporation of relevant State water quality

Riverkeeper, 833 F.3d at 376 ("[A] state participates in Clean Water Act regulation of interstate natural gas facilities by congressional permission, rather than through inherent state authority."); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958) ("[T]he Federal Government under the Commerce Clause of the Constitution (Art. I, § 8, cl. 3) has dominion, to the exclusion of the States, over navigable waters of the United States."); 15 U.S.C. § 717r(d)(1) (federal Courts of Appeals have "original and exclusive jurisdiction" to review permits for interstate gas pipelines issued by "State administrative agenc[ies] acting pursuant to Federal law," including Clean Water Act Section 401 Water Quality Certifications). Where States have a choice in whether to participate, there is no commandeering and no Tenth Amendment violation. *See Hodel*, 452 U.S. at 290 ("We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role."); *Islander*, 482 F.3d at 93 ("Congress has the authority to regulate discharges into navigable waters under the Commerce Clause, and the State . . . exercises only such authority as has been delegated by Congress. Accordingly, there is no basis for Respondent's Tenth Amendment challenge . . . .").

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standards in this otherwise Federally filled universe."), *cert. denied*, 511 U.S. 1141 (1994). The general provisions of Pennsylvania administrative law Petitioners seek to enforce over the Natural Gas Act's exclusive review provisions are *not* federally-approved water quality standards.

CONCLUSION

For each of the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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March 27, 2019